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EDWARD THOMPSON CO., Publishers,
Northport, Long Island, N. Y.

THE
AMERICAN AND ENGLISH
ENCYCLOPÆDIA
OF
LAW.

COMPILED UNDER THE EDITORIAL SUPERVISION OF

JOHN HOUSTON MERRILL,

*Late Editor of the American and English Railroad Cases and the American and
English Corporation Cases.*

VOLUME X.



NORTHPORT, LONG ISLAND, N. Y.:
EDWARD THOMPSON COMPANY, LAW PUBLISHERS.
1889.

LA 121740

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THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW.

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I. DEFINITION AND DIVISION.—Implied trusts are such as arise by operation of the law for the purpose of carrying out the presumed intention of the parties, or without regard to the intention of the parties, for the purpose of asserting rights of parties or of frustrating fraud; they include the two classes of trusts, known as resulting and constructive trusts.¹ In some States they have been

1. Bispham's Eq. (4th ed.), p. 118; 1 Pomeroy's Eq., p. 136, § 155; Story's Eq. Jur. (13th ed.), § 980, vol. 2, p. 282; Bouvier's Law Dict., tit. TRUSTS; Burrill's Law Dict., tit. IMPLIED TRUSTS.

This definition certainly has the weight of authority in its favor, although Lewin and Perry give a different meaning. The former says (Lewin on Trusts, ch. 8, § 2, 1): "Whenever a person having a power of disposition over property manifests any intention with respect to it in favor of another, the court . . . will execute that intention through the medium of a trust, however informal the language in which it happens to be expressed." And in ch. 8, § 2, 2, he further says: "A frequent case of implied trusts arises where a testator employs words precatory or recommendatory or expressing a belief." To the same effect see Perry on Trusts (3rd ed.), § 112, vol. 1, p. 111. This description is followed by Rapalje & Lawrence's Law Dict., but the latter authority seems to include also under the head of implied trusts, resulting and constructive trusts.

The Student's Pocket Law Lexicon takes the same view. See also Abbott's Law Dict., tit. Constructive Trusts. Snell gives the following classification of trusts: "Trusts may be classified under three heads: express trusts, implied trusts and constructive trusts . . . Trusts implied and constructive are frequently confounded, or at least classed together, and it is not always easy to draw the line between them." This author uses implied trusts in a very restrictive sense as equivalent to resulting trusts. So also, Brown's Law Dict., tit. Trusts.

But, as formerly stated, the weight of authority is against this definition and classification. Of classing trusts, which arise from precatory words, etc., under implied trusts, Pomeroy says: "There is another kind which are sometimes but very improperly called implied trusts; namely, where a party by a written instrument, deed or will, has intended to create a trust for some specific object, and has used language showing that intent, but the language he has employed does not in *express terms* declare and create the trusts, so

the court in deciding upon the effect of the instrument, is obliged to construe or interpret the words in order that they may amount to a declaration of the trust. The most familiar illustration is that of a trust arising from mere precatory words in a deed or will. These trusts have no relation whatever to those which arise by implication of law. They are in every respect express trusts, either active or passive; they only differ in form from ordinary express trusts from a certain incompleteness or vagueness of the language used to create or declare them, so that a court is forced to interpret this language. When interpreted it becomes in every sense an express declaration of the trust. To include these instances among implied trusts is to violate every principle of true classification and to introduce an unnecessary confusion into the subject. All true implied trusts differ from express trusts not only in the manner of their creation, but also in their essential features and qualities. 1 Pomeroy Eq. Jur., § 155, p. 137 n. The same author further says (Pom. Eq. Jur., § 1010, vol. 2, p. 574 n): "These trusts (*i. e.*, trusts inferred by a construction of deeds, precatory words, etc.) are in no sense implied, if the word is used, as it only can be properly, in opposition to express. They are a species of express trusts, and not a class distinct from express trusts. They differ from all other express trusts only in degree and not in kind. In every instance of express trusts the court must see an intention to convey or to hold the property in trust for some purpose, and its intention must be shown by the language used; in one instance the language is strict and technical, in another it is not so technical but the meaning is equally plain. In the present instance there is no such striking language used to show that intention, and the intention is gathered from the whole instrument or from the nature of the dispositions. The term 'implied' should be confined exclusively to those trusts which arise by operation of law and are opposed to express trusts."

The distinction between express and implied trusts is thus given: "A broad distinction separates all express trusts from those which arise by operation of law. In the former class the trust relation is rightful and permanent. In the latter there is no such element

of right and permanency. Even if the trust relation is not wholly wrongful, resulting from fraud or other unconscientious act, still a certain antagonism between the *cestui que trust* and the trustee is involved in the very existence of the trust; and instead of the idea of permanence, the substantial right of the beneficiary is that the trust should be ended by a conveyance of the legal title to himself. All trusts by operation of law consist, therefore, in a separation of the legal and equitable estates, one person holding the legal title for the benefit of the equitable owner, who is regarded in equity as the real owner, and who is entitled to be clothed with the legal title by a conveyance." Pomeroy's Eq. Jur. 603.

To the same effect Story says: "Passing from these more general considerations in regard to trusts . . . we may next proceed to examine them under the heads, into which they are usually divided, of express trusts and implied trusts, the latter comprehending all those trusts which are called constructive and resulting trusts. Express trusts are those which are created by the direct and positive acts of the parties by some writing, deed or will. Not that in those cases the language of the instrument need point out the very nature, character and limitations of the trusts in direct terms, *ipsissimis verbis*; for it is sufficient that the intention to create it can be fairly collected upon the face of the instrument from the terms used, and the trust can be drawn, as it were *ex visceribus verborum*. Implied trusts are those which are deducible from the nature of the transaction as a matter of clear intention, although not found in the words of the parties; or which are superinduced upon the transaction by operation of law, as a matter of equity, independent of the particular intention of the parties." Story's Eq. Jur., (13th ed.), § 980, vol. 2, p. 282. See, also, *Brown v. Cherry*, 56 Barb. (N. Y.) 640; *Wharton's Law Lex.*, tit. IMPLIED TRUSTS; *Stimson's Law Glossary*, tits. TRUSTS, IMPLIED TRUSTS, RESULTING TRUSTS; *Adams' Doct. of Eq.* (7th Am. ed.), p. 27.

Civil Code Cal., § 2217 calls these trusts "involuntary trusts." Accordingly this title will treat only of constructive and resulting trusts. The so called implied trusts arising from the construction of wills, deeds, etc., from precatory words, etc., will be treated under the title TRUSTS.

called "involuntary trusts."¹

II. RESULTING TRUSTS—Definition.—Resulting trusts are trusts raised by implication or construction of law, and presumed to exist from the supposed intention of the parties and the nature of the transaction.²

III. CONSTRUCTIVE TRUSTS—Definition.—Constructive trusts are such as are raised by equity for the purpose of working out rights and justice, where there was no intention of the party to create such a relation and often directly contrary to the intention of the one holding a legal title.³

IV. RESULTING TRUSTS—Division.—Resulting trusts may arise in several ways, and may conveniently be treated under the four

1. Civil Code California (1880), § 2217; Civil Code Dakota (Swiser's ed. 1884), § 1290. And see proposed Civil Code N. Y., § 1169.

2. Bouvier's Law Dict.; Pomeroy's Eq. Jur., § 155, vol. 1, p. 137 and notes; Story's Eq. Jur. (13th ed.), § 1195; Bispham's Eq. (4 ed.), 118; Student's Pocket Law Lex., tit. RESULTING TRUSTS; Wharton's Law Lex., tit. RESULTING TRUSTS; Rapalje & Lawrence's Law Dict.; Stimson's Law Gloss., tit. RESULTING TRUSTS.

Burrill restricts the meaning of resulting trusts, defining them as follows: "A resulting trust is one raised by implication for the benefit of the party granting an estate. Various kinds of trusts are ranked under this head in the books, such as trusts raised by implication for the benefit of a person who advances the purchase money of an estate, etc., but these are rather implied than resulting trusts properly so called, the term resulting in strictness importing a going back or reverting of an estate to the party from whom it proceeded." Burrill's Law Dict., tit. RESULTING TRUSTS. But the weight of authority is clearly against him. See preceding note and authorities previously cited.

In *Keller v. Kunkel*, 46 Md. 569, a different but equally restricted definition was adopted, namely: "That which arises when one person buys an estate and pays the purchase money but takes the deed under the name of another person, then a trust results by construction in favor of the person who pays the purchase money."

3. Pomeroy's Eq. Jur., § 155, vol. 1, p. 137. Bispham says that these trusts exist purely by construction of law, without any actual or supposed intention that a trust should be created,

but merely for the purpose of asserting rights of parties, or of frustrating fraud.. Bispham Eq. (4th ed.), 118. See also Perry on Trusts (3rd ed.), § 166; Bouvier's Law Dict.; Rapalje & Lawrence's Law Dict., tit. CONSTRUCTIVE TRUSTS; Wharton's Law Lex., tit. CONSTRUCTIVE TRUSTS; Student's Pocket Law Lex., tit. CONSTRUCTIVE TRUSTS; Abbott's Law Dict., tit. CONSTRUCTIVE TRUSTS. The scope of these trusts is thus given by Bouvier (Law Dict., tit. TRUSTS): "Under these branches of trusts it has been said that 'wherever one person is placed in such a relation to another by the act or consent of that other, or the act of a third person, or the law, that he becomes interested for him or with him in any subject of property or business he is prohibited from acquiring rights in the subject antagonistic to the person with whose interest he has become associated.' Note by HARE, J., to 1 Ldg. Cas. Eq. 62.

"The rule as to such trusts applies not only to persons standing in direct fiduciary position toward others, such as trustees, attorneys, etc., but also to those who occupy any position out of which a similar duty ought in equity and good morals to arise; as against partners, tenants in common, mortgagees." In this connection, see *Burks v. Burks*, 7 Baxt. (Tenn.) 356.

The only dissenting authority on this subject is Burrill, who says that "A constructive trust is one raised by construction of law, or arises by operation of law, as distinguished from an express trust; a trust implied or inferred from circumstances, otherwise called an implied trust and sometimes a resulting trust. But the distinction is mainly one of terminology." Burrill's Law Dict., tit. CONSTRUCTIVE TRUSTS.

following heads: (1) where the purchaser of an estate pays the purchase money, and takes title in the name of a third person; (2) where a person standing in a fiduciary relation uses fiduciary funds to purchase property, and takes the title in his own name; (3) where an estate is conveyed upon trusts which fail, either in whole or in part, or are not declared, or are illegal; (4) where a conveyance is made without consideration, and it appears from the circumstances that the grantee was not intended to take beneficially.¹

V. RESULTING TRUSTS OF THE FIRST CLASS—Title in One, Purchase Money Paid by Another.—In all cases where the purchase money of an estate is paid by one person and the title is taken in the name of a third party, that third party being a stranger, the party taking the title holds it in trust for him who pays the purchase money. The reason of this doctrine, which is well settled in England and a great majority of the United States, is that the man who pays the purchase money is supposed to become or intends to become the owner of the property, and the beneficial title follows that supposed intention.²

1. Bispham's Eq. (4th ed.) 118; 1 Perry on Trusts (3rd ed.) 127. The latter author gives five classes, but they may be reduced to the four mentioned in the text. In *Lloyd v. Spillett*, LORD CHANCELLOR HARDWICKE said that a resulting trust arising by operation of law existed: (1) When an estate was purchased in the name of one person, and the consideration came from another. (2) When a trust was declared only as to part, and nothing was said as to the residue, that residue remaining undisposed of, remained to the heir at law, and he observed that he did not know of any other instances except in cases of fraud.

See also 2 Lomax Dig. 200; Wharton's Law Lexicon, tit. RESULTING TRUSTS, and Brown's Law Dict., tit. TRUSTS. The first of these authorities considers resulting trusts as arising (1) out of the equitable conversion of land into money, or money into land; (2) where an estate is purchased in the name of one person, and the consideration is paid by another; (3) where there is a conveyance of land without any consideration or declaration of uses; (4) where a conveyance of land is made in trust as to part, and the conveyance is silent as to the residue; (5) where a conveyance is made upon such trusts as shall be appointed, and there is default of appointment; (6) where a conveyance is made upon particular trusts which fail of taking effect; (7)

where a purchase is made by a trustee with trust money; (8) where a purchase of real estate is made by a partner in his own name with partnership funds; (9) where a renewal of a lease is obtained by a trustee or other person, standing in a fiduciary relation; (10) where purchases are made of outstanding claims upon an estate by trustees or some of the tenants thereof, connected by privity of estate with others having an interest therein; (11) where fraud has been committed in obtaining the conveyance; (12) where a purchase has been made without a satisfaction of the purchase money to the vendor; (13) where a joint purchase has been made by several, and payments of the purchase money to the vendor has been made beyond their proportion.

This enumeration, somewhat condensed, is followed by Wharton and Brown. See *supra*. For trusts under the first of these classes see tit. EQUITABLE CONVERSION AND RECONVERSION. Those under (2) and (3) belong to the first division in the text; (7) (8) (9) and (10) to the second; (4) (5) and (6) to the third, and (3) and (12) to the fourth. For (11), see tit. FRAUD.

2. England.—*Dyer v. Dyer*, 2 Cox 92; s. c., 1 Ldg. Cas. Eq. (White & Tudor, 4th Am. ed.) 314; *Willis v. Willis*, 2 Atk. 71; *Crop v. Norton*, 2 Atk. 75; *Lloyd v. Spillett*, 2 Atk. 150; *Rider v. Kidder*, 10 Ves. Jr. 360; *Ex parte Hough-*

ton, 17 Ves. Jr. 251; Redington v. Redington, 3 Ridg. 106, 177; Ambrose v. Ambrose, 1 P. Wms. 321; *Ex parte* Vernon, 2 P. Wms. 549; Woodman v. Morrel, Freem. Ch. Cas. 33; Groves v. Groves, 3 Y. & J. 170; Lade v. Lade, 1 Wils. 21; Wray v. Steele, 2 V. & B. 388; Lever v. Andrews, 7 Bro. P. C. 288; Withers v. Withers, Amb. 151; Prankerd v. Prankerd, 1 S. & S. 1; Howe v. Howe, 1 Vern. 415.

United States Courts.—Powell v. Monson etc. Mfg. Co., 3 Mason (U.S. C. C.) 362; Olcott v. Bynum, 17 Wall. (U.S.) 44.

Alabama.—Foster v. Trustees, 3 Ala. 302; Anderson v. Jones, 10 Ala. 401; Caple v. McCollum, 27 Ala. 461; Bates v. Kelly, 80 Ala. 142.

Arkansas.—McGuire v. Ramsey, 9 Ark. (4 Eng.) 518; Sale v. McLean, 20 Ark. 612; DuVal v. Marshall, 30 Ark. 230.

California.—Osborne v. Edicott, 6 Cal. 149; Bayles v. Baxter, 22 Cal. 575; Millard v. Hathaway, 27 Cal. 119; Jenkins v. Frink, 30 Cal. 586; Wilson v. Castro, 31 Cal. 420; Case v. Codding, 38 Cal. 191; Wormouth v. Johnson, 58 Cal. 621; Ward v. Ward (Cal.), 14 Pac. Rep. 604.

Colorado.—Lipscomb v. Nichols, 6 Colo. 290.

Delaware.—Morgan v. Newells, 2 Harr. (Del.) 224.

Georgia.—Murphy v. Peabody, 63 Ga. 522; Kirkpatrick v. Davidson, 2 Kelly (Ga.) 297.

Illinois.—Prevo v. Watters, 5 Ill. 35; Smith v. Sackett, 10 Ill. 534; Coates v. Woodworth, 13 Ill. 654; Williams v. Brown, 14 Ill. 200; Nichols v. Thornton, 16 Ill. 113; Bruce v. Roney, 18 Ill. 67; Latham v. Henderson, 47 Ill. 185; Kane County v. Herrington, 50 Ill. 232; Mathis v. Stufflebeam, 94 Ill. 481; Scheerer v. Scheerer, 109 Ill. 11; Donlin v. Bradley, 119 Ill. 412.

Indiana.—Elliot v. Armstrong, 2 Blackf. (Ind.) 198; Jennison v. Graves, 2 Blackf. (Ind.) 440; Rhodes v. Green, 36 Ind. 7; Milliken v. Ham, 36 Ind. 166; Hampson v. Fall, 64 Ind. 382.

Iowa.—McLennan v. Sullivan, 13 Iowa 521.

Kansas.—Reynolds v. Reynolds, 30 Kan. 91.

Kentucky.—Perry v. Head, 1 A. K. Marsh. (Ky.) 47; Stark v. Cannady, 3 Litt. (Ky.) 399; Chaplin v. McAfee, 3 J. J. Marsh. (Ky.) 513; Letcher v. Letcher, 4 J. J. Marsh. (Ky.) 590; Doyle v. Sleeper, 1 Dana (Ky.) 531.

Louisiana.—Hall v. Sprigg, 7 Mar. La. 243.

Maine.—Buck v. Pike, 11 Me. 9; Baker v. Vining, 30 Me. 121; s. c., 50 Am. Dec. 617; Kelley v. Jenness, 50 Me. 455; Lawry v. Spaulding, 73 Me. 31.

Maryland.—Neale v. Hagthorp, 3 Bland. Ch. (Md.) 551; Dorsey v. Clark, 4 H. & J. (Md.) 551; Hollis v. Hollis, 1 Md. Ch. 479; Glenn v. Randall, 2 Md. Ch. 220; Farringer v. Ramsey, 2 Md. 365; Insurance Co. v. Deal, 18 Md. 26; s. c., 79 Am. Dec. 673; Bank v. Snively, 23 Md. 253; Keller v. Kunkel, 46 Md. 565.

Massachusetts.—Root v. Blake, 14 Pick. (Mass.) 271; Peabody v. Tarbell, 2 Cush. (Mass.) 226; Livermore v. Aldrich, 5 Cush. (Mass.) 431; McGowan v. McGowan, 14 Gray (Mass.) 119; Kendall v. Mann, 11 Allen (Mass.) 271; Blodgett v. Hildreth, 103 Mass. 484; Sherburne v. Morse, 132 Mass. 469.

Minnesota.—Irvine v. Marshall, 7 Minn. 286.

But see *infra*, p. 60, note 1.

Mississippi.—Powell v. Powell, 1 Freem. Ch. (Miss.) 134; Runnells v. Jackson, 1 How. (Miss.) 358; Mahorner v. Harrison, 21 Miss. (13 Sm. & M.) 53; Leiper v. Hoffman, 26 Miss. 615; Harvey v. Ledbetter, 48 Miss. 95; McCarroll v. Alexander, 48 Miss. 128; Brooks v. Shelton, 54 Miss. 353; Robinson v. Leflore, 59 Miss. 148; Bratton v. Rogers, 62 Miss. 281.

Missouri.—Paul v. Choteau, 14 Mo. 580; Rankin v. Harper, 23 Mo. 579; Eddy v. Baldwin, 23 Mo. 588; Kelly v. Johnson, 28 Mo. 249; Baumgartner v. Guesfield, 38 Mo. 36; Johnson v. Quarles, 46 Mo. 423.

Nevada.—Frederick v. Haas, 5 Nev. 389; Boskowitz v. Davis, 12 Nev. 446.

New Hampshire.—Page v. Page, 8 N. H. 187; Lyford v. Thurston, 16 N. H. 399; Dow v. Jewell, 18 N. H. 340; Pembroke v. Allenstown, 21 N. H. 107; Tibbets v. Tilton, 31 N. H. 273; Hall v. Young, 37 N. H. 134; Hopkinson v. Dumas, 42 N. H. 296.

New Jersey.—DePeyster v. Gould, 2 Gr. Ch. (N. J.) 474; Howell v. Howell, 15 N. J. Eq. (2 McCart.) 75; Stratton v. Dialogue, 16 N. J. Eq. (1 C. E. Green) 70; Johnson v. Dougherty, 18 N. J. Eq. (3 C. E. Green) 447; Cutter v. Tuttle, 19 N. J. Eq. (4 C. E. Green) 549; Van Syckle v. Kline, 34 N. J. Eq. 332; Mershon v. Duer, 40 N. J. Eq. 333; Plaut v. Plaut, (N. J. May 16, 1888) 12 Cent. Rep. 239.

New York.—*Jackson v. Sternberg*, 1 Johns. Cas. N. Y. 153; *Boyd v. McLean*, 1 Johns. Ch. (N. Y.) 582; *Botsford v. Burr*, 2 Johns. Ch. (N. Y.) 405; *Steere v. Steere*, 5 Johns. Ch. (N. Y.) 1; *White v. Carpenter*, 2 Paige Ch. (N. Y.) 218; *Partridge v. Havens*, 10 Paige Ch. (N. Y.) 618; *Jackson v. Matsdorf*, 11 Johns. (N. Y.) 91; *Jackson v. Mills*, 13 Johns. (N. Y.) 463; *Jackson v. Morse*, 16 Johns. (N. Y.) 197; *Forsythe v. Clark*, 3 Wend. (N. Y.) 637; *Guthrie v. Gardner*, 19 Wend. (N. Y.) 414; *Gomez v. Bank*, 4 Sandf. Sup. Ct. (N. Y.) 106; *Brown v. Cheney*, 59 Barb. (N. Y.) 628; *Union College v. Wheeler*, 59 Barb. (N. Y.) 585; *Lounsbury v. Purdy*, 18 N. Y. 515; *McCartney v. Bostwick*, 32 N. Y. 53; *Robbins v. Robbins*, 89 N. Y. 251.

North Carolina.—*Henderson v. Hoke*, 1 Dev. & Bat. Eq. (N. Car.) 119; *Cunningham v. Bell*, 83 N. Car. 328.

Ohio.—*Creed v. Lancaster Bank*, 1 Ohio St. 1; *Williams v. Van Tuyl*, 2 Ohio St. 336; *McGovern v. Knox*, 21 Ohio St. 547.

Pennsylvania.—*Stewart v. Brown*, 2 S. & R. (Pa.) 461; *Jackman v. Ringland*, 4 W. & S. (Pa.) 149; *Lloyd v. Carter*, 17 Pa. St. 216; *Strimpfler v. Roberts*, 18 Pa. St. 283; *Lynch v. Cox*, 23 Pa. St. 265; *Beck v. Graybill*, 28 Pa. St. 66; *Brock v. Savage*, 31 Pa. St. 410; *Edwards v. Edwards*, 39 Pa. St. 369; *Williard v. Williard*, 56 Pa. St. 119; *Nixon's Appeal*, 63 Pa. St. 279; *Bickel's Appeal*, 86 Pa. St. 204.

South Carolina.—*Dillard v. Crocker*, *Speer's Ch.* (S. Car.) 20; *Williams v. Hollingsworth*, 1 Strobh. (S. Car.) Eq. 103; s. c., 47 Am. Dec. 527; *Garrett v. Garrett*, 1 Strobh. Eq. (S. Car.) 96; *McGuire v. McGowen*, 4 Des. (S. Car.) 491; *Witte v. Wolfe*, 16 (S. Car.) 256.

Tennessee.—*Smithal v. Gray*, 1 Humph. (Tenn.) 491; *Ensley v. Ballentine*, 4 Humph. (Tenn.) 233; *Gass v. Gass*, 1 Heisk. (Tenn.) 613; *Click v. Click*, 1 Heisk. (Tenn.) 607; *Burks v. Burks*, 7 Baxt. (Tenn.) 353.

Texas.—*Tarpley v. Poage*, 2 Tex. 139; *Long v. Steiger*, 8 Tex. 460; *Oberthier v. Strand*, 33 Tex. 522; *Burns v. Ross* (Tex., Oct. 23, 1888), 9 S. W. Rep. 468.

Vermont.—*Pinney v. Fellows*, 15 Vt. 525; *Dewey v. Long*, 25 Vt. 564; *Clark v. Clark*, 43 Vt. 685.

Virginia.—*Bank of U. S. v. Carrington*, 7 Leigh (Va.) 566; *Law v. Law*, 76 Va. 527.

West Virginia.—*Weinrich v. Wolf*,

24 W. Va. 299; *Smith v. Patton*, 12 W. Va. 541.

Wisconsin.—*Rogan v. Walker*, 1 Wis. 527.

"The clear result of all the cases, without a single exception, is that the trust of a legal estate, whether freehold, copyhold or leasehold; whether taken in the names of the purchaser and others jointly, or in the names of others without that of the purchaser; whether in one name or several; whether jointly or successive, results to the man who advances the purchase money. This is a general proposition supported by all the cases, and there is nothing to contradict it." Per LORD CHIEF BARON EYRE, in *Dyer v. Dyer*, 2 Cox 92; s. c., 1 Ldg. Cas. in Eq. (*White & Tudor*, 4th Am. ed.) 314. This language is adopted by most if not all of the leading text writers. *Story's Eq. Jur.* (13th ed.), § 1201; *Bispham's Eq.* (4th ed.), p. 119; 1 *Pomeroy's Eq. Jur.*, p. 610; 1 *Perry on Tr.* 138; 1 *Lewin on Tr.* (1st Am. ed.) 163.

Accordingly it has been held that where parties managing another's business, take a lease at his desire, and pay rent under it with his funds, a resulting trust arises in favor of his estate, after his decease, and nominal lessees will be restrained from transferring the lease to the prejudice of the estate. *Plaut v. Plaut* (N. J.), 12 Cent. Rep. 239.

So, where A, having bought the property at the instance of B, and given bonds for the purchase money, allowed B to occupy, and the latter paid part of the purchase price from the proceeds of crops, and it was shown that A intended to convey to B when the purchase money was fully paid, *Held*, there was a resulting trust in favor of B, and that a mortgage of the property executed by him would bind it, subject to the right of A to have the balance of the purchase money paid. *Witte v. Wolfe*, 16 S. Car. 256.

So, where it appeared that defendant had purchased certain lands with money furnished for that purpose by plaintiff's intestate, and had held the lands as trustee for the latter during his life, it was error to dismiss the bill to declare a resulting trust in plaintiff's favor. *Reynolds v. Sumner*, (Ill., Jan. 19, 1888), 14 N. E. Rep. 661.

A, the purchaser, to raise the purchase money, got B to become his surety on his note, and therewith obtained the money from a bank, and

1. What Necessary to Establish.—In order to establish a resulting trust of this class, it is necessary that the person paying the purchase money should have actually paid it as his own,¹ as part of the original transaction,²

paid it to the owner of the land, who, at the request of A, conveyed it to B as indemnity for his suretyship. *Held*, that a trust resulted in favor of A. *Bratton v. Rogers*, 62 Miss. 281.

A surety on a note upon which judgment had been recovered, purchased and paid for the land of his principal at an execution sale; but doubting whether it was lawful for him to bid at said sale, he had the sheriff issue the certificate of purchase to another. *Held*, that he had a resulting trust in the land. *Mathis v. Stufflebeam*, 94 Ill. 481.

Where one man pays the purchase money to the State, and he and those claiming under him have the lands assessed, pay the taxes and exercise acts of control and ownership over them; patents taken out by the party who made the application will enure to the benefit of him who paid the purchase money, although more than twenty-one years have elapsed since the patent issued. *Brock v. Savage*, 31 Pa. St. 410.

Where a married woman paid the consideration money for the conveyance of land which was, without her knowledge or consent, deeded to her brother in his own name without any declaration of a trust, *held*, that a trust resulted for her benefit, though she had consented to a conveyance which would have vested the whole estate in herself, and proved ineffectual as a trust. *Lounsbury v. Purdy*, 18 N. Y. 515.

Where it was clearly established that a father purchased land with money belonging to his children, furnished for the purpose by their guardian, the court refused to subject the land to the judgment of a prior creditor of the father. *Robinson v. Robinson*, 22 Iowa 427.

R bought a tract of school land from the State, made improvements, paid the purchase money instalments up to the time of his death, four years afterwards, when he was in default for a years' taxes. He left a widow and an infant child. The widow assigned the certificate of purchase to A, who paid the balance of the purchase money, and received from the State the patent for the

land. *Held*, that A was seized as to one-half of the land in trust for R's child, who was entitled to a conveyance upon payment of one-half of the purchase money and taxes paid by A. *Reynolds v. Reynolds*, 30 Kan. 91.

Defendant in ejectment claimed that the consideration for plaintiff's purchase was paid by defendant and her husband, and that the conveyance to plaintiff, absolute in form, was in fact made in trust for defendant's husband. *Held*, that as against the plaintiff's absolute conveyance, the statute of uses and trusts would not permit such a trust, arising merely from payment of consideration, to be asserted. *Campbell v. Campbell* (Wis.), 35 N. W. Rep. 743. And this trust was *held* to arise even where the person paying the purchase money was a slave. *Leiper v. Hoffman*, 26 Miss. 615.

It has also been *held* to extend to a ship. *Ex parte Houghton*, 17 Ves. 251; to a lease, *Crop v. Norton*, 2 Atk. 75; to slaves, *Long v. Steiger*, 8 Tex. 460.

1. See *infra*, V., §§ 2 and 3 and notes. *Kendall v. Mann*, 11 Allen (Mass.) 15; *Davis v. Wetherill*, 11 Allen (Mass.) 19; *Pinnock v. Clough*, 16 Vt. 500; *Steere v. Steere*, 5 Johns. Ch. (N. Y.) 1. Accordingly it has been *held* that a surety who pays the purchase money upon the default of his principal, takes no interest in the land. *Gee v. Gee*, 32 Miss. 190.

And where a decedent had paid off an equitable mortgage on certain land and directed the mortgagee to deed it to a third person, who obtained a conveyance of the legal title from the owner, it was *held* that as the decedent had not actually paid the purchase money, but only removed an incumbrance on the land, there could be no resulting trust thereof in favor of his heirs. *Boyer v. Floury* (Ga., Jan. 30, 1888), 5 S. E. Rep. 63.

The payment must be actual. It is not sufficient that security should be given. *Dillard v. Crocker*, Spear's Ch. (S. Car.) 20.

2. *Hunt v. Friedman*, 63 Cal. 510; *Millard v. Hathaway*, 27 Cal. 119; *Cross's Appeal*, 97 Pa. St. 471; *Perry v. McHenry*, 13 Ill. 227.

at or before the time of the conveyance.¹

2. What Consideration Will Raise.—It is not, however, necessary that the consideration to raise such a resulting trust should be money;² but if the consideration moves from the *cestui que trust*, a trust will be declared in his favor, whether that consideration be money,³ services,⁴

Therefore it is impossible to raise a resulting trust so as to divest the legal estate, by the application of the funds of a third person, whether he is a principal or a *cestui que trust*, to satisfy the unpaid purchase money. *Coles v. Allen*, 64 Ala. 98; *Alexander v. Tams*, 13 Ill. 221; *Sale v. McLean*, 29 Ark. 612; *Buck v. Pike*, 11 Me. 9; *McCarroll v. Alexander*, 48 Miss. 128; *Kelly v. Johnson*, 28 Mo. 249; *Watson v. Thompson*, 12 R. I. 466.

1. *Kendall v. Mann*, 11 Allen (Mass.) 15; *Davis v. Wetherill*, 11 Allen (Mass.) 19; *Bailey v. Hemenway*, (Mass.) 6 N. E. Rep. 613; *Boskowitz v. Davis*, 12 Nev. 446; *Olcott v. Bynum*, 17 Wall. (U. S.) 44; *Lehman v. Lewis*, 62 Ala. 129; *Foster v. Trustees*, 3 Ala. 302; *DuVal v. Marshall*, 30 Ark. 230; *Walter's Appeal* (Pa.), 8 Atl. Rep. 406; *Cross's Appeal*, 97 Pa. St. 471; *Beecher v. Wilson* (Va., April 26, 1888), 6 S. E. Rep. 209; *Alexander v. Tams*, 13 Ill. 221; *Westerfield v. Kimmer*, 82 Ind. 365; *Roberts v. Ware*, 40 Cal. 634; *Mahorner v. Harrison*, 21 Miss. (13 Sm. & M.) 53; *Cutler v. Tuttle*, 19 N. J. Eq. 549.

And this rule applies, even under the *New York* statute of trusts. *Niver v. Crane*, 98 N. Y. 40.

In *Pennsylvania* it has been said in several cases that a resulting trust can only arise at the inception of title, either through the payment of the purchase money by which it is obtained, or through fraud in its acquisition. *Barnet v. Dougherty*, 32 Pa. St. 371; *Kellum v. Smith*, 33 Pa. St. 158; *Bickel's Appeal*, 86 Pa. St. 204; *Cross's Appeal*, 97 Pa. St. 471. The latter part of this statement is inaccurate, as a resulting trust, properly speaking, never arises from fraud.

It has been said, however, that the payments, which, in order to raise a resulting trust, must be made at the time of the purchase, are so made, if made after the agreement, but before the execution of the conveyance. *Brown v. Cave*, 23 S. Car. 251.

In *Forsythe v. Clark*, 3 Wend. (N. Y.) 637, it was said that a trust would

not result to a person whose funds have been applied in payment for land, subsequently to the purchase unless the funds were so applied under an agreement made at the time of the purchase. And see *Brooks v. Shelton*, 54 Miss. 353.

Compare *Blodgett v. Hildreth*, 103 Mass. 484, where *WELLS, J.*, said: "The exact time and form in which the consideration was rendered, are immaterial, provided they were in pursuance of the contract of purchase. He who purchases at the time and pays afterwards, is as much a purchaser as if he had bought for cash."

2. *Bispham Eq.* (4th Am. ed.), 122; note to *Dyer v. Dyer*, 1 Ldg. Cas. Eq. (White & Tudor, 4th Am. ed.) 341. The principle is fully stated by *SHERLEY, C. J.*, in *Dwinel v. Veazie*, 36 Me. 509. He says (see p. 512): "The principle upon which one person is regarded as holding estates for another by a resulting trust is, that the other has paid for the estate so conveyed. It is not material in what manner payment was made to the grantor. It is sufficient that it was made in such manner as to induce him to convey." And see *Bibb v. Hunter*, 79 Ala. 351; *Shaffer v. Petty* (W. Va., Nov. 1887), 4 S. E. Rep. 278, 283.

3. See authorities cited in preceding note.

4. **Services.**—Equity will decree an implied trust in favor of him who renders professional services wherewith to purchase property, as well as in favor of him who furnishes the money for that purpose, where the legal title is taken in the name of another. *White v. Sheldon*, 4 Nev. 380.

And where two attorneys, plaintiff and defendant, not partners, had rendered valuable services to a litigant, from whom defendant, in consideration thereof, had procured a conveyance of land to himself in plaintiff's absence from the State, it was held that the plaintiff was entitled to a deed of one undivided half. *Robarts v. Haley*, 65 Cal. 397.

In *Williams v. Turner*, 7 Ga. 348, which was a case in which a trust was

land¹ or any other thing of value.²

sought to be established in a ferry right, where A had agreed with B that he would advance to B the purchase money for a lot of land, free of interest for one year; in consideration of which B had agreed to secure the ferry right on said land for the use of A, and the contract was executed and the title of the land taken in the name of B, it was *held* that an implied trust was created as to the ferry right, and that B held it as trustee for A. *Williams v. Turner*, 7 Ga. 348.

And in *Bumpus v. Bumpus*, 59 Mich. 95, it was declared that no suit to obtain a reconveyance of land could be maintained by the parents against their son, no offer to recompense him for his services having been made by them, where the son had devoted eighteen years after coming of age to carrying on the business of his parents, and had saved them \$20,000 without reward, and during that time had bought real estate worth \$2,500, with the profits of the business, taking title in his own name. And see *Lyon v. Lyon*, 1 Tenn. Ch. 225.

1. **Land.**—*Hunt v. DuPuy*, 11 B. Mon. (Ky.) 282; *Blauvelt v. Ackerman*, 20 N. J. Eq. (5 C. E. Gr.) 141; *Clark v. Clark*, 43 Vt. 685; *Bostleman v. Bostleman*, 24 N. J. Eq. 103; *Parker v. Coop*, 60 Tex. 111.

2. **Other Thing of Value.**—The following have been *held* to be sufficient to raise a resulting trust:

A conveyance absolute on its face and importing consideration. *Albright v. Oyster*, 19 Fed. Rep. 849. But the consideration clause in a deed is not always conclusive. *Millard v. Hathaway*, 27 Cal. 119.

Receipts for shares of land. *Donlin v. Bradley*, 119 Ill. 412.

A settler's claim. *Brooks v. Ellis*, 3 Iowa 527.

A bond to convey. *Hardin v. Baird*, 6 Litt. (Ky.) 340.

Furnishing the money by a third party to the purchaser for the benefit of the *cestui que trust*. *Pegues v. Pegues*, 5 Ired Eq. (N. Car.) 418.

The payment of an old debt. *Dwinel v. Veazie*, 36 Me. 509.

A release of indebtedness. *Thomas v. Thomas*, 62 Miss. 531; *Shaffer v. Fetty* (W. Va. Nov. 1884), 4 S. E. Rep. 248.

The promissory note of a third per-

son given for the benefit of the *cestui que trust*. *Morey v. Herrick*, 18 Pa. St. 123; *Bibb v. Hunter*, 79 Ala. 351.

The giving of a note by the person in whose name the purchase was made, for the benefit of the *cestui que trust*, and upon the understanding that it should be paid from the funds of the latter, subsequently received by the nominal purchaser for her benefit. *Lounsbury v. Purdy*, 18 N. Y. 515.

The acceptance of a promissory note by the grantor. *Buck v. Pike*, 11 Me. 9.

See also *Peabody v. Tarbell*, 2 Cush. (Mass.) 226; *Blodgett v. Hildreth*, 103 Mass. 484; *Harrison v. Emery*, 86 N. Car. 161; *Laughlin v. Mitchell*, 14 Fed. Rep. 382; *Dryden v. Hanway*, 31 Md. 254.

So where H contracted for the purchase of a tract of land, and made the cash payment. The papers were adjusted by H's father, who took the deed in his own name, giving his own notes for the deferred payments, and executed a mortgage to secure the same. It was *held* that payments made by H's father in consideration that H should not move to another State, constituted a resulting trust in favor of H, the real purchaser. *Cramer v. Hoose*, 93 Ill. 503.

And where A takes out a grant of land from the State in pursuance of a contract with B that the latter shall share the land upon payment of a certain portion of the expenses incurred in securing and completing the title, and B is let into possession of the land by consent of A, a trust in favor of B attaches to the estate, and he is entitled to an account of the proceeds of timber cut from said land sold by A. *Harrison v. Emery*, 85 N. Car. 161.

Under a written contract, a person undertook to enter land with warrants furnished by another, taking title in their joint names and paying half the cost after one year. One month thereafter he had the precise amount of warrants agreed upon, which he entered in his own name. He paid the note for half the costs of the warrants and often admitted the other's interest in the land. *Held*, that a trust resulted for a half interest, which was not affected by the statute of frauds. *Reynolds v. Sumner* (Ill., Oct. 26, 1888), 18 N. E. Rep. 334.

3. Source of the Consideration.—Nor is it necessary that the consideration should move directly from the *cestui que trust*; it is sufficient if it satisfactorily appear that the person supplying it intends it as a loan or gift to such *cestui que trust*.¹

4. Foundation of Resulting Trusts of the First Class.—The whole foundation of resulting trusts of this class is the ownership and payment of the purchase money by one when the title is taken in the name of another;² and on the presumption, founded on such

But a purchase of real estate completed on the credit of two, and afterwards paid for wholly by one of them, does not, of itself, give rise to a resulting trust. *Brooks v. Fowle*, 14 N. H. 248.

And so a husband's promise to invest for his wife in land money of her inheritance received by him at a time when, under the law, such money is not hers, is based upon no valid consideration, and she, therefore, can claim no trust in the land thus purchased with her money. *Westerfield v. Kimmer*, 82 Ind. 365.

A tract of land was deeded to a purchaser who soon died intestate. An execution against one of the heirs of the purchaser was levied on his interest in the land. Plaintiff claimed to be the equitable owner. It was shown that he paid the purchase money, had been in possession of the land prior to the date of the judgment, and had exercised rights of and claimed ownership; that the purchaser did not claim ownership in his lifetime. *Held*, that the transaction created a resulting trust in favor of plaintiff, superior to the lien of the judgment, as the continuous possession by plaintiff was sufficient constructive notice of ownership. *Carter v. Challin* (Ala.), 3 So. Rep. 313.

1. *Kelly v. Johnson*, 28 Mo. 249. See also *Wright v. Gay*, 101 Ill. 233, where it was said that, where land of which A. was the equitable owner was about to be sold, and B, C & D, three partners, had orally agreed with A to purchase the land for the benefit of her children, and B for himself, and as representing the others, bought the land, taking the title for security in his own name, the facts raised a trust in favor of A's children.

In *Honore v. Hutchings*, 8 Bush (Ky.) 687, the parties plaintiff and defendant had jointly purchased land. Hutchings advanced the whole of the purchase money, took a conveyance to himself and executed a writing, providing, *inter alia*, that when the land was

sold he was to have the whole of the sum so advanced with interest, and that the profits over that sum were to be equally divided between them. That the arrangement was to continue for eighteen months. Honore was to pay one-half of the sum so advanced, with the accrued interest, or Hutchings was to be the sole owner of the land. The land was not sold in eighteen months, and Honore failed to pay any part of the sum so advanced. Subsequently Hutchings sold the land at a large profit, and refused to pay Honore any part of the sum realized. On suit brought by the latter to recover one-half the net profits, it was *held* that a trust resulted in favor of Honore to the extent of one-half of the land jointly purchased.

LINDSAY, J., delivering the opinion of the court, put this decision on the ground that Honore had *secured to be paid* his share of the purchase money, saying (p. 693): "But it is equally well established that if a joint purchase be made in the name of one party, and the other *secures to be paid* his share of the purchase price, he will be entitled to his share of the property purchased as a resulting trust. . . . In this case we have written evidence that Hutchings bought the land jointly with Honore; that Honore *secured to be paid* his share of the \$6,000, the purchase price, and ten per cent. interest thereon, which sum had been advanced by Hutchings on the joint purchase of himself and Honore."

2. *Bruce v. Roney*, 18 Ill. 67; *Pembroke v. Allentown*, 21 N. H. 107.

Agent Paying out of His Own Funds.—Therefore, if an agent buys land for his principal and takes title in his own name, and pays the price out of his own funds, no resulting trust can arise, since there is no payment by the principal on which the right of the latter can rest, but that right is solely dependent on the verbal promise of the

transaction, of the intention of the parties that such a trust should result.¹

5. What Will Not Raise Such a Trust.—Therefore a mere parol agreement,² declaration,³ or voluntary conveyance,⁴ will not raise such a trust; nor will payment of money or other transaction, subsequent to the time of the conveyance,⁵ nor the mere loan of

agent, which is within the statute of frauds. *Bispham's Eq.* (4th ed.) 120; *O'Hara v. Dilworth*, 72 Pa. St. 403; *Minot v. Mitchell*, 30 Ind. 288; *Homer v. Homer*, 107 Mass. 82. Compare *Follansbe v. Kilbreth*, 17 Ill. 522; *Hidden v. Jordan*, 21 Cal. 92; *Chastain v. Smith*, 30 Ga. 96.

But when the funds are furnished to the agent, the mere fact that they cannot be traced distinctly into the land will not prevent a trust from resulting. *Bispham's Eq.* (4th ed.) 121; *Frank's Appeal*, 59 Pa. St. 194; *Sanfoss v. Jones*, 35 Cal. 422; *Malloy v. Malloy*, 5 Bush (Ky.) 465. See *infra*, § 30 and notes.

Mere Violation of a Parol Agreement.

—The rule has frequently been expressed as follows: "Where no money is advanced, and there is nothing more in the transaction than is implied from the violation of a parol agreement, equity will not decree the purchaser a trustee. *Hackney v. Butts*, 41 Ark. 393; *Kistler's Appeal*, 73 Pa. St. 398; *Walker v. Brunyard*, 13 Sm. & M. (Miss.) 723.

1. *White v. Carpenter*, 2 Paige Ch. (N. Y.) 217; *Jackson v. Feller*, 2 Wend. (N. Y.) 465; *Glidwell v. Spough*, 26 Ind. 319; *Henderson v. Hoke*, 1 Dev. & Bat. Eq. (N. Car.) 119.

2. Hence, where a man employs another person by parol as agent to buy an estate for him, and the latter buys it accordingly in his own name, the principal paying no part of the purchase money, no trust results in favor of the latter. *McCall's Appeal* (Pa.), 11 Atl. Rep. 206; *Hackney v. Butts*, 41 Ark. 393; *Collins v. Sullivan*, 135 Mass. 461; *Kendall v. Mann*, 11 Allen (Mass.) 15, 17; *Howland v. Blake*, 97 U. S. 624; *Burden v. Sheridan*, 36 Iowa 125; *Watson v. Erb*, 33 Ohio St. 35. See *infra*, V., § 16 and notes.

Nor will a parol agreement to purchase for another or to hold the land in trust for another, raise such a trust. *Randall v. Constans*, 33 Minn. 329; *Saulsbury v. Black* (Pa., March 12, 1888), 13 Atl. Rep. 67; *Pinnock v. Clough*, 16 Vt. 500.

Nor a parol agreement that another shall be interested in the purchase of land. *Bland v. Talley* (Ark. Dec. 17, 1887), 6 S. W. Rep. 234; *Smith v. Garth*, 32 Ala. 368. Nor a parol agreement that the purchase shall be for the benefit of another. *Hunt v. Friedman*, 63 Cal. 510.

Nor an oral contract that one should buy land on joint account for another. *Bailey v. Hemenway* (Mass. June 23, 1888), 6 New Eng. Rep. 613; *Green v. Drummond*, 31 Md. 71.

Nor an oral agreement by a husband to pay out of his wife's distributive share, for property purchased at a sale of her father's estate. *Reaves v. Garrett*, 34 Ala. 558.

Nor a verbal agreement to take in the name of the wife. *Lawrence v. Lawrence*, 14 Oreg. 77.

Nor an oral agreement to buy at sheriff's sale and reconvey. *Kellum v. Smith*, 33 Pa. St. 158; *Bank v. Bennett*, 76 Pa. St. 402; *Kistler's Appeal*, 73 Pa. St. 393; *Lathrop v. Hoyt*, 7 Barb. (N. Y.) 59.

But where a resulting trust has actually arisen from the facts and the relations of the parties, it will not be destroyed by a verbal, and therefore void, agreement that such a trust shall exist. *Robinson v. Leflore*, 59 Miss. 148.

But where the defendant, in pursuance of a previous parol understanding with plaintiff that land shall be bought by the defendant for their joint benefit, buys the land and takes title in his own name, the court will declare and execute the trust. *Leggett v. Leggett*, 88 N. Car. 108.

3. *Moyer's Appeal* (Pa.), 12 Cent. Rep. 519; *Bland v. Talley* (Ark., Dec. 17, 1887), 6 S. W. Rep. 234; *Williard v. Williard*, 56 Pa. St. 119; *Dorsey v. Clark*, 4 Har. & J. (Md.) 551; *Thompson v. Branch*, Meigs (Tenn.) 390; *Watson v. Thompson*, 12 R. I. 466.

4. *Shaffer v. Huntingdon*, 53 Mich. 310; *Lane v. Lane* (Me., Nov. 19, 1888), 16 Atl. Rep. 323.

5. A resulting trust will not arise from an advance of money to the pur-

money to make the purchase;¹ nor even the payment of the purchase money, if it is not the intention of either party that the beneficial interest should be in the party so paying.²

chaser after the purchase is complete. *Watter's Appeal* (Pa.), 8 Atl. Rep. 406; *Olcott v. Bynum*, 17 Wall. (S. C.) 44; *Bailey v. Hemenway* (Mass. June 23, 1888), 6 N. E. Rep. 613; *Lehman v. Lewis*, 62 Ala. 129. So even under the *New York* statute. *Niver v. Crane*, 98 N. Y. 40.

Nor from any other transaction subsequent to the conveyance. *Niver v. Crane*, 98 N. Y. 40.

Accordingly it was *held* in a recent case, *Beecher v. Wilson* (Va., April 26, 1888), 6 S. E. Rep. 209, that after the legal title has been conveyed to one who agreed to buy for another, the application of the latter's money to pay notes for the purchase money created no resulting trust in his favor. So where the plaintiffs were heirs at law of a decedent who had paid off an equitable mortgage on certain land and directed the mortgagee to deed it to the defendant, who obtained a conveyance of the legal title from the owner, it was *held*, that as decedent did not pay the purchase money, but only removed an incumbrance on the land, there could be no resulting trust thereof in favor of his heirs. *Boyer v. Floury* (Ga., Jan. 30, 1888), 5 S. E. Rep. 63.

1. *Whaley v. Whaley*, 71 Ala. 159; *Gibson v. Foote*, 40 Miss. 788; *Caruthers v. Williams*, 21 Fla. 485; *Page v. Page*, 8 N. H. 187. Plaintiff purchased real estate for which he was to pay \$950, \$200 in cash, and the balance to be secured by mortgage on the property, and to enable him to make the cash payment procured a loan of \$200 from defendant. As security for its payment title was taken in defendant, he executing the mortgage back, and verbally agreeing to convey to plaintiff on payment of the \$200 and being secured on account of his liability on the mortgage. *Held*, that the defendant held the entire property in trust for the plaintiff. *Thomas v. Jameson* (Cal., Sept. 22, 1888), 19 Pac. Rep. 177.

2. *White v. Carpenter*, 2 Paige Ch. (N. Y.) 217; *Jackson v. Feller*, 2 Wend. (N. Y.) 465; *Glidwell v. Spagh*, 26 Ind. 319; *Henderson v. Hoke*, 1 Dev. & Bat. Eq. (N. Car.) 119.

What Does Not Constitute—Instances.

—A paid money to B to be used in the purchase of C's land. B never made

nor contracted with C to make the purchase, and C died. *Held*, that C's heir at law could not set up a claim to the money on tendering a deed of the land. *Rogers v. Rogers*, 63 Iowa 92.

A testator having given his widow the use and benefit of his farm for the support and education of his children until one of them should come of age, when it was to be sold and the proceeds divided among the heirs; she sold the land, and gave bond for a good title in the future, and purchased other land with the consideration money. *Held*, that she conveyed only her interest, and there was no resulting trust to the heirs in the land purchased. *Hadley v. Stuart*, 62 Iowa 267.

Where a married woman inherited property to which her husband, who died before her, did not, according to the law of the State, acquire the title, and afterwards she married again, and her second husband became entitled thereto by the law of the State where she resided with him, *held*, that the children of the first marriage could not, after the divorce of their mother from the second husband, have a resulting trust declared in their favor as to the avails of the property in the hands of the said husband. *McCullough v. Ford*, 96 Ill. 439.

Where, on the subdivision of a school district and the apportionment of assets, it was agreed that certain taxes yet to be collected from territory not included in A, should be paid, when collected, to A, *held*, that the fact that the money was paid to the district formed out of the territory from which the taxes were collected did not make that district the trustee of A. *Jasper v. Wheatland*, 62 Iowa 62.

I and B, each claiming the right to purchase certain public land, it was agreed in writing, that the lot should be bid in by the public bidder, to be conveyed by him as five disinterested citizens should award. I and B each paid one-half the price of the land. *Held*, that the circumstances of the case rebutted the ordinary presumption of equity, that a trust results in favor of a party paying the consideration for the purchase of real estate. *Irvine v. Marshall*, 7 Minn. 286.

A letter from A to B, saying: "I intend to settle up our affairs and give

Nor can a resulting trust arise in opposition to the intention of the parties;¹ nor where the use is expressly limited to the grantee in a deed;² nor where the purpose was a fraudulent one;³ nor where it would break in upon the policy of the law or a public statute.⁴

6. To What Property Applicable.—The doctrine of resulting trusts applies in all its phases to personal as well as to real prop-

erty your deeds, that you entrusted with me," is not sufficient to establish a trust in B's favor, in land which had been conveyed to A by B and others. *Blodgett v. Hildreth*, 103 Mass. 484.

It has been doubted whether a trust would arise in favor of the true owner where a father, under a claim of right, seized property which belonged to his son-in-law, sold it, and invested the proceeds in land. *Ensley v. Ballentine*, 4 Humph. (Tenn.) 233.

1. Intention of Parties.—*White v. Carpenter*, 2 Paige Ch. 217, 265; *Botsford v. Burr*, 2 Johns. Ch. (N. Y.) 405; *Steere v. Steere*, 5 Johns. Ch. (N. Y.) 1; *Elliott v. Armstrong*, 2 Blackf. (Ind.) 198, 213; *Phillips v. Crammond*, 2 Wash. (U. S. C. C.) 441, 445.

2. Use Limited in a Deed.—*Donlin v. Bradley*, 119 Ill. 412, *MULKEY, J.*: "In these cases there can be no implied trust, for the grantor, by expressly declaring the trusts upon which the conveyance is made, leaves nothing for implication." (p. 420). See *Leggett v. DuBois*, 5 Paige Ch. (N. Y.) 114; *Alexander v. Warrance*, 17 Mo. 228, *Dean v. Dean*, 6 Conn. 285.

But the mere recital in a deed that the purchase money was paid by the grantee is not conclusive to establish the trust. *Millard v. Hathaway*, 27 Cal. 119, *Hyden v. Hyden*, 6 Baxt. (Tenn.) 406; *McKeown v. McKeown*, 33 N. J. Eq. 384; *Cotton v. Wood*, 25 Iowa 43; *Murry v. Sell*, 23 W. Va. 475; *Livermore v. Aldrich*, 5 Cush. (Mass.) 431.

Although it has been said that a resulting trust cannot be shown against an absolute deed in consideration of natural love and affection. *Miller v. Stokely*, 5 Ohio St. 194. And see *Irwin v. Ivers*, 7 Ind. 308; s. c., 63 Am. Dec. 420; *Miller v. Blackburn*, 14 Ind. 80; *McDonald v. McDonald*, 24 Ind. 70.

Compare Cotton v. Wood, 25 Iowa 43. In this case *BECK, J.*, said (p. 47): "It is further objected that there is an express declaration in the deed that the conveyance is for the use of the grantee, and for a good and valuable considera-

tion, there can be no presumptive or resulting trust, and that, inasmuch as the deed of the property in question, as to the wife, states these facts, she will be presumed to have the beneficial interest in the property, and the presumption cannot be rebutted by parol evidence. This may be the rule, but it does not extend to cases where land is purchased with the funds of a party, or the consideration paid by him, and the conveyance taken in the name of another. Such cases are exceptions to the rule. Unless such exceptions are recognized, there could be, in fact, no such thing as a presumptive trust, unless evidence thereof appeared in the body of the deed."

3. Fraud.—*Proseus v. McIntyre*, 5 Barb. (N. Y.) 424; *Baldwin v. Campfield*, 8 N. J. Eq. (4 Halst.) 891; *Ford v. Lewis*, 10 B. Mon. (Ky.) 127; *Vanzant v. Davies*, 6 Ohio St. 52. And see title *FRAUD*. See *infra*, § 37, note 7.

4. Policy of Law.—It has been held, therefore, that where an alien, for the purpose of evading the law of the State prohibiting him from taking and holding real property, purchases land and takes a conveyance thereof in the name of a third person, no resulting trust arises in favor of such alien. *Leggett v. DuBois*, 5 Paige Ch. (N. Y.) 114; *Phillips v. Crammond*, 2 Wash. (U. S. C. C.) 441, 447; *Taylor v. Benham*, 5 How. (U. S.) 270; *Hubbard v. Goodwin*, 3 Leigh (Va.) 492.

Nor, under the English registration acts, is the doctrine applicable to the case of a vessel, purchased and paid for by one man, but registered in the name of another. *Hill on Trustees* (4th Am. ed.) 151; *Ex parte Houghton*, 17 Ves. 251.

Nor when the purpose is to do that through the medium of a trustee what the *cestui que trust* could not do in his own person. *Alsworth v. Cordtz*, 31 Miss. 32.

See also *Murphy v. Hubert*, 16 Pa. St. 50, 56; *Eastham v. Roundtree*, 56 Tex. 110. And see *infra*, VII., p. 54, n. 3; XI.; XII.

erty.¹ But it cannot be set up as to property perishable in its nature,² nor as to a mere claim to property.³

7. Resulting Trusts by Part Payment of the Purchase Money.—Where two or more persons together advance the price, and title is taken in the name of one of them, a trust will result in favor of the other with respect to a share of the property proportionate to his share of the price.⁴

1. *Bispham's Eq.* (4th ed.) 120; 1 *Perry on Trusts* (3rd ed.) 146; 2 *Pomeroy's Eq. Jur.* 611, § 1038.

It has accordingly been held to extend to the purchase of stock. *Garrick v. Taylor*, 29 *Beav.* (Eng. Ch.) 79; *Stover v. Flack*, 41 *Barb.* (N. Y.) 162; *Creed v. Lancaster Bank*, 1 *Ohio St. 1.*

To a mortgage. *Kelley v. Jenness*, 50 *Me.* 455.

To an annuity. *Rider v. Kidder*, 10 *Ves.* 363.

And where a bond is assigned at the instance and request of a third person who pays the consideration, the assignee holds in trust for him and his estate. *Grant v. Heverin* (Cal., Oct. 24, 1888), 19 *Pac. Rep.* 493.

2. It was said in *Union Bank v. Baker*, 8 *Humph.* (Tenn.) 447, that a resulting trust may be set up as to lands and slaves, but not as to property more perishable in its nature.

3. *Mandeville v. Solomon*, 53 *Cal.* 38.

4. 2 *Pomeroy's Eq. Jur.* 611; *Bispham's Eq.* (4th ed.) 121; 2 *Story Eq. Jur.* (13th ed.) 542; 1 *Perry on Trusts* (3rd ed.) 147; *Powell v. Monson*, and *Brimfield Mfg. Co.*, 3 *Mason* (U. S. C. C.) 347, 364; *Larkins v. Rhodes*, 5 *Port* (Ala.) 196; *Rhea v. Tucker*, 56 *Ala.* 450; *Bibb v. Hunter*, 79 *Ala.* 351; *Shelby v. Tardy* (Ala., May 24, 1888), 4 *So. Rep.* 276; *Anthe v. Heide* (Ala., May 31, 1888), 4 *So. Rep.* 380; *Russell v. Marchbanks* (Ark., April 29, 1887), 4 *S. W. Rep.* 200; *Dikeman v. Morrie*, 36 *Cal.* 94; *Case v. Coddington*, 38 *Cal.* 191; *McCreary v. Casey*, 50 *Cal.* 349; *Somers v. Overhulser*, 67 *Cal.* 237; *Lipscomb v. Nichols*, 6 *Colo.* 290; *Letcher v. Letcher*, 4 *J. J. Marsh.* (Ky.) 590; *Brothers v. Porter*, 6 *B. Mon.* (Ky.) 106; *Pierce v. Pierce*, 7 *B. Mon.* (Ky.) 433; *Honore v. Hutchings*, 8 *Bush* (Ky.) 687; *Latham v. Henderson*, 7 *Ill.* 185; *Smith v. Smith*, 85 *Ill.* 189; *McNamara v. Garrity*, 106 *Ill.* 384; *Springer v. Springer*, 114 *Ill.* 550; *Donlin v. Bradley*, 119 *Ill.* 412; *McDonald v. McDonald*, 24 *Ind.* 68; *Purdy v. Purdy*, 3 *Md. Ch.* 547; *Bank v. Snively*, 23 *Md.* 253; *McCarroll v. Alexander*, 48 *Miss.*

621; *Cloud v. Ivie*, 28 *Mo.* 579; *Baumgartner v. Guessfield*, 38 *Mo.* 36; *Bear v. Koenigstein*, 16 *Neb.* 65; *Frederick v. Haas*, 5 *Nev.* 389; *Boskowitz v. Davis*, 12 *Nev.* 449; *Dow v. Jewell*, 18 *N. H.* 340; s. c., 45 *Am. Dec.* 371; *Tebbetts v. Tilton*, 31 *N. H.* 273, 283; *Hall v. Young*, 37 *N. H.* 134; *Botsford v. Burr*, 2 *Johns. Ch.* (N. Y.) 405; *Ross v. Hegeman*, 2 *Edw. Ch.* (N. Y.) 373; *Quackenbush v. Leonard*, 9 *Paige Ch.* (N. Y.) 334; *Trustees v. Wheeler*, 59 *Barb.* (N. Y.) 585; *Jackson v. Moore*, 6 *Cowen* (N. Y.) 706; *McGovern v. Knox*, 21 *Ohio St.* 547; *Stewart v. Brown*, 2 *S. & R.* (Pa.) 461; *Morey v. Herrick*, 18 *Pa. St.* 123; *Chadwick v. Felt*, 35 *Pa. St.* 305; *Bigley v. Jones*, 114 *Pa. St.* 510; *Shoemaker v. Smith*, 11 *Humph.* (Tenn.) 81; *Neill v. Keese*, 13 *Tex.* 187; *Pinney v. Fellows*, 15 *Vt.* 525; *Clark v. Clark*, 43 *Vt.* 685; *McCully v. McCully*, 78 *Va.* 159; *Sheldon v. Sheldon*, 3 *Wis.* 699.

In *Lewis v. Building Association*, 70 *Ala.* 276, it was held that where the title to a tract of land was taken by a husband, and one-third of the purchase money was paid by the wife's father as an advancement to her, a trust in the land arose to that amount which extended to the whole of the land and which, upon the final payment of the purchase money, would have been enforced.

So where the separate property of the wife, consisting of land, was given in exchange in part payment for a larger tract of land which was attached for a debt due by the husband, it was held that the exchange created a resulting trust in the wife's favor in the larger tract thus acquired in proportion to the value which her land so exchanged sustained to the value of the whole of the land given in exchange. *Parker v. Cook*, 60 *Tex.* 111.

In *Frederick v. Haas*, 5 *Nev.* 389, a trust arose *pro tanto*, though part of the consideration was paid in chattels.

So under evidence that complainant furnished part of the money with which defendant purchased a lot, that it was

The Payments Must Be of Aliquot Part.—But it has been said, though the principle is by no means universally established, that the payment to raise a trust *pro tanto* must be of some definite aliquot part of the purchase money.¹

agreed that complainant should have a one-half interest therein, but that defendant, instead, took a bond for title in his wife's name and made the last deferred payment, before due, without complainant's knowledge, defendant will be decreed a trustee and compelled to convey title to an undivided one-half interest to the plaintiffs. *Anthe v. Heide* (Ala., 31, 1888), 4 So. Rep. 380.

But compare *Bernard v. Bougard*, 1 Harr. Ch. (Mich.) 130; *Coppage v. Barnett*, 34 Miss. 621; *Bogert v. Perry*, 17 Johns. (N. Y.) 351; *Jackson v. Bate-man*, 2 Wend. (N. Y.) 57; where it seems to have been held that payment of part of the consideration will not raise a trust *pro tanto*.

1. The leading case is *McGowan v. McGowan*, 14 Gray (Mass.) 119. In this case HOAR, J., said (page 121): "When a part of the purchase money is paid by one, and the whole title is taken by the other, a resulting trust *pro tanto* may, under some circumstances, be created. But in the latter case we believe it to be well settled that the part of the purchase money paid by him in whose favor the resulting trust is sought to be enforced, must be shown to have been paid for some specific part, or distinct interest in the estate; for 'some aliquot part' as it is sometimes expressed; that is, for a specific share, as a tenancy in common, or joint tenancy, of one-half, one-quarter, or other particular fraction of the whole; or for a particular interest, as a life estate, or tenancy for years, or remainder, in the whole; and that a general contribution of a sum of money towards the entire purchase is not sufficient."

And in *Bailey v. Hemenway* (Mass. June 23, 1888), 6 N. E. Rep. 612, MORTON, C. J., said: "There being no memorandum in writing, no trust can arise or be attached to the two-fifths held by the defendant, unless the facts show a resulting trust by implication of law. To produce this result, it must appear that each of the plaintiffs contributed and furnished one-quarter part of the money and credits paid for the bond. . . . It was not obtained by each of the parties paying and furnishing an *aliquot* fourth part. The plaintiffs each

made a general contribution for the purpose, varying in amounts." It was held, therefore, that no trust arose *pro tanto*. See also *Buck v. Warren*, 14 Gray (Mass.) 121 n; *Fickett v. Durham*, 109 Mass. 419.

The reason for this rule is thus given by MR. CHANCELLOR JONES, in *White v. Carpenter*, 2 Paige Ch. (N. Y.) 217, 240. "But though there may be a trust of a part only of the estate by implication of law, it must be of an *aliquot* part of the whole interest in the property. The *cestui que trust* to whom the trust results must become by the operation of law upon the estate, a tenant in common with the grantee, of the whole interest vested in him by the grantor, there can be no resulting trust of the whole estate to a given extent of the value of it, leaving the residuum, if any, of the value, to the grantee. . . .

When an estate results by implication of law, the title and legal estate of the whole, or of some *aliquot* part of the whole, must vest in the party to whom it results. . . . The principle is, that the whole consideration for the whole estate, or for the moiety, the third or some other definite part of the whole, must be paid to be the foundation of a resulting trust; and that the contribution or payment of a sum of money generally for the estate, when such payment does not constitute the whole consideration, does not raise a trust by operation of law for him who pays it; and the reason of the distinction obviously is, that neither the entire interest in the whole estate, nor in any given part of it could result from any such a payment to the party who makes it, without injustice to the grantee by whom the residue of the consideration is contributed."

See also the language of MR. JUSTICE STORY in *Smith v. Burnham*, 3 Sumner (U. S. C. C.) 435, 466.

And see also *Cutler v. Tuttle*, 19 N. J. Eq. 549; *Wheeler v. Kirtland*, 23 N. J. Eq. 13; *Shaffer v. Fetty* (W. Va. 1887), 4 S. E. Rep. 278; *Sayre v. Townsend*, 15 Wend. (N. Y.) 647; *Perry v. McHenry*, 13 Ill. 227; *Alexander v. Tams*, 13 Ill. 221; *Reynolds v. Morris*, 17 Ohio St. 510; *Bibb v. Hunter*, 79.

Ala. 351; *Olcott v. Bynum*, 17 Wall. (U. S.) 44. Compare *Jenkins v. Eldridge*, 8 Story (U. S.) 181, 288.

But the principle has not been universally adopted; thus in *Sheldon v. Sheldon*, 3 Wis. 699, the amounts paid were \$745 and \$1,105 respectively. The raising of a trust *pro tanto* seems not to have been doubted in this case, the whole contention being Statute of Limitations. In *Pierce v. Pierce*, 7 B. Mon. (Ky.) 433, the amounts were \$1,000 and \$492.50, and a resulting trust was raised on those proportions. In *Chadwick v. Felt*, 35 Pa. St. 305, the amounts paid were \$75 and \$425; and in *Parker v. Cook*, 60 Tex. 111, land was given in part payment in exchange for a larger tract of land, and title was taken in the name of a person other than the owner of the first mentioned tract. It was held that the exchange created a resulting trust in favor of the owner of the first mentioned tract of land in proportion to the value which the land thus exchanged sustained to the value of the whole of the land for which it was exchanged.

Moreover the courts have been very liberal in deciding what constitutes such a definite aliquot part or interest. Thus besides the usual aliquot parts the following have been held to raise resulting trusts *pro tanto*: three-sevenths and four-sevenths, *Clark v. Clark*, 43 Vt. 685; five-eighths and three-eighths, *Rhea v. Tucker*, 56 Ala. 450; twenty-two-fifths, *Latham v. Henderson*, 47 Ill. 185; one-fortieth, *Botsford v. Burr*, 2 Johns. Ch. (N. Y.) 405; one hundred two-thousand and - fifty - firsts ($\frac{100}{2051}$), *Buck v. Swazey*, 35 Me. 41.

In *Crawford v. Manson* land was purchased for \$3,500. The daughter of the purchaser alleged that \$1,700 of the purchase money was paid by her. The court held that if that sum was so paid by her, she was entitled to become a tenant in common with her father, she holding seventeen thirty-fifths and he eighteen thirty-fifths, or to leave him sole owner and recover of him \$1,700 with a lien (by decree) upon the premises for its payment. (Georgia, Nov. 21st, 1888), 8 S. E. Rep. 54.

When Rule as to Aliquot Part Complicated With.—When the first payment is in full satisfaction of one instalment under the contract of purchase, and the vendor is ready to make the deed to the person entitled, the rule in relation to aliquot payments is sufficiently com-

plied with, whether the portion paid is an exact division of the whole purchase price or not. *Fleming v. McHale*, 47 Ill. 282.

Maine.—The doctrine in Maine seems to be that the payment must be of a known and certain part. In *Baker v. Vining*, 30 Me. 121; s. c., 50 Am. Dec. 617, *TENNEY, J.*, said: "No case has been found where a resulting trust has been held to arise upon payment made in common by the one asserting his claim and the grantee in the deed, wherein the grantor acknowledges the receipt of the consideration from him alone when the amount belonging to one and the other is uncertain and unknown even to those who make the payments; and no satisfactory evidence is offered exhibiting the portion which was really the property of each, the trust springs from a presumption of law, because the alleged *cestui que trust* has paid the money. Such presumption must be attended with no uncertainty. The foundation is the payment and this must be clearly established."

The next case is *Buck v. Swazey*, 35 Me. 41. In that case the value of the land was \$1,025.50, the plaintiff advancing one-sixth of the purchase money; and afterwards, in order to make cash payment, a further sum of \$50. He claimed the resulting trust in the land to the extent of one-sixth of its value, and in addition to the extent of one hundred two-thousand-and-fifty-firsts ($\frac{100}{2051}$). The court decreed a trust in the land in his favor in both of these proportions. In *Kelley v. Jenness*, 50 Me. 455, the general doctrine was laid down that part payment raised a trust *pro tanto*. As the whole transaction was very much involved the matter was referred to a commissioner to ascertain the exact amount. In *Dudley v. Bachelder*, 53 Me. 403, the court declared that the payment must be of an aliquot part; but as the case was one where the whole of the purchase money had been paid the statement was a mere *obiter dictum*. Of the cases which are relied upon as authority (*Baker v. Vining*, 30 Me. 121; and *McGowan v. McGowan*, 14 Gray (Mass.) 114) the former does not support the doctrine.

Ohio.—The doctrine in the text is laid down in *Reynolds v. Morris*, 17 Ohio St. 510. But in that case the facts were that the defendant agreed in writing to collect a note endorsed to him for the endorser, and received in

Where Amounts Paid Are Uncertain.—In some cases it has been held that where the amounts paid were uncertain they would be presumed by the court to be equal.¹

8. Advancements.—The presumption that the person who pays the purchase money of an estate, the title to which is taken in the name of a stranger, intended some benefit to himself does not arise when the purchaser takes the conveyance in the name of some person for whom he is under any legal or moral obligation to provide;² as in the case of a father taking title in the name of a child,³

payment of the note and another debt a tract of land, and expenses of uncertain amount were incurred in making the collection, and the case was decided on the ground that "the amount due the endorser was so uncertain" that a trust as to the land could not be enforced.

1. *Shoemaker v. Smith*, 11 Humph. (Tenn.) 81; *Edwards v. Edwards*, 39 Pa. St. 369; *Letcher v. Letcher*, 4 J. J. Marsh. (Ky.) 590.

2. *Bispham's Eq.* (4th ed.) 125; *Perry on Trusts* (3rd ed.), 161; 2 *Pomeroy's Ex. Jur.* 611, § 1039; *Lewin on Trusts*, *170, *177; 2 *Story's Eq. Jur.* (13th ed.) 538, § 1202, *et seq.*; *Miller v. Blose*, 30 Gratt. (Va.) 744; *Dyer v. Dyer*, 2 Cox 92; s. c., 1 Ldg. Cas. Eq. (White & Tudor, 4th Am. ed.) 314, 343; *Insurance Co. v. Deal*, 18 Md. 26; *Russ v. Mebius*, 16 Cal. 350; *Miller v. Stokely*, 50 Ohio St. 194; *Taylor v. James*, 4 Des. (S. Car.) 1; *Jackson v. Jackson*, 91 U. S. 122; *Cotton v. Wood*, 25 Iowa 43.

3. The leading case is *Dyer v. Dyer*, 2 Cox 92; s. c., 1 Ldg. Cas. Eq. (4th Am. ed.) 314. In that case copyhold premises had been granted to Simon Dyer, his wife and son William, to take in succession for their lives and the longest liver of them. The entire purchase money had been paid by the father. The wife died, and then the husband, having by will devised the property to a younger son. The latter filed a bill against his brother William, and it was held that the latter could not be treated as a trustee of the legal estate for the benefit of his father's devisee, but that he took beneficially by way of advancement, and the bill was dismissed.

The rule in this case has been followed in the United States. *Russ v. Mebius*, 16 Cal. 350; *Gee v. Gee*, 32 Miss. 190; *Taylor v. Moseley*, 57 Miss. 544; *Page v. Page*, 8 N. H. 187; *Trem-*

per v. Burton, 18 Ohio 418; *Lawrence v. Lawrence*, 14 Oreg. 77; *Shepherd v. White*, 10 Tex. 72; *Eastham v. Roundtree*, 56 Tex. 110; *Lorentz v. Lorentz*, 14 W. Va. 809; *Dudley v. Bosworth*, 10 Humph. (Tenn.) 9; *James v. James*, 41 Ark. 301; *McGinnis v. Edgell*, 39 Iowa 419; *Read v. Huff*, 40 N. J. Eq. 229; *Harden v. Darwin*, 66 Ala. 55; *Buren v. Buren*, 79 Mo. 538; *Partridge v. Havens*, 10 Paige (N. Y.) 618; *Shaw v. Read*, 47 Pa. St. 96.

Accordingly it has been held that when a father has purchased a tract of land in the name of his son under a written contract requiring the vendor on payment of the purchase money to convey the land to the son, the latter may bring a bill in equity to compel a conveyance of the land to him. *Lorentz v. Lorentz*, 14 W. Va. 809.

But in *Neale v. Hagthorp*, 3 Bland (Md.) 551, it was said that, where a father had conveyed to his son all his real estate on condition that the son would pay certain debts due by the father, there was so far a resulting trust in favor of the father as to require the son to show that he had paid such debts, and to give the administrator of the father the right to an account.

And where a son was entrusted with money to buy land for his father, and without the knowledge of the latter took title in his own name, and the father occupied the land as his residence, there was a resulting trust in his favor, which was held to prevail over a mortgage made by the son. *Taylor v. Moseley*, 57 Miss. 544.

Payment of Part of Purchase Money.—Where a father pays a large proportion of purchase money for an estate, and his son, paying the smaller part, takes a deed thereof, the presumption is that the father intended an advancement to the son. *Shepherd v. White*, 11 Tex. 346.

It applies where the son is a minor. *Proseus v. McIntyre*, 5 Barb. (N. Y.)

or a husband in the name of a wife.¹ In this case the presumption is, *prima facie*, that the purchase and conveyance

424; *Demaree v. Driskill*, 3 Blackf. (Ind.) 115.

Or an idiot. *Cartwright v. Wise*, 14 Ill. 417.

Or where title is taken in the name of a daughter. *Butler v. Insurance Co.*, 14 Ala. 777; *Hatton v. Landman*, 28 Ala. 127; *Fleming v. Donahoe*, 5 Ohio 255; *Wheeler v. Kidder*, 105 Pa. St. 270; *Eastham v. Roundtree*, 56 Tex. 110.

Secus where the manifest intention of the parties was otherwise. *Jackson v. Matsdorf*, 11 Johns. (N. Y.) 91.

Or where it is taken in the name of several children. *Stanley v. Brannon*, 6 Blackf. (Ind.) 193; *Partridge v. Havens*, 10 Paige Ch. (N. Y.) 678; *Douglas v. Price*, 4 Rich. Eq. (S. Car.) 322.

Or in the name of a father and his son jointly. *Thompson v. Thompson*, 1 Yerg. (Tenn.) 97.

Or in the joint names of a son and a stranger. *Lamplugh v. Lamplugh*, 1 P. Wms. (Eng. Ch.) 111. See 1 Perry on Trusts (3rd ed.) 163.

Or in the name of an adopted daughter. *Astreen v. Flanagan*, 3 Edw. Ch. (N. Y.) 279.

Purchase by Son in Name of Father.

—But the converse of the rule is not true, and if the money be advanced by the son, and title taken in the name of the father, the relation of the parties will not defeat the resulting trust. *Howell v. Howell*, 15 N. J. Eq. 75; *Johnson v. Anderson*, 7 Baxt. (Tenn.) 251. In the latter case, A, being a minor, contracted with B for a tract of land, but on account of the minority of A, B was unwilling to make a contract with him, and it was accordingly agreed that C, the father of A, should become the contracting party instead of A. The land was accordingly conveyed to C, but A paid the purchase money. The facts were held to make out a resulting trust in favor of A.

Illegitimate Children.—It seems to be well established that the doctrine of advancements is applicable where the purchase is made in the name of an illegitimate child. *Beckford v. Beckford*, Loft's Rep. 490. The case is imperfectly reported. The facts are set forth showing a purchase by a father in the name of an illegitimate child, and the decision is given in a note as

follows: "As I understand, the Lord Chancellor decreed that the son took for his own benefit and not in trust." There is a *dictum* to the same effect in *Kilpin v. Kilpin*, 1 M. & K. (Eng. Ch.) 520, 542; and *Beckford v. Beckford* is cited as an authority on the point in *Soar v. Foster*, 4 K. & J. (Eng. Ch.) 152, 160.

In *Kimmel v. McRight*, 2 Pa. St. 38, land was purchased by a father in the name of his natural child, at a time when the father was deeply indebted. Subsequently the property was sold at a sheriff's sale as the property of the father who lived on it with his son. The father set up as a defence that the property belonged to his son, the purchase of it in the name of the latter constituting an advancement. The court held that as the transaction was in fraud of creditors, it would be considered that the son held the title on a resulting trust in favor of the father. But the implication is clear that had the transaction been clear of fraud, it would have been construed as an advancement. See further *Wait v. Day*, 4 Denio (N. Y.) 439; *Anon.*, 1 Wall. Jr. (U. S. C. C.) 107.

But it has been decided that the rule does not extend to the case of an illegitimate child of a legitimate child. *Tucker v. Burrow*, 2 Hem. & M. (Eng. Ch.) 515.

1. *Harden v. Darwin*, 66 Ala. 55; *Milner v. Freeman*, 40 Ark. 62; *Thomas v. Chicago*, 55 Ill. 403; *Maxwell v. Maxwell*, 109 Ill. 588; *Lochenour v. Lochenour*, 61 Ind. 595; *Cotton v. Wood*, 25 Iowa 43; *Spring v. Hight*, 22 Me. 408; *Stevens v. Stevens*, 70 Me. 92; *Lane v. Lane* (Me., Nov. 19, 1888), 16 Alt. Rep. 323; *Insurance Co. v. Deal*, 18 Md. 26; *Groff v. Rohrer*, 35 Md. 327; *Whitten v. Whitten*, 3 Cush. (Mass.) 191; *Johnson v. Johnson*, 16 Minn. 512; *Fatheree v. Fletcher*, 31 Miss. 265; *Gilliland v. Gilliland* (Mo., Dec. 20, 1888), 10 S. W. Rep. 139; *Gray v. Gray*, 13 Neb. 453; *Bartlett v. Bartlett*, 13 Neb. 456; *Dickinson v. Davis*, 43 N. H. 647; *Hill v. Bank*, 45 N. H. 300; *Belford v. Crane*, 16 N. J. Eq. 265; *Wilton v. Devine*, 20 Barb. (N. Y.) 9; *Guthrie v. Gardner*, 19 Wend. (N. Y.) 414; *Jencks v. Alexander*, 11 Paige Ch. (N. Y.) 619; *Garfield v. Hatmaker*, 15 N. Y. 475; *Earnest's Appeal*, 106 Pa.

St. 310; *Wallace v. Bowen*, 28 Vt. 638; *Bennett v. Camp*, 54 Vt. 36; *Jackson v. Jackson*, 91 U. S. 122.

Compare *Pembroke v. Allenstown*, 21 N. H. 107; *Tebbetts v. Tilton*, 31 N. H. 273; *Whitestone v. Constable*, 14 Johns. (N. Y.) 469; *Parish v. Rhodes, Wright (Ohio)* 339, where a purchase by a husband in the name of his wife was *held* to raise a trust in his favor.

And this presumption arises, even though it was expressly understood at the time of the transaction that the conveyance is taken for the sole purpose of providing a home for the wife, and, in case he should survive her, the title should vest in him and not descend to her heirs, no instrument in writing having been executed to declare the trust. *Johnson v. Johnson*, 16 Minn. 512.

In *Jackson v. Jackson*, 91 U. S. 123, land in the District of Columbia was purchased by a wife with money partly coming to her from the estate of her father, and partly with her earnings subsequent to her marriage. The husband attempted to set up a resulting trust in the land, on the ground that the money with which it was purchased belonged, at the time it was purchased, absolutely to him, the common law rights of the husband over his wife's property not having at that time been altered in the District of Columbia. The court, while granting this contention, were yet of the opinion that the transaction constituted an advancement for the wife.

Therefore, where a wife, acting under a power of attorney from her husband, to collect all money and property due him for her own use, purchased land with the money so received, and took the conveyance to herself, it was *held* that no trust arose in favor of the husband. *Whitten v. Whitten*, 3 Cush. (Mass.) 191.

And one who, having acquired an equitable title to real estate, acquiesces in the same being held to his wife by the person holding the legal title, will be presumed to have intended the same as an advancement to his wife, and to create no trust. *Gray v. Gray*, 13 Neb. 453; *Bartlett v. Bartlett*, 13 Neb. 456.

So where the purchase is made in the joint names of the husband and wife. *Dummer v. Pitcher*, 2 M. & K. (Eng. Ch.) 262.

Where a Trust Will Arise.—But where land is purchased with community property and title taken in the name of

the wife, the presumption of advancement does not arise. *Higgins v. Johnson*, 20 Tex. 389; *Cooke v. Brand*, 27 Tex. 457. *Compare* *Peck v. Brummagim*, 31 Cal. 447; *Smith v. Boquet*, 27 Tex. 507.

So where land is bought with a mixed fund belonging in part to a husband and in part to his wife, and title is taken in the wife's name upon her agreement to convey to the husband at his request, there is a resulting trust in favor of the husband. *Harden v. Darwin*, 66 Ala. 55.

And a purchase by a wife, with money borrowed on her own credit, of land mortgaged by her husband, after foreclosure and the expiration of the time for redemption, will not raise a trust in favor of the husband. *Baker v. Baker*, 22 Minn. 262.

So where the deed for land articulated for in the name of husband and wife was, by her direction, made in his name, and he paid the purchase money, the presumption is that he paid it for himself. *Kline's Appeal*, 39 Pa. St. 463.

And where the wife, against the will of her husband and without his knowledge, took title to an estate for which her husband paid, it was *held* to raise a resulting trust in his favor. *Gogherty v. Bennett*, 37 N. J. Eq. 87.

And similarly where the wife received from her husband money to be invested in real property, under an agreement between them that the title was to be taken in his name alone, and instead took title in their joint names, a trust resulted in favor of the husband. *Higgins v. Higgins*, 14 Abb. N. C. (N. Y.) 13.

Legal Wife.—But it seems that she must be his legal wife. *Soar v. Foster*, 4 Kay & Johnson (Eng. Ch.) 152, where Harris, having married his deceased wife's sister, purchased stock in the joint names of himself and "his said wife Rachel." It was *held* that the transaction could not be an advancement, since the woman was legally only his mistress; *Wood, V. C.*, saying, p. 161: "Then how does the inference arise that the purchase was intended as a provision for the defendant? Not upon the ground of his being under a moral obligation to provide for the defendant, for that argument would be equally applicable, if, instead of an invalid marriage of this description, the case had been one of bigamy by a person representing himself to be unmarried. In such a case there would be a clear moral

were intended to be an advancement for the benefit of the nominal purchaser.¹

(1) EXTENT OF THE DOCTRINE—(a) *To Persons*.—The doctrine extends to purchases by a father in the name of his son and a stranger,² or by a husband in the name of his wife and a stranger.³ In these cases the moiety to the son or wife will be an advancement, but the moiety in the name of the stranger will be presumed to be in trust for the actual purchaser.⁴

The doctrine of advancements has further been extended to the case of a mother purchasing real property in the name of a son or daughter;⁵ to a purchase by a father in the name of his son-in-

duty incumbent upon the person supposed to provide for a woman whom he had so grossly deceived. The same argument would apply to a case of mere cohabitation without any form of marriage whatever. Any moralist would say that a man was bound to make provisions for the woman with whom he had so cohabited. But it would be impossible for this court to *hold*, if in either of the cases supposed an investment had been made by the man, in the names of himself and the woman, that upon the mere ground of his being under such moral obligation, the purchase could be presumed to have been intended by him as a provision or advancement."

Trustee of Wife.—Of course the rule applies where a husband purchases property and has it conveyed to his wife's trustee. *Alexander v. Warrance*, 17 Mo. 228.

Purchase with Property of Wife—Title in Husband.—Where the husband purchases land with the separate property of his wife, which he holds as her trustee, taking title to himself, a trust will result in her favor. *Derry v. Derry*, 74 Ind. 560; *Radcliff v. Radford*, 96 Ind. 482; *Loften v. Witboard*, 92 Ill. 461; *Walker v. Elledge*, 65 Ala. 51. But no such trust will arise unless the money paid for the land shall have come into his possession as such trustee. *Waldron v. Saunders*, 85 Ind. 270; *Moddrell v. Riddle*, 82 Mo. 31. See *infra*, VI., 1, p. 44, note 4.

Purchase by Wife in Name of Husband.—In this case the trust may be proved. *McGovern v. Knox*, 21 Ohio St. 547, 552.

1. *Supra*, p. 18, notes 2 and 3; p. 19, note 1.

2. *Lamplugh v. Lamplugh*, 1 P. Wms. (Eng. Ch.) 111.

3. *Kingdon v. Bridges*, 2 Vern. (Eng. Ch.) 67; *Back v. Andrews*, 2 Vern. 120.

4. See cases cited in two preceding notes.

5. A distinction has been made between the case of a father purchasing in the name of his child and the case of a mother purchasing in the name of her child, on the ground as stated by JESSEL, M. R., in *Bennet v. Bennet*, L. R., 10 Ch. Div. 478, that "there is no legal moral obligation—no obligation according to the rules of equity—on a mother to provide for her child." And the weight of authority in England is against treating such a purchase by a mother as an advancement.

In re de Visme, 2 De G. J. & Sm. 17, was a petition by a daughter asking a transfer to herself, as executrix of her mother, of certain stock for which the mother had paid, and which stood in the name of the petitioner and of her brother, who was a lunatic. The court ordered the transfer, on the ground that there was no presumption of an advancement to the two children, and the stock therefore belonged to the estate of the mother. It appeared, however, that the mother, at the time of the purchase, was living apart from her husband, and that the petitioner alleged that the object of taking title in the names of the son and daughter was the securing of the funds from the control of the husband.

This case was followed in *Bennet v. Bennet*, L. R., 10 Ch. Div. 474, where a widowed mother had borrowed a large sum of money for her son's benefit. The facts of the case show clearly, however, that a loan and not an advancement was intended.

Compare Sayre v. Hughes, L. R., 5 Eq. 376. In this case the evidence showed that the daughter who claimed the advancement was an invalid who had always resided with her mother, and that the mother had declared her

law;¹ by a grandfather in the name of a grandchild;² by an uncle in the name of his nephew;³ by a husband in the name of his wife's nephew;⁴ or niece,⁵ and, generally, by anyone who stands *in loco parentis* to the person in whose name he purchases.⁶

The rule does not apply to the case of a brother or sister who purchases property in the name of another brother or sister,⁷ unless the purchaser stands *in loco parentis* to the one in whose name title is taken.⁸

(b) *To property*.—*Extends to Personal Property*.—The doctrine of advancements extends to personal property as well as to real.⁹

intention of providing for her. The purchase of stock in the joint names of the mother and daughter was *held* to be an advancement for the latter.

Possibly these cases may be reconciled by inquiring into the intention of the parties in each case.

And see *Batstone v. Salter*, L. R., 10 Ch. App. 431, where a transfer of stock by a mother into the joint names of herself, her daughter and her son-in-law, was *held* to be an advancement, and where the daughter having died before the mother, and the son-in-law having survived both of them, the latter took, as an advancement, on the ground that it would have been good as an advancement to the daughter, and as the character of the transaction was impressed upon it at the time of its inception, this character was not changed by the subsequent death of the daughter in her mother's lifetime, and consequently the property went to the son-in-law by virtue of his rights as husband.

In the *United States*, the cases are uniform in treating such a purchase by a mother as *prima facie* an advancement. *Murphy v. Nathans*, 46 Pa. St. 508, where a mother negotiated for the purchase of land, paid the purchase money, and directed the deed to be made to her married daughter.

And in *Flynt v. Hubbard*, 57 Miss. 471, a mother entrusted money to her son to complete a purchase of land for her. The son took the title in his own name and then, with the consent of his mother, exchanged the land so purchased for other land. It was *held* that he took the latter land as trustee for her benefit.

So, in *Boozar v. Teague* (S. C., Oct. 10, 1887), 3 S. E. Rep. 551, no resulting trust arose in favor of a mother who gave her son an absolute deed to a tract of land, on the parol promise of the latter to pay two notes which she had given to the vendor for two-thirds

of the amount of the purchase money, she having paid the other one-third, although these notes were subsequently paid by the mother.

1. *Baker v. Leathers*, 3 Ind. (1 Port.) 558; *James v. James*, 41 Ark. 301; *Miller v. Blose*, 30 Gratt. (Va.) 744, 752. So a deed of conveyance to a son-in-law, in consideration of his marriage and "natural love and affection" of the grantor for his daughter and the grantee, is an advancement to the son-in-law, and not in trust for the daughter. *Thompson v. Thompson*, 18 Ohio St. 73. And *Batstone v. Salter*, L. R., 10 Ch. App. 431, where a purchase by a mother in the joint names of herself, her daughter and son-in-law was *held* to be an advancement. *Supra*, p. 18, note 3.

2. *Ebrand v. Dancer*, 2 Ch. Ca. 26; s. c., 1 Coll. (Eng. Ch.) 265 n. Compare *Lloyd v. Read*, 1 P. Wms. (Eng. Ch.) 607. But the rule seems to have no application if the grandchild be illegitimate. *Tucker v. Burrow*, 2 Hem. & M. 515.

3. *Jackson v. Feller*, 2 Wend. (N.Y.) 465.

4. *Currant v. Jago*, 1 Coll. (Eng. Ch.) 261.

5. *Robert's Appeal*, 85 Pa. St. 84.

6. *Tucker v. Burrow*, 2 Hem. & M. (Eng. Ch.) 515; *Robert's Appeal*, 85 Pa. St. 84; *Jackson v. Feller*, 2 Wend. (N. Y.) 465; *Miller v. Blose*, 30 Gratt. (Va.) 744; *Higdon v. Higdon*, 57 Miss. 264; *Jackson v. Jackson*, 91 U. S. 122.

7. *Field v. Lonsdale*, 13 Beav. (Eng. Ch.) 78; *Maddison v. Andrew*, 1 Ves. Jr. (Eng. Ch.) 57; *Forrest v. Forrest*, 34 L. J. Ch. (Eng.) 428; *Edwards v. Edwards*, 39 Pa. St. 369, 377; *Smitheal v. Gray*, 1 Humph. (Tenn.) 491; s. c., 34 Am. Dec. 664; *Keaton v. Cobb*, 1 Dev. Eq. (N. Car.) 439.

8. *Higdon v. Higdon*, 57 Miss. 264.

9. *Stock*.—*Dummer v. Pitcher*, 2 M. & K. (Eng. Ch.) 262; *Butler v. Ins. Co.*

(2) TRANSACTION WILL NOT BE CONSTRUED AS ADVANCEMENT IF IN FRAUD OF CREDITORS.—If the deed is made to the grantee in any of the foregoing cases, for the purpose of defrauding the creditors of the one paying the purchase money, a trust will result to the latter so as to make the property liable to his debts.¹ But if the person so paying the purchase money

14 Ala. 777; *Hill v. Bank*, 45 N. H. 300.

Slaves.—*Douglas v. Price*, 4 Rich. Eq. (S. Car.) 322; *Dillard v. Dillard*, 3 *Humph. (Tenn.)* 41.

1. See tit. FRAUD. *Spring v. Hight*, 16 N. J. Eq. 265; *Newells v. Morgan*, 4 *Harr. (Del.)* 225; *Demaree v. Driskill*, 3 *Blackf. (Ind.)* 115; *Creed v. Lancaster Bank*, 1 *Ohio St.* 1; *Kimmel v. McRight*, 2 *Pa. St.* 38; *Doyle v. Sleeper*, 1 *Dana (Ky.)* 531; *Watson v. LeRow*, 6 *Barb. (N. Y.)* 481.

The leading case is *Guthrie v. Gardner*, 19 *Wend. (N. Y.)* 414, where the plaintiff below, Ann Gardner, claimed title under a deed from one Jewett, dated 1821, she being at that time the wife of one Waterman. It appeared that the husband of the plaintiff had paid for the land with his own property, and directed the deed to be made to his wife, and that at the time of the transaction he was indebted to Guthrie, who afterwards obtained judgment on his claim, and issued execution thereon. The sheriff sold the land in question as the property of the husband, Guthrie becoming the purchaser, taking the sheriff's deed therefor, and entering into possession. On ejectment brought against him by Ann Gardner, it was held that the original transaction, being in fraud of the creditors of the husband, raised a resulting trust in his favor.

So where the title was taken in the name of the wife "for the purpose of scaring Captain Hill [a creditor and partner of the purchaser] into a settlement," there was a trust in favor of the husband. *Bartlett v. Bartlett*, 13 *Neb.* 456.

So where a stockholder in a failing bank puts his property into the hands of his son to secure the enjoyment of it for himself and family, and to protect it from creditors of the bank, the transaction is fraudulent and void, and causing the property to be taken in execution and sold to the son, a leased land to be forfeited and re-entered by the son in his name, will not change the character of the transaction. *Edington v. Williams*, *Wright's Ch. (Ohio)* 439.

And the transaction will raise such a resulting trust even though the creditors have notice of the trust. *Elliott v. Horn*, 10 *Ala.* 348.

Where land was purchased with the separate earnings of the wife during coverture, and title was taken in the name of the wife, the husband being deeply indebted at the time of the purchase, it was held to raise a resulting trust in his favor. *Belford v. Crane*, 16 *N. J. Eq.* 265.

Where a father, in the purchase of land, pays one-half the purchase money with his own money, intending the same as an advancement to his daughter, and takes the deed in the name of a third party in order to defraud his creditors, she cannot claim a resulting trust in the land, though no party to her father's fraud. *Eastham v. Roundtree*, 56 *Tex.* 110.

But in *Gowing v. Rich*, 1 *Ired. L. (N. Car.)* 553, it was held that, where land was purchased by a mother and the conveyance taken in the name of her daughter, who became personally liable for part of the consideration money, a creditor of the mother could not sell this land under an execution at law to satisfy a judgment against the mother, although the land was so conveyed expressly to protect it from her debts, but that the land could be subjected to the payment of her debts by compelling the grantee and trustee to convey to the purchaser the legal title. But before that could be done, the grantee must be compensated for the money she had paid or indemnified for the liability she had incurred.

Extent of Trust.—The best view seems to be that the trust in this case is created only in favor of creditors to the amounts of their claims. *Jencks v. Alexander*, 11 *Paige Ch. (N. Y.)* 619; *Proseus v. McIntyre*, 5 *Barb. (N. Y.)* 424. In the latter case, after declaring that where title is taken in the name of a son to defraud creditors of the father, who paid the purchase money, the court say: "But as between the father and son, and those claiming under the father, the conveyance is absolute, and will vest

was not indebted at the time, subsequent creditors could not defeat the title or enforce the trust, unless the settlement or conveyance was so made for the purpose of afterwards running in debt and defrauding creditors.¹

(3) CHARACTER IMPRESSED BY ORIGINAL TRANSACTION.—The character of such a conveyance as an advancement or a resulting trust must be impressed upon it by the original transaction.²

(4) PRESUMPTION OF ADVANCEMENT MAY BE REBUTTED.—The presumption of advancement, being a mere circumstance of evidence, may be rebutted by other evidence or other presumptions tending to show that the nominal grantee was to hold as a trustee.³

in the son the entire legal and equitable estate."

But compare *Bartlett v. Bartlett*, 13 Neb. 456. In that case Henry Bartlett bought real estate and took title in the name of his wife, as he expressed it, "for the purpose of scaring Captain Hill [his partner and creditor] into a settlement. Subsequently Bartlett paid Hill's whole claim, and after the payment the wife died intestate, leaving a brother and sister as her heirs at law. Bartlett brought action to have a trust in the lands declared in his favor. But it was decided that having thus placed his property for the purpose of hindering and delaying his creditor, a court of equity can give him no relief.

And in *Elliott v. Horn*, 10 Ala. 348, it was said that such a purchase is void, both as to creditors and subsequent purchasers from the father, though they have notice of the conveyance to the son.

See next succeeding note. See also tit. FRAUD, and *infra*, VIII., 1; p. 58, note 1.

1. See tit. FRAUD. *Creed v. Lancaster Bank*, 1 Ohio St. 1; *Dillard v. Dillard*, 3 Humph. (Tenn.) 41; 1 Perry on Trusts (3rd ed.), 169.

2. *Dudley v. Bosworth*, 10 Humph. (Tenn.) 9; s. c., 51 Am. Dec. 690; *Thompson v. Thompson*, 1 Yerg. (Tenn.) 97; *Howell v. Howell*, 15 N. J. Eq. 75, 77.

3. *Bispham's Eq.* (4th ed.) 127; 1 Perry on Tr. (3rd ed.) 167; *Butler v. M. Ins. Co.*, 14 Ala. 777; *Harden v. Darwin*, 66 Ala. 55; *Ins. Co. v. Deal*, 18 Md. 26; *Guthrie v. Gardner*, 19 Wend. (N. Y.) 414; *Jackson v. Matsdorf*, 11 Johns. (N. Y.) 91; *Fleming v. Donahoe*, 5 Ohio 255; *Tremper v. Burton*, 18 Ohio 418; *Smith v. Strahan*, 16 Tex. 314; s. c., 67 Am. Dec. 622; *Baker v. Leathers*, 3 Ind. 558; *Hodgson v. Macy*,

8 Ind. 121; *Dudley v. Bosworth*, 10 Humph. (Tenn.) 9.

Accordingly where A purchased real estate, taking title in the name of his wife "to save costs and trouble, and to have the legal title in his then wife, in case the husband should die," it was a trust in his favor, and not an advancement. *Cotton v. Wood*, 25 Iowa 43.

So where title was taken in the name of the wife, on the representation of the vendor and the magistrate who took the acknowledgment, that the husband "would own it the same as though it was deeded to himself." *Wallace v. Bowen*, 28 Vt. 638.

So where the money was paid by a parent, and a son, without the knowledge or consent of the parent, procured the deed to be made to him. *Peer v. Peer*, 11 N. J. Eq. (3 Stockt.) 432.

So where property, for which the husband paid, was deeded to the wife under the impression that they would thus acquire a joint title. *Milner v. Freeman*, 40 Ark. 62.

So where a husband bought land taking title in the name of his wife, the presumption of an advancement to her was repelled by evidence showing that he intended to limit her interest in the land to the term of her own life. *Farley v. Blood*, 30 N. H. 354.

Burden of Proof.—The presumption in these cases being in favor of an advancement, the burden is on the person asserting the trust to prove his contention. *Stevens v. Stevens*, 70 Me. 92; *Earnest's Appeal*, 106 Pa. St. 310; *Cotton v. Wood*, 25 Iowa 43; *Dudley v. Bosworth*, 10 Humph. (Tenn.) 9; *Lane v. Lane* (Me., Nov. 19, 1888), 16 Atl. Rep. 323.

What Evidence Sufficient.—Any written acknowledgment by the grantee

9. Resulting Trusts Not Within the Statute of Fraud.—From their very nature resulting trusts are not within the statute of frauds.¹ They are indeed expressly excepted from the operation of that statute in England,² and in the following states and territories viz.: Alabama,³ Arkansas,⁴ Colorado,⁵ Florida,⁶ Georgia,⁷ Idaho,⁸ Illinois,⁹ Indiana,¹⁰ Iowa,¹¹ Kansas,¹² Maine,¹³ Massachusetts,¹⁴ Michigan,¹⁵ Minnesota,¹⁶ Mississippi,¹⁷ Missouri,¹⁸ Nebraska,¹⁹ New Hampshire,²⁰ New Jersey,²¹

that the transaction was not intended as an advancement is sufficient to rebut the presumption. *Shepherd v. White*, 10 Tex. 72.

So is uninterrupted possession of the parent claiming title adversely to the deed. *Peer v. Peer*, 11 N. J. Eq. (3 Stockt.) 432.

See further as to what evidence is sufficient, *Earnest's Appeal*, 106 Pa. St. 310; *Taylor v. Taylor*, 9 Ill. (4 Gilm.) 303; *Slack v. Slack*, 26 Miss. 287.

What Insufficient.—But evidence that the husband paid all the purchase money, expended large sums of money for improvements, and paid all the taxes, is not sufficient to overcome the presumption. *Maxwell v. Maxwell*, 109 Ill. 588. See also *Lane v. Lane* (Me., Nov. 19, 1888), 16 Att. Rep. 323.

What Evidence Admissible to Rebut.—The antecedent or contemporaneous declarations of the purchaser, or circumstances tending to show that it was the intention of the purchaser that the grantee should hold as a trustee, and not beneficially for himself, are admissible to rebut the presumption of an advancement. *Milner v. Freeman*, 40 Ark. 62; *Butler v. M. Ins. Co.*, 14 Ala. 777; *Taylor v. Taylor*, 9 Ill. (4 Gilm.) 303; *Persons v. Persons*, 25 N. J. Eq. 250; *Seibold v. Christman*, 75 Mo. 308.

The proof which in such cases will overcome the presumption of a gift to the wife must be of facts antecedent to or contemporaneous with the purchase, or else immediately afterwards, so as to be in fact part of the same transaction. *Read v. Huft*, 40 N. J. Eq. 229.

What Inadmissible.—But the declarations of the husband, made two years after the conveyance, are inadmissible to rebut the presumption. *Ins. Co. v. Deal*, 18 Md. 26.

1. *Hoxie v. Carr*, 1 Sumn. (U. S. C. C.) 172, 187; *Cook v. Kennerly*, 12 Ala. 42; *Cable v. McCollum*, 27 Ala. 461; *Lehman v. Lewis*, 62 Ala. 129; *Bates v. Kelly*, 80 Ala. 142; *McGuire v. Ramsey*, 9 Ark. 518; *Dean v. Dean*,

6 Conn. 285; *Ward v. Armstrong*, 84 Ill. 151; *Elliott v. Armstrong*, 2 Blackf. (Ind.) 198; *Farringer v. Ramsay*, 4 Md. Ch. 33; *Peabody v. Tarbell*, 2 Cush. (Mass.) 226; *Kelly v. Mills*, 41 Miss. 267; *Cloud v. Ivie*, 28 Mo. 578; *Shaw v. Shaw*, 86 Mo. 594; *Farrington v. Barr*, 36 N. H. 86; *Jackson v. Matsdorf*, 11 Johns. (N. Y.) 91; *Hanff v. Howard*, 3 Jo. Eq. (N. Car.) 440; *Myers v. Myers*, 25 Pa. St. 100; *Sanford v. Weeden*, 2 Heisk. (Tenn.) 71; *Brown v. Brown*, 77 Va. 619.

2. 29 Charles 2, ch. 3; 3 Stats. at Large 385; Rev. Stat., vol. 1, 774.

3. Civil Code *Alabama* (1887), § 1845.

4. Digest of Statutes (*Arkansas* 1886), § 3383.

5. General Statutes (*Colorado*, 1883), § 1516.

6. McClellan's Digest (*Florida* 1881), p. 214, § 2.

7. Code of *Georgia* (Lester, Rowell & Hill's ed., 1882), § 2316.

8. Rev. Stat. *Idaho* (1887), § 6008.

9. Rev. Stat. *Illinois* (Cothran's ed., 1887), p. 742, § 9.

10. Rev. Stat. *Indiana* (Myers & Co's ed., 1888), § 2969.

11. Rev. Code *Iowa* (Miller's ed., 1884), § 1934.

12. Compiled Laws of *Kansas* (Dasler's ed., 1885), § 6497.

13. Rev. Stat. *Maine* (1883), p. 650, § 11.

14. Public Statutes *Massachusetts* (1882), p. 792, § 1.

15. Howell's Annotated Statutes of *Michigan* (1882), § 5568.

16. Statutes of *Minnesota* (1878), p. 553, § 6.

17. Rev. Code *Mississippi* (1880), § 1296.

18. Rev. Stat. *Missouri* (1879), §§ 2511, 2512.

19. Compiled Statutes of *Nebraska* (1885), pp. 363, 464, §§ 3, 4.

20. General Laws of *New Hampshire* (1878), p. 324, § 13.

21. Revision of *New Jersey* (1877), p. 445, § 3.

New York,¹ Pennsylvania,² South Carolina,³ Utah,⁴ Vermont⁵ and Wisconsin.⁶ But this exception in these statutes is merely declaratory of existing law, and accordingly in those States where there is no such express statutory exception, resulting trusts are on the same footing as in those States where such an exception exists.⁷

10. Parol Evidence Admissible to Establish or Rebut.—Since resulting trusts are based on the mere presumption⁸ that the creation of a trust was the intention of the parties, and since they are not within the statute of frauds,⁹ it is well settled that parol evidence is admissible to establish¹⁰

1. Rev. Stat. *New York* (Banks & Bro., 7th ed., 1882), pt. 2, ch. 1, tit. 2, § 50; vol. 3, p. 2180.

2. Purdon's Digest, (1883), p. 831, § 3.

3. General Statutes of *South Carolina* (1882), §§ 1961, 1962.

4. Code of Civil Procedure, § 1206. See also laws of 1884, p. 366.

5. Rev. Laws *Vermont* (1880), § 1933.

6. Rev. Stat. *Wisconsin* (1878), § 2076.

7. *Hoxie v. Carr*, 1 Sumn. (U. S. C. C.) 172, 187; *Farringer v. Ramsay*, 4 Md. Ch. 33.

8. *Supra*, V., 4, and notes.

9. *Supra*, V., 9, and notes.

10. *Hoxie v. Carr*, 1 Sumn. (U. S. C. C.) 172, 187; *Laughlin v. Mitchell*, 14 Fed. Rep. 382; *Cagle v. McCollum*, 27 Ala. 461; *Rhea v. Tucker*, 56 Ala. 450; *Lee v. Browder*, 51 Ala. 288; *McGuire v. Ramsey*, 9 Ark. 518; *Mallagh v. Mallagh* (Cal. Feb. 4, 1888), 16 Pac. Rep. 535; affirmed on rehearing, Sept. 26, 1888, 19 Pac. Rep. 256; *Lipscomb v. Nichols*, 6 Colo. 290; *Scott v. Taylor*, 64 Ga. 506; *Corder v. Corder* (Ill.), 14 West Rep. 120; *Elliott v. Armstrong*, 2 Blackf. (Ind.) 198; *Irwin v. Ivers*, 7 Ind. 308; s. c., 63 Am. Dec. 421; *Letcher v. Letcher*, 4 J. J. Marsh (Ky.) 590, 593; *Faris v. Dunn*, 7 Bush (Ky.) 276; *P'Pool v. Thomas* (Ky., May 3, 1888), 8 S. W. Rep. 198; *Baker v. Vining*, 30 Me. 121; *Whitmore v. Learned*, 70 Me. 276; *Hollis v. Hayes*, 1 Md. Ch. 479; *Dryden v. Hanway*, 31 Md. 254; *Peabody v. Tarbell*, 2 Cush. (Mass.) 226; *Livermore v. Aldrich*, 5 Cush. (Mass.) 431; *Shaw v. Shaw*, 86 Mo. 594; *Farrington v. Barr*, 36 N. H. 86; *Page v. Page*, 8 N. H. 187, 195; *Jackson v. Matsdorf*, 11 Johns. (N. Y.) 91; *Malin v. Malin*, 1 Wend. (N. Y.) 625; *Boyd v. McLean*, 1 Johns. Ch. (N. Y.) 582; *Swinburne v. Swinburne*,

28 N. Y. 568; *Botsford v. Burr*, 2 Johns. Ch. (N. Y.) 405; *Stafford v. Wheeler*, 93 Pa. St. 462; *Jackman v. Ringland*, 4 Watts & Serg. (Pa.) 149; *McGuire v. McGowen*, 4 Dessaus. (S. Car.) 486; *James v. Fulcrod*, 5 Tex. 512; *Agricultural Association v. Brewster*, 51 Tex. 257; *Bank v. Carrington*, 7 Leigh (Va.) 566; *Miller v. Blose*, 30 Gratt. (Va.) 744; *Kane v. O'Connors*, 78 Va. 76; *Smith v. Batton*, 12 W. Va. 541.

The leading case is *Boyd v. McLean*, 1 Johns. (Ch.) N. Y. 582. In that case a bill was filed praying that the defendant be decreed to reconvey certain property to the plaintiff, on paying the amount due. It appeared that the plaintiff had agreed in writing with one Colden, that he should convey and that they should purchase a lot of land in Newburgh. The plaintiffs alleged in their bill that they had borrowed the money from McLean, and as security for its repayment had the deed made in his name, and that the plaintiffs entered into possession. The defendant absolutely denied the loan and declared that he had paid the money as his own. For the defendant it was insisted that, having in his answer absolutely denied any trust or loan, parol proof of it was inadmissible, since the deed stood in his name. MR. CHANCELLOR KENT, after a careful review of the English and American authorities, decided in favor of the admissibility of the evidence, saying (p. 590): "I consider myself bound by this series of authorities, and that the parol proof taken in the present case is to be received as competent."

In *McGuire v. Ramsey*, 9 Ark. 518, JOHNSON, C. J., said (p. 527): "Resulting trusts, or trusts created by operation of law, being expressly excluded from the operation of the statute [of

or rebut¹ them; and this even contrary to the consideration

Frauds] it is manifest that parol evidence is admissible to establish them. The evidence in such cases is not introduced to establish any fact inconsistent with the legal operation of the words of the deed, but merely to engraft a trust upon the legal estate."

In *Osborne v. Endicott*, 6 Cal. 149, it was said that, in order to create a resulting trust, the facts need not appear affirmatively on the face of the deed, but may be proved by any note or memorandum in writing of the original purchase, even though the statute of frauds be pleaded.

The fact and manner of paying the purchase money may be proved by parol. *DePeyster v. Gould*, 2 Green's Ch. (13 N. J. Eq.) 474, 480.

The transaction out of which a resulting trust arises may be proved by parol, but the trust itself must rest upon the acts or situation of the parties as proved, and not merely upon their declarations. *Foot v. Bryant*, 47 N. Y. 544.

UNDERWOOD, J., said, in *Letcher v. Letcher*, 4 J. J. Marsh. (Ky.), on p. 594: "Although a trust cannot be created by parol declarations, and although a parol agreement in relation to lands cannot be enforced; yet, when the question is whether the law will imply a trust from the facts in a given case, it is not improper to show the intent of the party laying out the money by his declarations."

The evidence must be clear and satisfactory, and can only be received to show a fact, from which the law, without any declaration of a trust, or agreement of the parties, implies a trust resulting from the fact proved. *Farrington v. Barr*, 36 N. H. 86.

Where a bill was filed by a sister against a brother to compel the conveyance to her of certain property, the title to which had been taken in him, under a purchase made by her, to secure the payment of the notes for the purchase money, which had been given by him, and upon a verbal agreement to convey to her upon the payment of said notes, which payment she alleged had been made, the proceeding is not to be regarded as one to change the deed to the brother from a fee simple to a conditional title. Evidence of such agreement and payment was admissible, without infringing the

rule that it is not competent to engraft an express trust on a written deed by parol proof. *Scott v. Taylor*, 64 Ga. 506.

But parol testimony of the mere intention of the parties is not admissible. *Shelby v. Tardy* (Ala., May 24, 1888)-4 So. Rep. 276.

But as to resulting trusts of the third and fourth class, see *infra*, VIII., 2.

1. *Jenkins v. Pye*, 12 Pet. (U. S.) 241; *Tryon v. Huntoon*, 67 Cal. 325; *Livermore v. Aldrich*, 5 Cush. (Mass.) 431; *Irvine v. Marshall*, 7 Minn. 286; *Farrington v. Barr*, 36 N. H. 86; *Page v. Page*, 8 N. H. 187, 195; *Botsford v. Burr*, 2 Johns. Ch. (N. Y.) 405; *Creed v. Lancaster Bank*, 1 Ohio St. 1.

In the last case it was said by CALDWELL, J.: "When a person purchases property with his own funds and places the title in the name of a stranger, the legal presumption is that he made such purchase for his own use, and that the property is held in trust for him."

This is, however, a mere abstract presumption that may be rebutted by circumstances or evidence going to show a different intention, and each case has to be determined by the reasonable presumptions arising from all the acts and circumstances connected with it; so that it may happen, that, where property is thus purchased and placed in the name of a stranger, the presumption that the law will draw, taking all the circumstances into consideration, will be that the property was intended for and vested absolutely in the person in whose name it is placed." The opinion goes on to show how these circumstances, etc., may be proved by parol.

"The presumption may be rebutted also by the declarations of the purchaser, made at the time of and in such immediate connection with the purchase [purchase] as to be part of the *res gestæ*. It is important that this rule in regard to declarations be received with the limitation here stated."

If a purchaser declare that he pays his money for the benefit of the nominee in the deed . . . let it tell against him. The legal effect of his act without the declaration, would have been to give him an equity, but any man of common sense may qualify the legal effect of his conduct by an accompanying declaration. But what do declarations before or after the purchase signify? If before,

clause in the deed,¹ and the answer of the trustee,² and even

they can import no more than an intention, which, because it is mere mental purpose, may be changed. If after, they operate to divest an equitable estate, and therefore are unworthy to be received." Per WOODWARD, J., in *Edwards v. Edwards*, 39 Pa. St. 369.

Rebuttal as to Part.—And the presumption may be negated as to part of the estate, and prevail as to part. *Perry on Trusts* (3rd. ed.), § 139; *Benbow v. Townsend*, 1 M. & K. 506; *Rider v. Kidder*, 10 Ves. 360; *Pinney v. Fellows*, 15 Vt. 525.

What Sufficient to Rebut.—A was about to go to California. His favorite sister furnished him with \$100, earned by teaching school at \$8.00 per month, to assist in defraying the expenses of his journey. Without her knowledge he bought land taking title in her name. He informed her of the fact, and asked for a power of attorney from her, to take possession of, lease or sell all lands she *had* or might hereafter have in California. She accordingly executed and returned the power of attorney. It was *held* that these facts could be shown by parol, and, being shown, were sufficient to rebut the presumption of a trust. *Tyron v. Huntoon*, 67 Cal. 325.

The parol evidence admissible to rebut the presumption must be of the intention of the parties at the time of the transaction. *Warren v. Steer*, 112 Pa. St. 634.

B paid the purchase money of an estate conveyed by a third person to A, who agreed to convey to B subject to a mortgage; and A and B afterwards agreed that A should raise an additional sum of money by another mortgage, and convey the estate to B subject to the two mortgages; and B subsequently accepted of A a deed of the estate, subject to the two mortgages, the latter of which was, in fact, never made. It was *held* that the presumption of a resulting trust, raised by the first agreement, was rebutted by the subsequent agreement and the acceptance of the deed. *Livermore v. Aldrich*, 5 Cush. (Mass.) 431.

So where A and B each claimed the right to purchase certain public land, and it was agreed in writing that the lot should be bid in by the public bidder, to be conveyed by him as five disinterested citizens should determine,

and A and B each paid one-half the price of the land, these circumstances shown in part by parol, were *held* sufficient to rebut the presumption of a trust. *Irvine v. Marshall*, 7 Minn 286.

So the presumption that the party furnishing the purchase money for land becomes its equitable owner, is rebutted by proof that the money was loaned to the taker of the legal title. *Moyer's Appeal* (Pa., May 14, 1888), 14 Atl. Rep. 253.

What Will Not Rebut.—"The intention of the parties at the time is the essential element, for if the party pays the consideration as his own, and not for the party taking title, the beneficial title is his; his declarations afterwards made, and not bearing upon his intention at the time, cannot affect his title nor vest in the party holding the title, an estate, which, at the execution of the deed, was the estate of the party paying the purchase money." Per CLARK, J., in *Warren v. Steer*, 112 Pa. St. 642.

1. *Hyden v. Hyden*, 6 Baxt. (Tenn.) 406; *Page v. Page*, 8 N. H. 187; *Buck v. Pike*, 11 Me. 9; *McKeown v. McKeown*, 33 N. J. Eq. 384; *DePeyster v. Gould*, 2 Gr. Ch. (3 N. J. Eq.) 474; *Cotton v. Wood*, 25 Iowa 43; *Cooper v. Skeel*, 14 Iowa 578; *Millard v. Hathaway*, 27 Cal. 119; *Murry v. Sell*, 23 W. Va. 475; *Livermore v. Aldrich*, 5 Cush. (Mass.) 431; *Peabody v. Tarbell*, 2 Cush. (Mass.) 232; *Irwin v. Ivers*, 7 Ind. 308; s. c., 63 Am. Dec. 420; *Pinney v. Fellows*, 15 Vt. 525; *Barron v. Barron*, 24 Vt. 375.

Though it seems that the express consideration in a deed cannot be contradicted by parol evidence by the parties to it or by those holding under them to defeat the conveyance. *Farrington v. Barr*, 36 N. H. 86; *Connor v. Follansbee*, 59 N. H. 124.

2. *Boyd v. McLean*, 1 Johns. Ch. (N. Y.) 582; *Buck v. Pike*, 11 Me. 24; *Baker v. Pining*, 30 Me. 121; *Moore v. Moore*, 38 N. H. 282; *Page v. Page*, 8 N. H. 187; *Larkins v. Rhoads*, 5 Port. (Ala.) 196; *Enos v. Hunter*, 9 Ill. 211; *Elliott v. Armstrong*, 2 Blackf. (Ind.) 198; *Jenison v. Graves*, 2 Blackf. (Ind.) 441; *Blair v. Bass*, 4 Blackf. (Ind.) 540; *Irwin v. Ivers*, 7 Ind. 308; s. c., 63 Am. Dec. 420; *Snell v. Utterback*, 1 Bibb (Ky.) 609.

after the death of the nominal purchaser,¹ but not contrary to an express trust, declared in the deed.²

11. Burden of Proof.—The burden of proof is on the party seeking to establish the trust.³

12. Character of Evidence.—And the evidence, in order to establish such a trust, must be clear, full, and satisfactory.⁴

1. *DePeyster v. Gould*, 3 N. J. Eq. 474; *Boyd v. McLean*, 1 Johns. Ch. (N. Y.) 582; *Harder v. Harder*, 2 Sand. Ch. (N. Y.) 17; *Fausler v. Jones*, 7 Ind. 277; *Harrisburg Bank v. Tyler*, 3 W. & S. (Pa.) 372; *Williams v. Hollingsworth*, 1 Strobb. Eq. (S. Car.) 103; *McCammon v. Pettit*, 3 Sneed. (Tenn.) 242; *Neill v. Keese*, 5 Tex. 23.

2. See *supra*, V, 5, p. 14, note 2.

3. *Lehman v. Lewis*, 62 Ala. 129. In this case, *BICKELL, C. J.*, said, (p. 133): "The presumption arising from the conveyance, that it fully speaks the whole truth, must prevail until the contrary is established beyond reasonable controversy. The burden of removing this presumption rests upon the party asserting the contrary, and it is not enough for him to generate doubt and uncertainty."

So it was said in *Whitmore v. Learned*, 70 Me. 276: "The burden rests heavily upon the plaintiff to establish against the record, a passive trust resulting by operation of law from the payment by one person of the consideration of a deed taken in the name of another."

And see *Bibb v. Hunter*, 79 Ala. 351; *Neyland v. Bendy*, 69 Tex. 711; *Green v. Deitrich*, 114 Ill. 636.

4. See preceding note and cases.

The law will not presume a trust, except in cases of absolute necessity. 2 Story's Eq. Jur. (13th ed.) 529; *Orton v. Knab*, 3 Wis. 576; *Strimpfler v. Roberts*, 18 Pa. St. 283; *Cook v. Fountain*, 3 Swanst. 591.

The leading case is *Boyd v. McLean*, 1 Johns. Ch. (N. Y.) 582. In that case MR. CHANCELLOR KENT, after reluctantly deciding that parol evidence is admissible to establish resulting trusts, goes on to say: "The cases uniformly show that the courts have been deeply impressed with the danger of this kind of proof, as tending to perjury and the insecurity of paper title, and they have required the payment by the *cestui que trust* to be clearly proved."

This doctrine has been uniformly followed. In *Sandford v. Weeden*, 2 Heisk. (Tenn.) 70, *NICHOLSON, C. J.*,

said: "Different judges have employed different language in declaring the character and weight of the evidence which is necessary and sufficient to establish a resulting trust. The result of all the attempts to define the rule as to the amount of parol proof necessary in such cases is, that the conscience of the court should be fully satisfied that the facts relied on to support a trust are true and sufficient to create the trust."

The language of the court in *Shaw v. Shaw*, 86 Mo. 594, is, if the ownership of the purchase money "be established by parol, in such a manner as to leave no reasonable doubt in the mind of the chancellor, the trust springs into being by implication of law." The proof required must be "well-nigh convincing in its character."

And in *Lee v. Browder*, 51 Ala. 288, the admission of parol evidence to establish a resulting trust was called "one of the mistakes of equity."

The following are some of the expressions used by the courts: The evidence should be:

Clear. *Smith v. Patton*, 12 W. Va. 541; *McCammon v. Pettit*, 3 Sneed (Tenn.) 246; *Parker v. Snyder*, 31 N. J. Eq. 164.

Very clear and received with great caution. *Corder v. Corder* (Ill., Mch. 28, 1888), 14 West. Rep. 120.

Clear and distinct or explicit. *Miller v. Blose*, 30 Gratt. (Va.) 744; *Kane v. O'Connors*, 78 Va. 76; *Wilts v. Horney*, 59 Md. 584.

Clear and satisfactory. *Laughlin v. Mitchell*, 14 Fed. Rep. 382; *Agricultural Association v. Brewster*, 51 Tex. 257; *P'Pool v. Thomas* (Ky., May 3, 1888), 8 S. W. Rep. 198.

Not only satisfactory, but clear and undoubted. *Reynolds v. Caldwell*, 80 Ala. 232.

Unquestionable. *Dudley v. Bachelder*, 53 Me. 403.

Clearly sufficient. *Billings v. Clinton*, 6 S. Car. 90.

Full, clear and convincing. *Lee v. Browder*, 51 Ala. 288; *Lehman v. Lewis*, 62 Ala. 129; *Donaghe v. Tams*,

13. What Must be in Evidence.—The controlling question is the ownership of the purchase money,¹ and in order to establish a resulting trust payment by the *cestui que trust* must be clearly shown.² Where, therefore, there has been no payment of purchase money by the *cestui que trust*, parol evidence will not be admitted to establish a trust.³

14. What Evidence Admissible.—The declarations or admissions of the nominal grantee that he holds the title for the benefit of another, are admissible to establish a resulting trust, though frequently entitled to little weight.⁴ So the declarations of the person paying the purchase money are admissible when they con-

81 Va. 132; *Baker v. Vining*, 30 Me. 121; s. c., 50 Am. Dec. 617.

Most convincing and irrefragable. *Hyden v. Hyden*, 6 Baxt. (Tenn.) 406.

On the other hand, in a recent case in *Texas* the defendant requested the court to charge the jury that: "In order to make a deed of trust out of a deed absolute on its face, or to engraft a parol trust on such a deed, it requires the clearest and most positive proof of such fact, and unless the plaintiff has such proof you will find for the defendant." The court refused so to charge, and the refusal was assigned as error. The lower court was affirmed, the court saying: "Such a degree of proof has never been required by the courts of this or any other State, so far as we are advised, and it was properly refused." *Neyland v. Bendy*, 69 Tex. 711.

In two cases in *Illinois*, *Green v. Dietrich*, 114 Ill. 636, and *Hencke v. Floring*, 114 Ill. 554, it was said that the proof must be "of the most satisfactory character." But in both of these it was after the lapse of many years.

See further, *Whitmore v. Learned*, 70 Me. 276; *Enos v. Hunter*, 9 Ill. 211; *Farringer v. Ramsay*, 4 Md. Ch. 33; *Lloyd v. Lynch*, 28 Pa. St. 419; *Bennett v. Fulmer*, 49 Pa. St. 155; *Farrell v. Lloyd*, 69; *Jenison v. Graves*, 2 Blackf. (Ind.) 440; *Parmlee v. Sloan*, 37 Ind. 482; *Holder v. Nunnally*, 2 Coldw. (Tenn.) 288; *Johnson v. Quarles*, 46 Mo. 423; *Miller v. Stokely*, 5 Ohio St. 194; *Tunnard v. Littell*, 23 N. J. Eq. 264; *Olive v. Dougherty*, 3 G. Greene (Iowa) 371; *Phelps v. Seely*, 22 Gratt. (Va.) 589; *Greer v. Baughman*, 13 Md. 257; *White v. Sheldon*, 4 Nev. 280; *Frederick v. Haas*, 5 Nev. 389.

1. *Shaw v. Shaw*, 86 Mo. 594.

2. The foundation of a resulting trust being the payment of the considera-

tion price by the person claiming to be the beneficial owner, it must be shown that the purchase was made on his account or for his benefit. It is sufficient if that which in fact formed the consideration of the deed be shown to have moved from the party for whom the trust is claimed to exist, or was furnished on his behalf or on his credit. *Bibb v. Hunter*, 79 Ala. 351.

It must be proved that the consideration belonged to the *cestui que trust*, or was advanced by some person for him as a loan or gift. *Dudley v. Bachelder*, 53 Me. 403.

See also *Olive v. Dougherty*, 3 Iowa 372; *Farringer v. Ramsay*, 4 Md. Ch. 33; *Kendall v. Mann*, 11 Allen (Mass.) 15; *Davis v. Wetherell*, 11 Allen (Mass.) 19; *Stephenson v. Thompson*, 13 Ill. 186; *Alexander v. Tams*, 13 Ill. 221; *Frederick v. Haas*, 5 Nev. 394; *Malin v. Malin*, 1 Wend. (N. Y.) 625; *Getman v. Getman*, 1 Barb. Ch. (N. Y.) 499.

3. *Perry on Trusts* (3rd ed.), § 134; *Bibb v. Hunter*, 79 Ala. 351; *Dudley v. Bachelder*, 53 Me. 403; *Olive v. Dougherty*, 3 Iowa 371; *Wright v. King*, *Harr. (Mich.)* 12; *Kendall v. Mann*, 10 Allen (Mass.) 15; *Irwin v. Ivers*, 7 Ind. 308; *Stephenson v. Thompson*, 13 Ill. 186; *Botsford v. Burr*, 2 Johns. Ch. (N. Y.) 408; *Walker v. Brungard*, 3 Smed. & M. (Miss.) 723; *Ensley v. Ballentine*, 4 Humph. (Tenn.) 233; *Thompson v. Branch*, Meigs (Tenn.) 390.

4. In *Lee v. Browder*, 51 Ala. 288, it was said that the oral evidence usually offered consists of the verbal declarations or admissions of the party to be charged with the trust.

The rule and reason for it are clearly enunciated in *Lehman v. Lewis*, 62 Ala. 129. "The verbal declarations or admissions of the grantee, in whom the legal estate resides, are admissible as

stitute parts of the *res gestæ*.¹ So of other parol testimony tending to show facts from which the law will imply a trust.²

15. What Evidence Inadmissible.—See note.³

evidence against him and all claiming under him otherwise than as *bona fide* purchasers for value. Evidence of this kind is admitted to be of the most unsatisfactory character, and is received with great caution. It is so easy of fabrication, so incapable of contradiction, and the total alteration of its effect which the slightest mistake or failure of recollection may cause, that, after the death of the grantee, it will not be made the basis of a decree establishing a resulting trust or an equity in opposition to the terms of a conveyance, unless it is clear, consistent and corroborated by circumstances."

See also *Corder v. Corder* (Ill., Mch. 28, 1888.), 14 West. Rep. 120; *Malin v. Malin*, 1 Wend. (N. Y.) 625, 649; *Donaghe v. Tams*, 81 Va. 132; *Green v. Dietrich*, 14 Ill. 636.

1. *Edwards v. Edwards*, 39 Pa. St. 369. In this case *WOODWARD, J.*, announced the doctrine in the text excluding statements made by the person paying the purchase money, made before and after the time of purchase on the ground that, if made before, they were merely evidence of intention, and if made subsequently, they should not be admitted to divest an equitable estate. This doctrine seems to be modified by the later case of *Warren v. Steer*, 112 Pa. St. 642, where the subsequent admissions were admitted, but said to be material only as they bore upon the intention of the parties at the time of the purchase.

See also *Blodgett v. Hildreth*, 103 Mass. 484.

Compare Corder v. Corder (Ill. March 28, 1888), 14 West. Rep. 120.

2. In *Leakey v. Gunter*, 25 Tex. 400, *Gunter* had purchased land from one *Lemon*. *Leakey* claimed to have paid the purchase money, and asserted a trust in the land. He offered evidence of certain conversations between himself and the agent of *Lemon*, in which *Gunter* did not participate. The court held, that these conversations were admissible as parts of the *res gestæ*, it being competent to prove by parol that the purchase was in fact made by him and for his benefit, though the deed was taken in the name of *Gunter*.

So where there had been complicated business transactions between a mother

and her son, parol evidence was admitted to show the nature of those dealings and to establish a trust. *Mallagh v. Mallagh* (Cal., February 2, 1888), 16 Pac. Rep. 535.

And where a sister filed a bill against her brother to compel the conveyance of land to which he had taken title to secure payment of notes made by him for the purchase money, he having verbally agreed to convey upon her paying the notes, parol evidence was admitted to prove the agreement and payment. *Scott v. Taylor*, 64 Ga. 506.

In a suit by a husband against his wife to enforce a resulting trust arising from the payment of part of the price, evidence that part of such price was paid by one not a party to the suit is admissible to rebut complainant's allegation that he paid it. *Kelly v. Kelly* (Ill., Nov. 15, 1888), 18 N. E. Rep. 785.

So it may be shown that the nominal purchaser was of such mean circumstances as to make it impossible for him to have been the purchaser. *Bispham's Eq.* (4th ed.) 123; 1 *Perry on Trusts* (3rd ed.), § 137. *Willis v. Willis*, 2 Atk. 71; *Farrell v. Lloyd*, 69 Pa. St. 247; *Strimpfer v. Roberts*, 18 Pa. St. 283; *Sayre v. Frederick*, 16 N. J. Eq. 205.

Compare Balbec v. Donaldson, 2 Grant's Cas. (Pa.) 459.

3. Evidence of the declaration of a deceased person, asserting an interest in land held by another, not made in the presence of the latter, is inadmissible. *Corder v. Corder* (Ill., March 28, 1888), 14 West. Rep. 120.

So the declarations of the person paying the purchase money when not the *res gestæ*. *Edwards v. Edwards*, 39 Pa. St. 369.

So declarations of the party paying the purchase money, and not bearing upon his intention at the time of the purchase. *Warren v. Steer*, 112 Pa. St. 634.

So evidence of the mere intention of the parties, without payment of the purchase money. *Shelby v. Tardy* (Ala., May 24, 1888), 4 So. Rep. 276.

And where a sister sought to establish a trust against her brother in land to which he held title in his own name,

16. What Evidence Sufficient.—Such evidence as leaves no reasonable doubt in the mind of the court is sufficient to establish a resulting trust.¹

17. What Evidence Insufficient.—But any evidence which falls short of the above requirement is insufficient.²

upon the ground that her share of her father's estate constituted part of the purchase money, declarations of her mother in her behalf are not admissible. *Schneider v. Becker* (Ill., May 9, 1888), 17 N. E. 31.

And in *Tennessee*, when a wife seeks to establish in equity a trust arising from the use of her money by her husband in the purchase of land, making her husband defendant, his testimony is inadmissible. *Hyden v. Hyden*, 6 Baxt. (Tenn.) 406.

1. See *supra*, V, 12, p. 29, note 4.

More must be shown than the mere violation of the parol agreement. 1 *Perry on Trusts* (3rd ed.), § 134; *Bibb v. Hunter*, 79 Ala. 351; *Hackney v. Butts*, 41 Ark. 393; *Walker v. Brungard*, 13 Sm. & M. (Miss.) 723; *Kistler's Appeal*, 73 Pa. St. 398; *Williard v. Williard*, 56 Pa. St. 119; *Loomis v. Loomis*, 60 Barb. (N. Y.) 22; *Duffy v. Masterson*, 44 N. Y. 557; *Lantry v. Lantry*, 51 Ill. 451.

The plaintiff in ejectment produced evidence that there had been an arrangement made, that the land in question should be purchased for four heirs, and that she paid, as part of the purchase money, a sum which, with her interest in the estate, would more than pay her one-fourth. *Held*, that such evidence was sufficient to establish a resulting trust unless negated in the belief of the jury. *Harrold v. Lane*, 53 Pa. St. 268.

Oral evidence that a conveyance of land by a quit-claim deed in the usual form from A, B and C, tenants in common, to D, the other tenant in common, was made in pursuance of an agreement between them, that in consideration of certain payments made and to be made by A, the land should be held by D in trust for A, is admissible and sufficient, even after the death of all the tenants in common, to establish a trust in A's favor in the shares conveyed by B and C, but not in the share conveyed by A himself, nor in the share of D. *Blodgett v. Hildreth*, 103 Mass. 484.

So where the plaintiff's land was sold under execution and bought in by the

defendant at about one-sixth of its value, evidence that the defendant, at the sale, declared that he was buying it for the plaintiff, and afterwards declared that he had bought it for the plaintiff, and that the plaintiff had subsequently actually paid the money, was sufficient to establish a trust. *Caple v. McCollum*, 27 Ala. 461.

Although there may be no direct proof, yet there is sufficient evidence to establish a resulting trust in favor of the mortgagor, where it appears that a mortgagee who purchased the mortgaged premises at a foreclosure sale, suffered the mortgagor to remain in possession and control of the land for several years, claiming and dealing with it as his own, having it assessed to himself for taxation and paying the taxes, and where the mortgagee frequently admitted payment of his debt in full after the sale, and obtained the clerk and master's deed, and transferred it by written endorsement to the mortgagor's wife. *Sullivan v. Sullivan*, 86 Tenn. 376.

2. Mere loose declarations of the husband and persons since dead, are not sufficient to establish a trust. *Modrell v. Riddle*, 82 Mo. 31.

In order to establish by parol a resulting trust against the grantee in a deed, it is not sufficient to introduce evidence that the complainant employed the grantee as his agent to purchase and pay for the estate, and promised to repay him the purchase money. *Kendall v. Mann*, 11 Allen (Mass.) 15.

Proof of an oral agreement by a man with his wife to purchase land with her money, and have the deed made to her, the deed having been afterwards taken in the name of the husband, consisting of the recollection of witnesses twenty-six years after it was alleged to have been made, of what they heard the husband and wife say about it, and the admissions of the husband being at most in general terms, was not sufficiently clear and satisfactory to establish the trust. *P'Pool v. Thomas* (Ky., May 3, 1888), 8 S. W. Rep. 198.

So the verbal declarations of the father, in whom the legal title was vested, as made to one witness both before and after the purchase, were held insufficient to raise a resulting trust in favor of his son, there being an unexplained discrepancy between the amount of the purchase money as paid and that alleged to have been advanced by the son, the person by whom the money was alleged to have been sent not being examined as a witness, and there being no knowledge of the trust, or other confirmatory proof among the members of the family. *Lee v. Browder*, 51 Ala. 288. And see *Lloyd v. Lynch*, 28 Pa. St. 419.

In an action involving the ownership of certain land the evidence for plaintiff showed that his testator, under whom he claimed, had the land surveyed, performed labor, and made improvements thereon, and that defendant had often stated that the land belonged to said testator. The opposing evidence showed that the defendant had contracted for the land in his own name, paid the purchase money, leased the property, hired testator to perform labor thereon, and that the said testator had admitted defendant's ownership of the land. Held, that plaintiff failed to show that defendant held the land in trust for said testator. *Corder v. Corder*, (Ill.) 16 N. E. Rep. 107.

A woman had delivered money to her son which he had invested in land, but what land did not certainly appear. For twenty years she lived with him and his widow on land the title to which was in his name, and which was always regarded as his, making no inquiry as to the title. The petition, after amendment, averred that the title was taken by him without her knowledge or consent. The only evidence was the random and uncertain declarations of the decedent and the indefinite testimony of the mother, then seventy-six years of age. This was insufficient to establish the trust. *Murphy v. Hanscome* (Iowa, Dec. 19, 1888), 40 N. W. Rep. 717.

A bill was brought by a father against his son to establish a resulting trust. It appeared that the contract for the purchase of land was made by the son in his own name, and that, at the time of the purchase, the father furnished the son with \$1,000, and deposited to the credit of the son the balance of the purchase money. That the son pro-

cured insurance, made leases and receipted for the rent in his own name; that the land was assessed in his name; that the son erected a house on the land, for which the father furnished the greater part of the cost; and that the father had lived with the son, and had declared that the property belonged to the latter, and that the former had loaned the money to pay for it. Evidence having been given of the above facts, was held insufficient to establish a resulting trust. *Moyer's Appeal* (Pa., May 14, 1888), 14 Atl. Rep. 253.

In *Wilts v. Horney*, 59 Md. 584, the facts were that a woman purchased property, taking title in her own name. On her death her son filed his bill claiming that the land was purchased with his money and was, therefore, held in trust for him. It was in evidence that shortly before the purchase the mother had received a sum of money, in her own right, and another sum in her son's right, either of which were more than sufficient to pay the purchase money. One of the grantors testified that the grantee informed him at the time the deed was prepared that she was purchasing with the money of her son, and two other witnesses, besides the son, spoke of similar declarations made by her at different times. On the other hand, five witnesses on the other side testified that she repeatedly declared that she had bought the property with her own money and for her own use. This testimony was held insufficient to raise a trust in the son's favor.

In *Schneider v. Becker*, (Ill., May 9, 1888), 17 N. E. Rep. 31, *Wendel Becker* had bought land, taking title in his own name, and subsequently conveyed it to his brother, *Peter*. *Barbara Schneider*, formerly *Becker*, his sister, thirty years after the purchase, sought to establish a trust in the land on the ground that her share of her father's estate went into the purchase money. Her case was supported only by evidence of conversations in which the defendant admitted that her share had formed part of the purchase money, and offered to buy her interest. Defendant denied such conversations, and he and another sister testified that they and *Wendel* furnished the purchase money. There was testimony that the defendant had accounted to plaintiff for her share left with *Wendel*, and during an interval of nine years after the purchase, although plaintiff

18. Effect of Laches.—A resulting trust will not be enforced by a court of equity, when the nominal purchaser has occupied and enjoyed the estate for a long time, and there has been laches on the part of the person claiming to be the *cestui que trust*.¹ But where the trust is admitted, and there has been no adverse holding, lapse of time is no bar.²

lived at a distance, no communication to her in relation to her interest was produced. It was held that this evidence justified the dismissal of the bill.

Decedent bought plaintiff's homestead and the land in controversy at a tax sale. A witness testified that the decedent had obtained \$165 from him on plaintiff's account, and stated that he held the tax deeds, that he had reconveyed the homestead but would hold the other for his trouble. There was also evidence that the deceased had said the land was plaintiff's and he would convey to him when certain things were performed. The amount required to redeem the homestead was \$120, and to redeem the land in question, \$63. Plaintiff was not indebted to deceased at the time. This evidence was held insufficient to establish a resulting trust in favor of the plaintiff. *Richardson v. Haney* (Iowa, Oct. 29, 1888), 40 N. W. Rep. 115.

See further, as to testimony held insufficient, *Bibb v. Hunter*, 79 Ala. 351; *Agricultural Association v. Brewster*, 51 Tex. 258; *Hencke v. Floring*, 114 Ill. 554; *Thomas v. Standiford*, 49 Md. 187; *Parker v. Snyder*, 31 N. J. Eq. 164; *Billings v. Clinton*, 6 S. Car. 90; *Adams v. Burns* (Mo., Nov. 26, 1888), 10 S. W. Rep. 26.

1. In *Clegg v. Edmonson*, 3 De G. M. & G. 787, a delay of nine years in attempting to enforce a resulting trust was held fatal, although the parties claiming the trust had been continually asserting their right, which, however, was always denied by the trustee.

In *Peebles v. Reading*, a delay of fourteen years was held to bar the right of the alleged *cestui que trust*. The case was that lands were sold under execution, the purchaser declaring that he was buying for the former owner. There was evidence of an agreement on the part of the former to convey to the latter on payment by the latter of the purchase money. The purchaser went into possession of the premises. DUNCAN, J., said: "Where no time is mentioned the law could intend a reasonable time, and that fourteen years

would be a time quite unreasonable, is an opinion which I have formed with much consideration." *Peebles v. Reading*, 8 S. & R. (Pa.) 484. So in *Graham v. Donaldson*, 5 Watts (Pa.) 451, a period of ten years barred the right.

And in *Strimpfler v. Roberts*, 18 Pa. St. 283, a period of twenty-one years was sufficient.

The whole matter, in *Pennsylvania*, is at present governed by the Act of 22nd April, 1856, § 6; P. L. 1856, p. 532; *Purd. Dig.* 1883, p. 1064, which provides that no action shall be brought to enforce any implied or resulting trust but within five years after such trust accrued, with the proviso that in cases of fraud the limitation shall run only from the discovery thereof. See *Best v. Campbell*, 62 Pa. St. 476.

In an *Iowa* case the decision was that the resulting trust would not be enforced by a court of equity when the *cestui que trust* has neglected and failed to assert his right, or to enforce his ownership of the property for such length of time, and under such circumstances as to estop him from questioning the title of the actual occupant. *Hall v. Doran*, 13 Iowa 368. And in a later case in the same State, it was said that long and unexplained delay is a material circumstance against the establishment of implied trusts in real estate when parol evidence alone is relied on for this purpose. *Sunderland v. Sunderland*, 19 Iowa 325.

And in *Brown v. Guthrie*, 27 Tex. 610, a delay of twelve years was held to bar the right to have a resulting trust declared.

See also *Robertson v. Maclin*, 3 Hayw. (Tenn.) 70; *Newman v. Early*, 3 Tenn. Ch. 714; *Smith v. Patton*, 12 W. Va. 541; *Delane v. Delane*, 7 Bro. P. C. 279; *Beckford v. Wade*, 17 Ves. 97; *Haines v. O'Connor*, 10 Watts (Pa.) 315; *Lewis v. Robinson*, 10 Watts (Pa.) 338; *Midmer v. Midmer*, 26 N. J. Eq. 299; *King v. Pardee*, 96 U. S. 90; 1 Perry on Tr. (3rd ed.), § 141.

2. Lapse of time is no bar to relief for the enforcement of a resulting trust, where there has been an acknowledg-

VI. RESULTING TRUSTS OF THE SECOND CLASS—Purchases by Persons in a Fiduciary Capacity.—The second class of resulting trusts arises where a trustee or other fiduciary, acting apparently within the scope of his powers—that is, having authority to do what he does—purchases property with trust funds and takes title thereto in his own name, without any declaration of trust. In such case a trust will result by operation of law for the benefit of the trust estate, as the trustee will be presumed to have intended that the purchase should enure to the benefit of the estate.¹ If the

ment of the trust, and no adverse possession and no laches. *Dow v. Jewell*, 18 N. H. 340.

When the holder of a legal title subject to a resulting trust permits the *cestui que trust* to occupy and enjoy the land as owner, he shall derive no benefit from the lapse of time. *Douglass v. Lucas*, 63 Pa. St. 9.

In *Jennings v. Shacklett*, 30 Gratt. (Va.) 765, an attempt was made to enforce a resulting trust resting on parol evidence thirty-three years after the transaction by which it was alleged to have been raised. The alleged *cestui que trust* was in possession of the premises to the time of her death, which occurred five years before the commencement of the action. Neither she nor her heirs made any attempt to set up the trust until creditors of the alienee undertook to subject the land to the payment of his debts. The court held that the delay was not a bar to the setting up of the trust, but that owing to the great lapse of time, the testimony to establish the trust must be such as to leave no doubt of the character of the transaction.

1. **Text Writers.**—Bisp. Eq. (4th ed.) § 86; 2 Story Eq. Juris. (13th ed.) § 1210; Perry on Trusts (3rd ed.), § 127; Adams on Equity (7th Am. ed.) *33, n. 1; 2 Pom. Equity Juris, § 1049; 1 Lewin on Trusts (8th ed.), *143.

English Authorities.—*Keech v. Sandford*, 1 Eq. Lea. Ca. 48, 49, 62; *Trench v. Harrison*, 17 Sim. 111; *Lench v. Lench*, 10 Ves. 511; *Mathias v. Mathias*, 3 Sm. & Giff. 552; *Onseley v. Anstruther*, 10 Beav. 453, 461; *Mathias v. Mathias*, 3 Sm. & Giff. 552; *Great Luxembourg Ry. Co. v. Magnay*, 25 Beav. 586; *Flitcroft's Case*, 21 Ch. D. 519, 529; *Bagnall v. Carlton*, 6 Ch. Div. 371; *New Sombrero Co. v. Erlanger*, 5 Ch. Div. 73; s. c., 3 App. Ca. 1218; *Lees v. Nuttall*, 1 Russ. & Myle. 53; *Carter v. Palmer*, 11 Bligh R. 397, 418, 419; *Lane v. Dighton*, Amb. R. 409; *Deg*

v. Deg, 2 P. Wms. 412, 414; *Perry v. Phillips*, 4 Ves. R. 107; *Powel v. Glover*, 3 P. Wms. 252 n.; *Fox v. Macreath*, 2 Bro. Ch. 400; s. c., 2 Cox 320; *Morret v. Paske*, 2 Ark. 54; *Kimber v. Barber*, L. R., 8 Ch. Ap. 56; *Wedderburn v. Wedderburn*, 4 My. & Cr. 41; *Docker v. Sones*, 2 My. & K. 665; *Gresley v. Mauseley*, 4 De G. & J. 78; *Holman v. Loynes*, 4 De G. M. & G. 270; *Hesse v. Briant*, 6 De G. M. & G. 623; *Knight v. Browyer*, 2 De G. & J. 421, 445; *Savery v. King*, 5 H. L. Cas., 627.

United States Courts.—*Phillips v. Crammond*, 2 Wash. (U. S.) 441; *Flanders v. Thompson*, 3 Woods (U. S.) 9; *Dodge v. Woolsey*, 18 How. (U. S.) 331, 341; *Koehler v. Black R. & Co.*, 2 Black (U. S.) 715; *Smith v. Burnham*, 3 Sumn. (U. S.) 435; *Thompson v. Perkins*, 3 Mason (U. S.) 232; *U. S. Bank v. State Bank*, 96 U. S. 30.

Alabama.—*Tilford v. Torrey*, 53 Ala. 120; *Crutch v. Taylor*, 66 Ala. 217; *Walker v. Elledge*, 65 Ala. 51; *Lewis v. Montgomery Bldg. Assoc.*, 70 Ala. 276.

Arkansas.—*Pindall v. Trevor*, 30 Ark. 249.

California.—*Jenkins v. Frink*, 30 Cal. 586; *Jenkins v. Frink*, 30 Cal. 586; *Neall v. Hill*, 16 Cal. 145; *Everdson v. Mayhew*, 65 Cal. 163.

Connecticut.—*Church v. Sterling*, 16 Conn. 388.

Georgia.—*Chastain v. Smith*, 30 Ga. 96; *Sasser v. Sasser*, 73 Ga. 275; *Martin v. Creer*, 1 Ga. Dec. 109.

Illinois.—*Dodge v. Cole*, 97 Ill. 338; *Musham v. Musham*, 87 Ill. 80; *Roberts v. Opp*, 56 Ill. 34; *Cookson v. Richardson*, 69 Ill. 137; *Moss v. Moss*, 95 Ill. 449; *Stow v. Kimball*, 28 Ill. 93; *Smith v. Ramsay*, 6 Ill. 373; *Follansbe v. Kilbreth*, 17 Ill. 522; *Loften v. Witboard*, 92 Ill. 461.

Indiana.—*French v. Sheplor*, 83 Ind. 266; s. c., 43 Am. Rep. 67; *Resor v. Resor*, 9 Ind. 347; *Miller v. Blackburn*, 14 Ind. 62; *Goldsberry v. Gentry*, 92 Ind. 193; *Boyer v. Libey*, 88 Ind. 235;

purchase is made partly with trust funds, a trust results *pro tanto*,¹

Fishbeck v. Gross, 112 Ill. 208; *Derry v. Derry*, 74 Ind. 560; *Pugh v. Pugh*, 9 Ind. 132; *Riehl v. Foundry Assoc.*, 104 Ind. 70; *Waldron v. Saunders*, 85 Ind. 270; *Catherwood v. Watson*, 65 Ind. 576.

Iowa.—*Fox v. Doherty*, 30 Iowa 334; *Robinson v. Robinson*, 22 Iowa 427; *Burden v. Sheridan*, 36 Iowa 125; s. c., 14 Am. Rep. 505; *Reichoff v. Brecht*, 51 Iowa 633; *Claussen v. Franz*, 1 Clarke (Iowa) 226; *Schaffner v. Gontzmacher*, 6 Clarke (Iowa).

Kansas.—*Rose v. Hayden*, 35 Kan. 106; s. c., 57 Am. Rep. 145; *English v. Law*, 27 Kan. 242; *Winkfield v. Brinkman*, 21 Kan. 682.

Kentucky.—*Lee v. Fox*, 6 Dana (Ky.) 171.

Louisiana.—*Hall v. Sprigg*, 7 Martin (La.) 243; s. c., 12 Am. Dec. 506.

Maine.—*Brown v. Dwelly*, 45 Me. 52; *McLarren v. Brewer*, 51 Me. 402; *Merrill v. Smith*, 37 Me. 394.

Maryland.—*Brooks v. Dent*, 1 Md. Ch. 523; *Thomas v. Standiford*, 49 Md. 181; *Ceill Bank v. Snively*, 23 Md. 253.

Massachusetts.—*Richards v. Manson*, 101 Mass. 482; *Bancroft v. Cousen*, 13 Allen 50; *Jones v. Dexter*, 130 Mass. 380; *Nat. Bank v. Barry*, 125 Mass. 20; *Bresnihan v. Sheehan*, 125 Mass. 11.

Michigan.—*Mich. Ry. Co. v. Melten*, 44 Mich. 321.

Mississippi.—*Harper v. Archer*, 28 Miss. 212; *Hancock v. Titus*, 33 Miss. 224; *Henderson v. Warmack*, 27 Miss. 830; *Cameron v. Lewis*, 56 Miss. 76.

Missouri.—*Valle v. Bryan*, 19 Mo. 423; *Woodford v. Stephens*, 51 Mo. 443; *Modrell v. Riddle*, 82 Mo. 31; *White v. Drew*, 42 Mo. 561; *Baumgartner v. Guessfield*, 38 Mo. 36.

Nebraska.—*Roy v. McPherson*, 11 Neb. 197.

New Hampshire.—*Farley v. Blood*, 10 Foster (N. H.) 354; *Hall v. Young*, 37 N. H. 134.

New Jersey.—*Stratton v. Dialogue*, 16 N. J. Eq. 70; *Nestal v. Schmid*, 29 N. J. Eq. 458; *Lathrop v. Gilbert*, 10 N. J. Eq. 344; *Gogerty v. Bennett*, 37 N. J. Eq. 87; *Johnson v. Dougherty*, 18 N. J. Eq. 406; *Baldwin v. Johnson*, 1 N. J. Eq. 441.

New York.—*Trephagen v. Burt*, 67 N. Y. 30; *Reid v. Fitch*, 11 Barb. Ch. (N. Y.) 399; *Crocker v. Crocker*, 31 N. Y. 507; s. c., 88 Am. Dec. 291; *Safford*

v. Hynds, 39 Barb. 625; *Freeman v. Kelly*, 1 Hoffm. Ch. 90; *Methodist Ch. v. Jaques*, 1 Johns. Ch. 450; s. c., 3 Johns. Ch. 77; *Dickson v. Codwise*, 1 Sandf. Ch. 214; *Schlaefler v. Corson*, 52 Barb. (N. Y.); *Day v. Roth*, 18 N. Y. 448; *Butts v. Wood*, 37 N. Y. 317; *Bliss v. Mattesen*, 45 N. Y. 22; *Newton v. Porter*, 69 N. Y. 133; *Pascoag Bank v. Hunt*, 3 Edw. Ch. (N. Y.) 583; *Bank of America v. Pollock*, 4 Edw. Ch. (N. Y.) 215.

North Carolina.—*Hall v. Sprigg*, 7 Mart. (N. Car.) 243; s. c., 12 Am. Dec. 506; *Lyon v. Akin*, 78 N. Car. 258; *Campbell v. Drake*, 4 Ired. (N. Car.) 94.

Oregon.—*Springer v. Young*, 14 Oreg. 280.

Pennsylvania.—*Wallace v. Duffield*, 2 S. & R. (Pa.) 521; s. c., 7 Am. Dec. 660; *Lefevre's App.*, 69 Pa. St. 122; s. c., 8 Am. Rep. 229; *Hammett's App.*, 72 Pa. St. 337; *Thompson's App.*, 22 Pa. St. 16; *Kisler v. Kisler*, 2 Watts (Pa.) 323; *Rupp's App.*, 100 Pa. St. 531; *Bigley v. Jones*, 114 Pa. St. 510; *Beck v. Ulrich*, 13 Pa. St. 636; s. c., 53 Am. Dec. 507; *Raybold v. Raybold*, 20 Pa. St. 308; *Barrett v. Bamber*, 81 Pa. St. 247; *Robb's App.*, 41 Pa. St. 45; *Harrisburgh Bank v. Tyler*, 3 W. & S. (Pa.) 373; *Coder v. Huling*, 27 Pa. St. 84; *Harrold v. Lane*, 53 Pa. St. 268; *Beigle v. Wentz*, 55 Pa. St. 369; *Filman v. Divers*, 31 Pa. St. 429; *Kline's App.*, 39 Pa. St. 463.

Rhode Island.—*Watson v. Thompson*, 12 R. I. 466.

Tennessee.—*Snell v. Elam*, 2 Heisk. (Tenn.) 82; *Broyles v. Nowlin*, 59 Tenn. 191; *Pritchard v. Wallace*, 4 Sneed (Tenn.) 405; s. c., 70 Am. Dec. 254; *Burks v. Burks*, 7 Baxt. 353; *Miller v. Birdsong*, 7 Baxt. (Tenn.) 531; *Hawthorne v. Brown*, 3 Sneed 462; *Pillow v. Thomas*, 1 Baxt. (Tenn.) 120.

Texas.—*Smith v. Boquet*, 27 Tex. 507; *Neill v. Keese*, 13 Tex. 187; s. c., 51 Am. Dec. 746.

Vermont.—*Pinney v. Fellows*, 15 Vt. 525; *Barron v. Barron*, 24 Vt. 375.

Wisconsin.—*Barker v. Barker*, 14 Wis. 131.

2. Part Payment with Trust Funds, Trust Results Pro Tanto.—Where the consideration, for the purchase of land conveyed to a third person, is paid in part with the money of the husband,

and the rule applies as well to personal as to real property.¹

There is no imputation of fraud and no proof is required of an intention to violate the existing fiduciary obligation, because it assumes that the purchaser intended to act in pursuance of his fiduciary duty and not in violation of it.²

1. Who Is Such Fiduciary.—The rule applies to purchases with trust funds, made by a trustee;³

and in part with that of the wife, not reduced to possession by the husband, the conveyance enures to the husband and wife respectively, in proportion to the amount so paid by them. *Hall v. Young*, 37 N. H. 134; *Tilford v. Torrey*, 53 Ala. 120.

The lands of a decedent were sold by order of court in proceedings in partition, and purchased by the husband of one of the heirs entitled to participate, who paid the purchase money except such portion as his wife was entitled to receive; this she released to the master who made a deed to the husband alone. *Held*, that a trust resulted in favor of the wife to the extent of her interest in said real estate. *Bigley v. Jones*, 114 Pa. St. 510. *Vide also* *Bitzer v. Bobo*, 38 N. W. Rep. (Minn.) 609; *Day v. Roth*, 18 N. Y. 448; *Ward v. Armstrong*, 84 Ill. 151; *Everdson v. Mayhew*, 65 Cal. 163; *Lewis v. Montgomery Bldg. Assoc.*, 70 Ala. 276; *Cecil Bank v. Snively*, 23 Md. 253; *Watson v. Thompson*, 12 R. I. 466; *Houghton v. Davenport*, 74 Me. 590.

1. 1 *Perry on Tr.* (3rd ed.), § 130. See *supra*, V., 6, note; V., 8, (1) (b), note.

2. Even in that single class where equity proceeds upon the maxim that an intention to fulfil an obligation should be imputed, and assumes that the purchaser intended to act in pursuance of his fiduciary duty, the notion of fraud is not invoked simply because it is not absolutely necessary under the circumstances; the existence of the trust in all cases of this class might be referred to constructive fraud. I refer to the class of cases where a trustee uses trust funds to pay for property purchased in his own name; equity assumes that he intended to act in accordance with his fiduciary duty, although in the majority of such instances the actual intention is to violate such duty. It will be seen that, in my opinion, certain kinds of so-called trusts, which are often spoken of as "constructive," do not at all belong to that class. 2 *Pom. Eq. Juris.*, § 1044, n. 1.

But the analogy should not be pushed too far. The trust which exists in these and similar cases is not of so high and complete a character that equity has an exclusive jurisdiction over the rights and interests of the beneficiaries, to maintain and enforce them against the trustees. The law, by means of its actions *ex æquo et bono*, supplies the beneficiaries with sufficient remedies for many violations of the trust relations. The relations in which such persons stand towards their beneficiaries partake so much of the trust character, however, that equity possesses a jurisdiction in many instances where its remedies are more effective, or its modes of procedure enable the court to do more complete justice by its decrees. 1 *Pomeroy Eq. Jur.*, § 157.

3. If property is bought by a trustee with the trust funds, it will be impressed with the original trust, and no declaration made in the deed conveying the property can impress it with a different trust. *Breit v. Yeaton*, 101 Ill. 242; *Pugh v. Pugh*, 9 Ind. 132.

A person purchasing property at a sale, with the funds of the debtor, is a trustee, and chancery will interfere when the trust is ended or likely to be abused. *Deatley v. Murphy*, 3 A. K. Marsh. (Ky.) 472; *Stow v. Kimball*, 28 Ill. 93.

A son owning a farm not fully paid for, and holding, in trust for his mother, \$300 to be invested in a home for her use during her life, and after her death to go to her children, by agreement with her used the money in paying off the debt and in consideration thereof set apart 100 acres of the tract as a home for her, to which she moved. *Held*, that, on her death, her heirs could assert a resulting trust in this 100 acres. *Burks v. Burks*, 7 Baxter (Tenn.) 353.

Election.—Property purchased with trust funds is the property of the *cestui que trust* if they choose to assert their rights. *Turner v. Petigrew*, 6 Humph. (Tenn.) 438; *Wilkinson v. Wilkinson* 1 Head (Tenn.) 305.

Property wrongfully purchased with the trust fund, may at the option of the *cestui que trust* be pursued into the hands of the trustee, or those in privity with him, and held subject to the terms of the original trust. *Martin v. Greer*, 1 Ga. Dec. 118.

The plaintiff, it seems, understood that her money was to be invested in the real estate and assented thereto, yet not having consented that an absolute deed be taken to another person without any recognition of her interest. *Held*, that the transaction was in fraud of her rights and that the estate was chargeable with an equitable lien in her favor in the nature of a resulting trust. *Day v. Roth*, 18 N. Y. 448.

• **Co-heir—Evidence.**—Under proceedings in partition, land of a decedent was sold by order of the orphan's court to one of the heirs. On ejectment for its possession by the purchaser, the defendant, another of the heirs, gave evidence that there had been an arrangement made that it should be purchased for four of the heirs, that she paid the purchaser as part of the purchase money a sum which, with her interest in the estate, would more than buy her one-fourth. *Held*, that such evidence was sufficient to establish a resulting trust unless negated in the belief of the jury. *Harrold v. Lane*, 53 Pa. St. 268.

Resulting Trust Does Not Arise Where There Is No Fiduciary Relation.—If one who stands in no fiduciary relation to another appropriates the other's money and invests it in real estate or other property, no trust results to the owner of the money. *Ensley v. Ballentine*, 4 Humph. (Tenn.) 233; *Hawthorne v. Brown*, 3 Sneed (Tenn.) 465. But compare *Beck v. Ulrich*, 13 Pa. St. 636; s. c., 53 Am. Dec. 507, and cases cited in a resulting trust arises even where there is no fiduciary relation.

What Is a Fiduciary Relation.—There is some question in the books as to what is a fiduciary relation, and it seems to depend largely upon the extent to which the person is trusted. As where a clerk in a store pilfered money and goods from his employer, and laid out the proceeds in the purchase of a tract of land. *Held*, that the person thus robbed could hold neither the clerk nor his representatives, after his death, as trustees of the land for his benefit, so as to enable him to call for a conveyance of the

legal title to himself. *Campbell v. Drake*, 4 Ired. Eq. (N. Car.) 94.

Also where a cashier fraudulently abstracted the funds of a bank, and invested them in a bond and mortgage in his own name and on his own account. *Held*, that this court could not protect the bank by laying hold of the bond and mortgage, or by restraining the mortgagor or mortgagee by injunction. *Pascoag Bank v. Hunt*, 3 Edw. Ch. (N. Y.) 583. But says *ELLIOTT, J.*, in *Riehl v. Evansville Foundry Assoc.*, 104 Ind. 72 (1885): "We have no doubt that these cases (*Campbell v. Drake*, 4 Ired. Eq. (N. Car.) 94, and *Pascoag Bank v. Hunt*, 3 Edw. Ch. (N. Y.) 583) were not well decided. They are in conflict with the very great weight of authority and are unsound in principle. The fact that the agent may be criminally prosecuted does not affect the right of the principal to get back his money. With quite as much reason might it be urged that the principal could not take from the embezzler the money, if found upon his person, because he can be punished by a criminal prosecution, as to urge that the principal cannot follow the trust because the embezzler is liable to be punished by a prosecution at the instance of the State. There is no conceivable reason why the wronged employer may not secure his money and the embezzler be also punished. The punishment is not to vindicate or reward the principal, but to protect the community from the criminal acts of embezzlers." Accordingly, a book-keeper or salesman who receives the money of his employer by virtue of his employment, receives it in a fiduciary capacity, and if he fraudulently appropriates it to his own use, he is guilty of a breach of trust. The funds which come into the hands of an agent for his principal are trust funds, and the latter, as the beneficiary, becomes in equity the owner of the property purchased by the agent with these funds, and may follow it into property in which it has been invested. *Riehl v. Foundry Assoc.*, 104 Ind. 72.

Equity will charge land, paid for in part with money known to have been stolen from a bank, with a trust in favor of the bank for the amount so used. *Nat. Bank v. Barry*, 125 Mass. 20; *Bresnihan v. Sheehan*, 125 Mass. 11; *U. S. Bank v. State Bank*, 96

executor;¹

U. S. 30; *Bank v. Carey*, 39 N. J. Eq. 25.

The owner of negotiable securities, stolen and afterwards sold by the thief, may follow and claim the proceeds in the hands of the felonious taker or of his assignee with notice, and this right continues and attaches to any securities or property in which the proceeds are invested, so long as they can be traced and identified and the rights of a *bona fide* purchaser do not intervene. The law will raise a trust *in invitum* out of the transaction in order that the substituted property may be subjected to the purposes of indemnity and recompense. *Newton v. Porter*, 69 N. Y. 133.

A clerk of a bank, through fraud using the borrowed cheque of a firm, whose account (in that way overdrawn) was more particularly under his own supervision, withdrew money from the bank and deposited it to his own account at another bank, and bought stock with it and caused such stock to be placed in the name of his sisters without consideration. *Held*, that the sisters were to be construed as trustees for the bank. *Bank of America v. Pollock*, 4 Edw. Ch. (N. Y.) 215.

Where a draft for money was entrusted to a broker to buy exchequer bills for his principal, and the broker received the money and misapplied it by purchasing American stock and bullion, intending to abscond with it and go to America, and did accordingly abscond, but was taken before he quitted England, and thereupon surrendered to the principal the securities for American stock and the bullion, who sold the whole and received the proceeds, *held*, that the principal was entitled to withhold the proceeds from the assignees of the broker, who became bankrupt on the day on which he received and misapplied the money. *Taylor v. Plumer*, 3 M. & S. 562; *Thompson v. Parker*, 3 Mason, (U. S.) 332; *Hoffman v. Canon*, 22 Wend. (N. Y.) 285; *Silbury v. McCoon*, 3 N. Y. 579; *Bassett v. Spofford*, 45 N. Y. 387.

Conversion of Trust Property by Trustee.—If a trustee or agent convert a trust fund in his hands into another species of property, and its identity can be traced, it will be held in its new form liable to the rights of the beneficiary. *Moffitt v. McDonald*, 11 Humph. (Tenn.)

457; 96 U. S. 30; *Walker v. Brungard*, 21 Miss. 723.

Mixing Trust Funds.—If a trustee commingles trust money with money of his own, and afterwards separates from the common fund a proper portion as to the property of the *cestui*, and with such portion of the fund purchases real estate in his own name, the trust becomes impressed upon and attaches to the money thus set aside and to the real estate purchased with such money. *Houghton v. Davenport*, 74 Me. 590.

Purchases Partly with Trust Funds and Partly with Funds of Trustee.—If a trustee purchases partly with his own funds and partly with those of a *cestui*, the *cestui* has a resulting trust in the purchase, and the burden rests on the trustee to show the amount of his own funds. *Watson v. Thompson*, 12 R. I. 466.

A trust results *pro tanto* where only part payment is made with trust funds. *Cecil Bank v. Snively*, 23 Md. 253.

Though an entry on public lands in the name of one for the use of another is illegal, where a son entrusted with money by his mother to enter lands, entered them in his own name. *Held*, that there was a resulting trust to her. *Buren v. Buren*, 79 Mo. 538.

The mere fact that the owner of land uses trust funds in the improvement thereof, will not raise for the beneficiaries of such funds a resulting trust in the land, so as to entitle them to the proceeds thereof, to the exclusion of judgment creditors subsequent to the making of the improvements. Such beneficiaries are not entitled to any equitable lien against the estate. *Cross's Appeal*, 97 Pa. St. 471.

Time of Payment.—To constitute a simple resulting trust, where one person's money is used in paying for lands conveyed to another, the money must be paid at the time of the purchase; but when a trustee thus uses trust funds, it is not essential to the *cestui's* equity to charge the lands, that the money be paid at the time of the purchase. The right may be enforced, whether the payment be made before or after the purchase, so long as the trust funds can be traced into specific property, and against all persons except *bona fide* purchasers. *Lehman v. Lewis*, 62 Ala. 129.

1. An executor who, with the money

administrator;¹ partner with funds of the partnership;²

of the estate, redeems land of the testator sold on execution, holds it in trust for the estate. *McCrary v. Foster*, 1 Iowa 271.

A trust results to legatees whose funds are applied by an executor to the purchase of property. *Perry v. Head*, 1 A. K. Marsh. (Ky.) 46.

Where an executor purchases land, and takes a conveyance to the estate, this is, *prima facie*, a declaration of trust, and the land will be subject to a division among the heirs. *Garrett v. Garrett*, 1 Strobb. (S. Car.) Eq. 96.

Where an executor or administrator, without any authority, purchases property for the estate, and no objection being made by those interested in the estate, to the use of the funds in that way, the property so purchased must be treated in equity as the property of the estate. *Harper v. Archer*, 28 Miss. 212.

Where executors were authorized by will to sell land devised to the testator's family on giving security, and they sold the land and employed the identical money it produced in buying other land, and there was evidence of declarations by one of the executors, tending to show that the purchase was in trust for the family, *held*, that the circumstances were sufficient to raise a trust for the family in the lands thus purchased. *Wallace v. Duffield*, 2 S. & R. (Pa.) 521.

1. Where an administrator of an estate uses the money of the estate to procure the title to lands for the benefit of the heirs of the estate, the heirs may adopt his act and claim the land, and in a suit by the conservator of one of the heirs to set aside a sale of such heir's portion of the land, the party in possession will not be allowed to set up in defence that the administrator had no right to make the investment, and that such heir's claim is only for his share of the money invested. *Doge v. Cole*, 97 Ill. 338; *Barker v. Barker*, 14 Wis. 131.

Where an intestate left a widow, one son and three daughters, and the widow administered the estate, and managed the whole of it and its proceeds for a period of thirty-seven years, investing and reinvesting the proceeds, at first in the joint names of herself and children, and afterwards, with their assent and knowledge, in her own individual name,

and they all lived together, the widow furnishing all the supplies for the family, *held*, that the widow was to be considered in all these investments as acting as trustee for those interested in the property purchased in her own name, and the law will raise a resulting trust to the owners in the property so purchased. *Seaman v. Cook*, 14 Ill. 501.

2. Where one of three partners took a portion of the partnership funds and invested it in lands in a distant State, with the declared intention of appropriating such lands to his own use and the use of his children, *held*, that the other partners might follow him and claim the lands in which the money had been invested; that the partner in such case was but a trustee. *King v. Hamilton*, 16 Ill. 190.

Where a complainant files a bill claiming for himself and others certain tracts of land purchased in partnership, to sustain the suit it is enough to show that the land was purchased with the partnership funds, without specifying the amount contributed by each partner. *Piatt v. Oliver*, 2 McLean (U. S.) 267; *Phillips v. Crammond*, 2 Wash. (U. S.) 441; *Jenkins v. Frink*, 30 Cal. 586.

A and B were partners in trade. B having the management of the partnership business, purchased real property with the partnership funds, and took a deed in his own name. Although the conveyance is made to him alone, and the legal title is invested in him, he holds one moiety for the benefit of his partner A. *Baldwin v. Johnson*, Saxt. (N. J. Ch.) 441; *Coder v. Huling*, 3 Casey (Pa.) 84.

Prior to the act of 1786, concerning partitions and joint rights and obligations, two men, who were partners in a drove of cattle, applied part thereof to a joint purchase of a settlement right to land, and one of them died; the survivor had the land surveyed by virtue of a land office treasury warrant, and sold it to a third person, who, *having notice of the partnership right*, obtained a grant of the *whole* from the commonwealth; a purchaser from the *heir of the deceased partner* was, nevertheless, entitled, in equity, to *his share* of the land. *Edgar v. Donally*, 2 Munf. (Va.) 387.

Where real estate is purchased with partnership funds, for the purpose of

guardian,¹

sale, to pay the debts of the firm, the heirs of a deceased partner, who alone took title to such land, will be considered trustees for the surviving partner. *Pugh v. Currie*, 5 Ala. 446.

If two or more persons as mining partners claim and develop a mine situated upon land owned by a third person, and the partners authorize one of their number to purchase the land of the owner for the benefit of all, and he buys the same in his own name, he holds the legal title of his partners' proportion in trust for them. *Settembre v. Putnam*, 30 Cal. 490.

Where real estate is purchased for partnership purposes and on partnership account, let the legal title be vested in whom it may, as where the conveyance is taken to the partners as tenants in common, it will, in equity, be deemed partnership property, and like other effects, personal estate; and the partners are *cestuis que trust*. But a court of law must view it, in general, only according to the legal title. *Hoxie v. Carr*, 1 Sumn. (U. S.) 174.

Where one party has acquired the legal title to real estate, to which another has a better right, a court of equity will convert him into a trustee of the true owner, and compel him to convey the legal title. *Winkfield v. Brinkman*, 21 Kan. 682; *Stark v. Starrs*, 6 Wall. 419; *Moody v. Arthur*, 16 Kan. 428.

The appropriation of the joint funds of a copartnership by one of the members of a firm, to the purchase of real estate conveyed to such partner in his own name, will not create a resulting trust in favor of his copartner, unless the funds were so appropriated in pursuance of an agreement between the parties at the time of the purchase. *Forsythe v. Clark*, 3 Wend. (N. Y.) 637.

A, B and C were partners in business, C contributing one-half of the capital. A debtor of the firm conveyed to B certain lands in discharge of the debt. On a dissolution of the partnership business, by mutual consent, B conveyed one-half of the lands to C, B still retaining the legal title to the other half. B died leaving an only heir. *Held*, that in equity, B was a trustee of the firm, and that the trust was executed in part by the conveyance to C, that he was then the trustee of A, and on his death, his only heir, to whom the legal title

descended, became trustee in his stead. *Smith v. Ramsay*, 1 Gilm. (Ill.) 373.

A parol agreement to become partners in the business of buying and selling lands in Maine is void, under the statute of frauds. *Smith v. Burnham*, 3 Sumn. 435.

If, on the dissolution of a firm, one partner sells the partnership assets by public auction to a person who afterwards, in pursuance of a secret arrangement made with him before the sale, re-conveys them to him, he will be *held* in equity to account to the other partner as if no sale had been made, although such partner was present at the sale and made a bid for the assets himself. *Jones v. Dexter*, 130 Mass. 380. *Vide Coder v. Huling*, 27 Pa. St. 84.

1. Property purchased by guardian, in his own name, with his ward's money, stands charged with the same trust as did the money.

Caplinger v. Stokes, Meigs (Tenn.) 175; *Broyles v. Nowlin*, 59 Tenn. 191. Where slaves were purchased by a guardian at the administrator's sale, and the notes of the guardian were handed to him by the administrator as the distributive share of his ward, it is *held* that there was no payment made by the guardian, and that the slaves purchased are the property of the ward, whether such slaves be in the hands of the guardian or his vendee with notice of ward's equity. *Turner v. Petigrew et al.*, 6 Humph. (Tenn.) 438.

Property purchased by a guardian, with funds belonging to his ward's estate, and the title to which was taken in the guardian's name, will, at the option of the ward, be declared to be held in trust for him. A purchaser of property so held in trust, at a sale under an execution against the trustee, the purchaser having notice of the facts creating the trust, will be decreed to hold it as trustee. *Durling v. Hammar*, 20 N. J. Eq. 220.

Where a guardian uses the money of his ward in the purchase of lands, the ward is entitled to the results of the purchase, whether the guardian purchased for himself or his ward, or whether he use the money merely as agent and not as guardian. *Shelton v. Lewis*, 27 Ark. 190; *Johnson v. Dougherty*, 18 N. J. Eq. 406.

The mother of the plaintiffs was entitled, under the will of her deceased

committee, conservator or trustee of a lunatic;¹

husband, to the income of his estate until she should again marry, when the whole estate was to vest in plaintiffs. She having married W, permitted him to collect the rents belonging to the plaintiffs. Part of these he deposited in a bank, and the balance he used in his business. Under an arrangement between the mother, acting as guardian of the plaintiffs, and W, he purchased certain premises for the plaintiffs, paying towards the same \$4,700 of their money in his hands, and assuming the payment of a mortgage of \$10,000 then on the premises, and took the title in his own name, but for their benefit. *Held*, that there was a resulting trust in favor of the plaintiffs; that W, having, as the agent of his wife, received the rents belonging to the plaintiffs, he was their trustee, and they might follow the fund into his hands, and into any property in which he might invest it. *Schlaeffer v. Corson*, 52 Barb. (N. Y.) 510.

Though a title bought in by a guardian and co-tenant was in fact worthless, as they purchased it in good faith believing it would be beneficial to the estate of the wards and co-tenants, the purchasers are entitled to be reimbursed for a proportional part of the price paid, by the heirs who claim the benefit of a compromise obtained by using it. *Lee v. Fox*, 6 Dana (Ky.) 171.

A purchase of land by a guardian, which he declared at the time to be for the use of his ward, is not such a trust as can be enforced by the ward, but is within the provisions of the statute of frauds and perjuries. *Kisler v. Kisler*, 2 Watts (Pa.) 323.

The rule which requires strictness of proof to establish a trust may be relaxed in a case of parties who do not deal on equal terms, as in a case between guardian and ward, where the guardian has kept no accounts, a trust will more readily be presumed. *Snell v. Elam*, 2 Heisk. (Tenn.) 82.

Where a person borrows money of an infant's guardian, to be used in paying his notes for lands which he has purchased, with the understanding and agreement between them that, on the guardian's resignation in a short time, the guardian would take out letters of guardianship and receive his own notes from the former guardian as money, and this agreement is carried into effect

and the money is so used, the transaction does not create an equity in the ward to charge the lands with the payment of the money so borrowed and used. *Coles v. Allen et al.*, 64 Ala. 98.

A guardian of an infant having purchased real estate chiefly with the money of his ward, he, however, contributing a portion, and having taken title in his own name, a trust results in respect to the property in favor of the infant who may claim afterwards, not merely a lien as security for the money, but a proportionate share of the estate. *Bitzer v. Bobo* (Minn.), 38 N. W. Rep. 609.

Where a guardian purchases lands for himself, upon his own credit, and takes a conveyance, and afterwards, in violation of his duty, uses the money of his wards in payment of the purchase money, no trust in the land results or arises in favor of the wards. *French v. Sheplor*, 83 Ind. 266.

Land for which the title is in the wife's name was sold by the sheriff; on distribution of the balance after payment of liens, a judgment creditor of the husband claimed it, alleging that the land had been bought with money she held as guardian, and the husband being liable for her misappropriation, he had an equitable title to the land. *Held*, that the creditor had no standing in court on that ground, and the wards having a resulting trust in the land, the balance was theirs, and the wife had the right to receive it as guardian. *Hammett's App.*, 72 Pa. St. 337.

On the death of A, in 1834, her realty, subject to her husband's curtesy, descended to her two sons, B and C. The husband was appointed guardian of the son's estate, obtained legislative permission to sell their realty, and invested the proceeds, with other moneys, in a farm in his own name. Of this farm he subsequently sold large portions to *bona fide* purchasers without notice, mortgaged a part of the rest, and subsequently died insolvent in 1877. *Held*, that B had an equitable title or resulting trust in the unsold residue of the farm, to the extent of his part of the purchase money thereof. *Watson v. Thompson*, 12 R. I. 466.

1. Where the committee of a lunatic purchases real estate and takes the conveyance to himself, in violation of his trust, and pays the consideration with

agent;¹ attorney, solicitor or

money belonging to the lunatic, a trust results in favor of the lunatic; and this trust is retained by the 1 R. S. 728, § 53, and is turned into a legal estate by the 45th section of the same article (1 R. S. 728, § 45), and it is liable to be sold on execution, and descends to the heir-at-law, if not otherwise disposed of. *Reid v. Fitch*, 11 Barb. (S. Car.) 399.

1. If an agent, employed to purchase lands for his principal and with his money, upon the purchase thereof takes the title thereto in his own name without the knowledge or consent of the latter, he will be adjudged to hold the title as trustee for his principal, and, if sold and transferred by him, the proceeds in his hands will be impressed with a similar trust, and the court will compel him to account therefor. *Kraemer v. Deustermann* (Minn.), 3 N. W. Rep. 276; *Schlaefel v. Corson*, 52 Barb. (N. Y.) 510.

The owner of a mining claim sold for taxes requested another to buy it in and furnished purchase money therefor. The agent purchased in his own name. *Held*, that these transactions created a resulting trust in the owner's favor, although the agent made no express promise to act as such. *O'Connor v. Irvine* (Cal.), 16 Pac. Rep. 236.

An agent who buys land at the request of his principal, taking title in his own name, and advancing the money, which is afterwards repaid, holds in trust for his principal, under *California* civil code, providing that when a land transfer is made to one, and the consideration is paid by or for another, a trust is presumed to result in the latter's favor. *Heilman v. Messmer* (Cal.), 16 Pac. Rep. 766.

An agent or attorney buying property under a judgment of his principal becomes a trustee if he pay the money of his principal or purchase for less than his claim, but the principal is not obliged to take the land, or consider the purchaser as his trustee, but may elect to treat him as a debtor and claim the money instead of the property. *Eshelman v. Lewis*, 49 Pa. St. 410.

An agent employed to purchase for another, whether he be actually or constructively an agent, cannot purchase for himself, but is a trustee for his employer. *Church v. Sterling*, 16 Conn. 388. And the principal has an equitable

estate subject to all the incidents attaching to such estate. *Follansbe v. Kilbreth*, 17 Ill. 522.

The statute of limitations is not allowed to run in favor of a man who was employed to act as agent but purchased for himself. He is considered a trustee, and his employer shall be entitled to the benefit of the purchase. *Hutchinson v. Hutchinson*, 4 Des. (S. Car.) Eq. 77; *Chastain v. Smith*, 30 Ga. 96.

A, being aware that B wished to obtain shares in a certain company, represented to B that he, A, could procure a certain number of shares at £3 per share. B agreed to purchase at that price, and the shares were thereupon transferred, in part to him and in part to his nominees, and he paid A £3 a share. He afterwards discovered that A was in fact owner of the shares, having just bought them for £2 a share. *Held*, that, on the facts, A was an agent for B; and A ordered to pay back to B the difference between the price of the shares. *Kimber v. Barber*, L. R., 8 Ch. Ap. 56.

Where a party managing an estate uses funds belonging to the estate with which to buy an outstanding tax title on real estate, a resulting trust to the extent of that title will arise, by operation of law, in favor of the heirs entitled to the trust funds used, and the grantee will be considered as holding them as trustee. *Ward v. Armstrong*, 84 Ill. 151.

Parol proof cannot be received to establish a resulting trust in lands purchased by an agent and paid for by his own funds, no money of the principal being used for the payment; for the relation of principal and agent depends upon the agreement existing between them, and the trust in such a case must arise from the agreement and not from the transaction, and where a trust arises from an agreement it is within the statute of frauds, and must be in writing. This rule is so inflexible that, though the agent may be indicted and convicted of perjury, in denying his character as agent in his answer under oath, the court cannot decree and establish the trust. But if an agent invest his principal's money in real estate without his knowledge, or if, investing the money with his knowledge, he takes the deed in his own name without his consent, or take a deed in form con-

steward;¹ father who purchases in his own name with the funds of his children;² mother who purchases in her own name with the funds of her children;³ husband who purchases out of his wife's separate property or out of *savings* of his wife's separate property;⁴ but, where purchase is made from savings out of an allowance made by the husband or out of the wife's earnings, no trust

trary to the understanding, there will be a resulting trust. 1 Perry on Trusts (3rd ed.), § 135, and cases cited.

1. Where a steward had laid out money remitted to him in purchases of land in his own name, Lord Hardwicke thought the property so purchased liable, and that the steward should be presumed to have meant to do the just and honest thing. The estate was treated by Lord Bath as purchased with trust money. *Bennett v. Mayhew*, cited 1 Bro. Ch. *232; 2 Bro. Ch. 287; See *infra*, XII., 2, (1) and notes.

2. Where a father obtains money from the guardian of his children and invests it for their benefit in certain lands, taking the title in his own name, the father will be treated as holding the same in trust for said wards, and it will not be subjected to the judgment of a creditor, rendered against the father after such purchase, but upon a debt contracted by him before. *Robinson v. Robinson*, 22 Iowa 427.

3. Where a mother, a married woman, received money from her daughter, and declared that certain lands, purchased by and conveyed to her for about the amount so received, were purchased with that money and for her daughter, the lands will be decreed to be held in trust for the daughter. *Johnson v. Dougherty et ux.*, 18 N. J. Eq. 406.

Where a purchaser of land died without completing his payments, and afterwards the vendor without manifesting any desire or intention of declaring a forfeiture of the contract under a clause giving him such right, resold one-half of the lot to a third person, and the other half to the widow of the original purchaser, for the exact sum then due on the first contract, and the half sold to the widow was worth considerably more than the price paid by her, and she, on payment, obtained a conveyance, it was *held* there was no forfeiture declared, and she took the legal title in trust for the heirs at law of her husband. *Musham v. Musham*, 87 Ill. 80; *Seaman v. Cook*, 14 Ill. 501; *Stow v. Kimball*, 28 Ill. 93; *Roberts v.*

Opp, 56 Ill. 34; *Fox v. Doherty*, 30 Iowa 334.

A widow, occupant of town lots, married again, and on her death intestate, leaving a minor child, her husband took from the county judge, who had received a patent from the United States, a certificate of title in his own name, and subsequently sold the lots. *Held*, that the widow's interest was her separate property, vesting, on her death, in her husband and child as tenants in common, and that to the extent of the child's interest the husband held the legal title in trust, and a purchaser with notice took subject to the trust. *Everdson v. Mayhew*, 65 Cal. 163.

4. Resulting trust arises in favor of wife whose husband induces her to allow him to sell separate land of hers and to use the money thus derived to purchase other land with, where he takes the title in his own name. A court of equity will enforce the trust after his death against his heirs. *Pritchard v. Wallace*, 4 Sneed (Tenn.) 405; 70 Am. Dec. 254; *Goldsberry v. Gentry*, 92 Ind. 193.

A purchase of real estate with a wife's money, which was obtained on condition that the deed should be taken in the wife's name, would constitute the husband a trustee for his wife, independent of the act of 1848. And the subsequent giving of a judgment for the money would not convert his situation of trustee into that of a mere debtor. *Fillman v. Divers*, 31 Pa. St. 429.

Where land had been conveyed to husband and wife which was purchased with money loaned by the wife, and the husband afterwards exchanged it for other land, the deed to which, by express agreement with his wife, was to be executed to her in consideration for the loan, but which was inadvertently executed to him, *held*, that he took the land only as a trustee for his wife, and that it was not subject to his debts. *English v. Law*, 27 Kan. 242.

Where land is purchased by a husband for his wife with money

belonging to her separate estate, and a deed is made out to the husband, a resulting trust arises in her favor, and if, within the statutory period thereafter, in which a resulting trust must be declared in writing, the husband executes a deed to the wife, it operates as a valid conveyance of the legal title to her even as against his judgment creditors. *Hay v. Martin* (Pa.), 13 Cent. Rep. 217.

Where a tract of land, bought by the husband with money belonging to the wife, is sold and exchanged by him for another tract, the exchange does not affect her right to pursue her money and fasten a trust on the lands received in the exchange. *Walker v. Elledge*, 65 Ala. 51.

On a partition sale of lands of heirs including L, her husband became a purchaser, paying only the \$22 in excess of his bid over her interest in the proceeds of the whole sale, and took title in his own name. *Held*, that a resulting trust thereby arose in her favor. *Loffen v. Witboard*, 92 Ill. 461.

If, on purchase of land by a husband partly on credit, the cash payment is made with money furnished by the wife's father as an advancement to her, a resulting trust arises in her favor to the extent of such payment, which can be specifically enforced by her when the purchase money is wholly paid. *Lewis v. Montgomery Mut. Bldg. & Loan Ass.*, 70 Ala. 276.

A father placed trust funds in the hands of his son-in-law, for the benefit of his daughter. The son-in-law purchased real estate with the trust funds, and took the deed in his own name. *Held*, that the court would protect the real estate against a judgment and execution creditor of the husband. And if the husband expends his own money to a large amount in the improvement of the trust property for the purpose of protecting it from his creditors, the court might properly refuse its aid in protecting the trust property, and certainly would not interfere, except so far as to protect the fund in the property belonging to the wife. *Lathrop v. Gilbert*, 10 N. J. Eq. 344.

After a husband and wife had perfected a donation claim they sold it, the husband investing the proceeds in other land, to which he took title in his own name, living on it with his wife for more than twenty years and recognizing, during the whole of that time, her right

to an undivided half. *Held*, that there was a trust in her favor and the statute of uses did not affect it. *Springer v. Young*, 14 Oreg. 280.

Where it was agreed that the husband should invest the wife's money in land for the use of her and her son, or return it to her, *held*, that in the former alternative, a resulting trust would be created in the land in favor of the wife; in the latter, it would be money had and received to her use. *Resor v. Resor et al.*, 9 Ind. 347.

If the husband purchases lands with the proceeds of or accumulations of the wife's separate estate and takes title in his own name, a trust results to the wife, and she may elect to charge him personally or claim the purchase as her own; so also if part only of the purchase money is paid with such funds, or the husband uses them in making improvements on the lands, a resulting trust arises to the extent of the sums thus expended, and the wife may charge the lands and improvements with their repayment to her. *Tilford v. Torrey*, 53 Ala. 120.

Where a husband buys land with his wife's money, taking a deed therefor in his own name, without her consent, or with her consent, agreeing orally to hold the land in trust for her, a trust results in her favor, under section 2976 R. S., 1881. *Radcliff v. Radford*, 96 Ind. 482.

In 1870 a husband and wife owned certain lands, the latter an undivided one-eighth thereof, and they sold it to A and B, who paid the husband \$3,000 in cash, which he applied to his own use, and gave him a mortgage for \$12,000, the balance of the consideration. In 1875, A and B, in consideration of \$100, and the cancellation of their mortgage, reconveyed the premises to the husband. After his death, and on a partition of the premises, *held*, that the wife was entitled to one-eighth part thereof in her own right. *Bergstrasser v. Sayre*, 42 N. J. Eq. 488. Where a wife furnished to her husband one-half the purchase price of a farm upon an understanding that the title should be taken in her name, but she was present when the conveyance was made to her husband, and knew the fact and made no objection, *held*, that, under sections 2071, 2077, 2078, R. S., no trust resulted in favor of the wife, though she may have believed that her husband held the title in trust for her. *Skinner v. James*, 69 Wis. 605.

When a wife allows her husband to act as her agent in the care and investment of her money, no presumption of gift arises. On the contrary, if he invests it in real estate, and takes the title in his own name, a resulting trust arises in her favor. *Heath v. Slocum* (Pa.), 9 Atl. Rep. 259.

No Trust Results.—Where a legacy in the hands of a guardian of a married woman was used by him to purchase land, and the deed was made to her husband, with the parol understanding and agreement that the land was purchased for the wife, it was *held*, *HAMA, J.*, dissenting, that the purchase money was not the separate property of the wife, and that there was, consequently, no resulting trust in her favor. *Miller v. Blackburn*, 14 Ind. 62.

A married woman cannot assert an equitable lien on lands purchased by her husband on the ground that her funds were used by him in paying the purchase money, when the proof shows that the payment was in fact made with moneys borrowed by him on his individual credit, which he intended to repay from his wife's funds when received. *Crutcher v. Taylor*, 66 Ala. 217.

A husband bought land paying for it in part with his wife's money. This land he sold and bought other land, his wife joining with him in the sale. *Held*, that there was no resulting trust giving the wife a claim on the land last purchased. *Jennings v. Langdon* (Pa.), 11 Atl. Rep. 212.

The land was purchased by the wife with money derived from the estate of her deceased father, but title, contrary to her directions, was taken in the name of her husband, George Roy, who afterwards conveyed the land to a third person with the intention of having him convey it to the wife, which was done. During the time George Roy held the title he engaged in mercantile ventures, obtaining credit and contracting debts on the faith of his being the absolute owner of the land. These debts were put in judgment, which were liens on the land when George Roy parted with the legal title. Afterwards executions were issued and levied on the land, which was about to be sold by the sheriff, when this action was brought to enjoin the sale. *Held*, that, as between Mrs. Roy and these creditors, their equity must be preferred and the injunction denied. *Roy v. McPherson*, 1 Neb. 197.

Where a husband, entrusted with his wife's money to invest in real estate in her name, took the title in his own name, paying with her money, and after their separation a settlement was made between them by which he gave her certain furniture and \$800, in consideration of which she gave him a written release and full discharge from all claims, debts, demands, actions and causes of action of every kind and nature, it was *held* a complete bar to a bill subsequently filed by her against him to compel a conveyance of the real estate to her. *Moss v. Moss*, 95 Ill. 449.

Money settled to the separate use of the wife, and in the event of no children to her absolutely—with power to the trustees, with her consent, to invest it in land, is no lien on land purchased by husband having obtained the purchase money thereof from the trustees, the circumstances not raising the presumption as if he had been under an engagement to purchase, that his purchases were in pursuance of that engagement; and upon the evidence the fact of the application of the trust fund, or the inability of the husband, by other means, not being made out. *Lench v. Lench*, 10 Ves. 511.

Prior to the act of 1875, money of the wife, not her separate estate, became the property of the husband *jure mariti*, and if invested in land by him, no resulting trust would be thereby accredited in favor of the wife or those claiming under her. *Modrell v. Riddle*, 82 Mo. 31.

A purchased land with his wife's money and took a deed in his own name; subsequently A became replevin bail on a judgment obtained against a third party by one B, and the land was sold on execution against A, B becoming the purchaser, but without any notice of the resulting trust in favor of the wife. *Held*, that B's title to the land was good as against the wife. *Catherwood v. Watson*, 65 Ind. 576.

Trust Results in Favor of Husband.—

If a wife, without her husband's knowledge or assent, deposits his wages, placed in her hands for safe keeping, in a savings bank, and uses the deposits with money of her own in the purchase of land, the title to which she takes and holds in her own name, the husband has an equitable interest in the land, to reach and apply which, in payment of his debt, a creditor of the husband may maintain a bill in equity against his

results.¹ The rule applies to purchases or investments made by an assignee with the funds of his assignor and title taken in his own name;² to the case of a man who purchases an estate with money of the woman with whom he cohabits;³ to trustees or directors of a corporation purchasing lands in their own names with corporate funds.⁴

2. Following Trust Funds—Election.—Trust funds may be followed into any land or property, in which they may have been invested by the trustee, in spite of any transmutation of form or change of possession, so long as the property can be distinctly traced;⁵ but the trustee may elect to take the land or hold the

wife. *Bresnihan v. Sheehan*, 125 Mass. 111.

1. Trust Does Not Result Unless Land Was Purchased with Wife's Separate Estate.—Where a husband takes title, paying for land with money of his wife, which was not part of her separate estate, so as to make him her trustee, a trust does not result in her favor. *Waldron v. Saunders*, 85 Ind. 270.

Trust results if husband purchase with the savings of his wife's separate property, but not from an allowance made by him. *Merrill v. Smith*, 37 Me. 394; *Farley v. Blood*, 10 Foster 354; *Raybold v. Raybold*, 20 Pa. St. 308; *Henderson v. Moore*, 27 Miss. 830.

Where a *feme covert* purchases land with the consent of her husband, for her separate use, with means which she was the meritorious cause of acquiring, a trust results to the wife. *Pinney v. Fellows*, 15 Vern. 525.

Where, on a question between husband and wife as to which of them was the actual owner of certain land standing in the husband's name, the proof showed that the wife had paid for the land with her own savings and by the earnings of her children, which the husband had permitted her to have, and by loans from her own relatives; *held*, that the title to the land should be declared to be in the wife. *Barrett v. Foley*, 12 Cent. Rep. (N. J.) 577.

2. A recovered judgments against B and recorded them. B became assignee in bankruptcy of C, and invested assets in his possession in land which he took in his own name; for this he was removed and compelled to convey the land to a new assignee. Held, that the land standing in B's name was subject to a resulting trust in favor of the bankrupt estate, and that A acquired no lien on said land. *Flanders v. Thompson*, 3 Woods (U. S.) 9.

3. James v. Holmes, 4 De G. F. & J. 470.

4. It is a fraud upon the rights of a railway corporation if a director who buys land for the use and benefit of the company and pays for them with its funds, takes title in his own name or jointly with others; and the nominal grantees would hold in trust for the company. *Michigan Ry. Co. v. Melles*, 44 Mich. 321; *Stratton v. Dialogue*, 16 N. J. Eq. 70; *Church v. Wood*, 5 Hamm. (Ohio) 283.

5. Story Eq. Juris., vol. 2, § 1210, and note. *Taylor v. Plumer*, 3 M. & Selw. 562; *Cunard v. Atlantic Ins. Co.*, 1 Peters S. C. R. 448; *Liebman v. Harcourt*, 2 Meriv. 513; *Chedworth v. Edwards*, 8 Ves. 46; *Ryall v. Ryall*, 1 Atk. 59; s. c., *Amb. 412*, 413; *Lane v. Dighton*, *Ambler R.* 409; *Atherley on Marr. Sett.*, ch. 28, pp. 442-444; *Buckeridge v. Glasse*, 1 Craig & Phil. 126; *Schlaefler v. Corson*, 52 Barb. 510; *White v. Drew*, 42 Mo. 561; *Martin v. Greer*, 1 Ga. Dec. 118; *United States Bank v. State Bank*, 96 U. S. 30; *Moffitt v. McDonald*, 11 Humph. (Tenn.) 457; *Walker v. Brungard*, 21 Miss. 723; *Lehman v. Lewis*, 62 Ala. 129; *King v. Hamilton*, 16 Ill. 190; *Newton v. Porter*, 69 N. Y. 133; *Bank v. Pollock*, 4 Edw. Ch. (N. Y.) 215.

In the case of a purchase of land by a trustee in his own name, in pursuance of the trust, the *cestui que trust* is entitled to the estate. But where it is purchased with trust money in violation of the trust, MR. ATHERLEY is of opinion that the *cestui que trust* has a lien only on the estate, and not a right to the estate. There is much sound sense in the distinction; but he admits *Bennet v. Mayhew* is apparently against it. *Atherley on Marr. Sett.*, ch. 28, pp. 443, 444.

So, too, where the fund is invested in.

trustee personally liable.¹

3. Time of Payment.—Such payment by the fiduciary must be made at the time the contract is entered into, or provision made therefor.²

personality, as in railway stocks. *Ex parte Cooke*, 4 Ch. Div. 123; *Story Eq. Juris.*, §§ 1255, *et seq.*

It has been held in some English decisions, approved in *Wallace v. Duffield*, 2 S. & R. (Pa.) 521; *Harrisburgh Bank v. Tyler*, 3 W. & S. (Pa.) 373; *Wallace v. McCullough*, 1 Rich Eq. (So. Car.) 426, that a trust is not fastened upon the property acquired under such circumstances, and that the *cestui que trust* can claim only a lien upon it, and a consequent decree of sale; but this is contrary to the current authority. A *cestui que trust* may elect to claim a lien, however. *Smith v. Perry*, 56 Ala. 266.

Where a husband bought lands for his wife with her money, taking the deed to himself, and agreeing to hold them in trust for her, and afterwards sold them without notice of the trust, taking in payment a note payable to himself, which, without his wife's consent, he assigned to one having notice of the trust, held, that she was entitled to the proceeds of the note. *Boyer v. Libey*, 88 Ind. 235.

But where a depositor drew out all of his deposit, including trust moneys, except a trifling balance, and used it chiefly for the purpose of loan, and for taking up outstanding notes, and for various other purposes outside of his mercantile business, it cannot be held that on the formation of a partnership in a mercantile business, several years afterwards, any part of the trust fund is traceable into the partnership assets. *Englar v. Offutt* (Md.), 19 Md. L. J. 947; 16 Atl. Rep. 497.

But compare *Campbell v. Drake*, 4 Ired. Eq. (N. Car.) 94; *Pascoag Bank v. Hunt*, 3 Edw. Ch. (N. Y.) 583.

1. Election.—Where such a purchase has been made by a guardian with the money of his ward, the ward may, on coming of age, at his option, take the money or the property, and if with full knowledge of the facts and of his rights he elects the money, the property discharged of the trust vests in the guardian absolutely. *Caplinger v. Stokes*, Meigs (Tenn.) 275; *Broyles v. Nowlin*, 59 Tenn. 191; *Durling v. Hammer*, 20 N. J. Eq. 220; *Docker v. Somes*, 2 My. & K. 655.

So where land is purchased by an agent in his own name, the principal is not obliged to take the land or treat the agent as his trustee, but may elect to treat him as a debtor, and take the money instead of the land. *Eshelman v. Lewis*, 49 Pa. St. 410.

And where a husband purchases with proceeds of his wife's separate estate, a trust results to the wife, and she may elect to charge him personally, or claim the purchase as her own. *Tilford v. Torrey*, 53 Ala. 120; *Turner v. Pettigrew*, 6 Humph. (Tenn.) 438; *Wilkinson v. Wilkinson*, 1 Head (Tenn.) 305; *Admx. Doge v. Cole*, 97 Ill. 338; *Barker v. Barker*, 14 Wis. 131. But if a trustee buy up a debt intending it for the *cestuis que trust*, and they refuse to take it or pay the purchase money, they cannot, after lying by for a length of time, step forward when the speculation turns out profitably and claim the debt for themselves. *Barwell v. Barwell*, 34 Beav. 371; *Barksdale v. Finney*, 14 Gratt. 338; *King v. Cushman*, 41 Ill. 31; *Herr's Est.*, 1 Grant Ca. 272; *Schoonmaker v. Van Wyke*, 31 Barb. (N. Y.) 457.

It is to be observed, however, that where such employment of fiduciary funds is unauthorized and wrongful in itself, the parties affected are not confined to the mere enforcement of a resulting trust, but may instead elect to take the money back. *Oliver v. Piatt*, 3 How. (U. S.) 333; *Bonsall's App.*, 1 Rawle (Pa.) 266; *May v. LeClaire*, 11 Wallace 217; *Baker v. Disbrow*, 18 Hun (N. Y.) 29; *Steele v. Babcock*, 1 Hill (N. Y.) Rep. 527.

2. Whether payment is made to the vendor directly, or to the nominal grantee to reimburse him, or to meet the payment, it is essential that such payment be proven to have been made before the consummation of the purchase. It is unsettled whether, if part is paid before and part after the deed is delivered, the proof of a parol agreement to hold the land in trust may be admitted. It seems admissible. Freeman v. Clarke, 1 Hoffm. Ch. (N. Y.) 90. The trust arises whether the payment be made before or after the purchase, the essence of the transaction being the purchase with trust funds. Lehman v.

4. Evidence.—The facts in all cases must be proved with great clearness and certainty.¹ For this purpose all competent evidence is admissible, as the admissions of the nominal purchaser and grantee in the deed;² recitals in the deed and other proper

Lewis, 62 Ala. 129. *Vide* also Lewis v. Montgomery Bldg. Assoc., 70 Ala. 276; French v. Sheplor, 83 Ind. 266; Forsythe v. Clark, 3 Wend. (N. Y.) 637.

1. Where a husband purchases land with his wife's money, a trust results in favor of the wife; but clear and convincing proof that the money belonged to the wife is necessary to establish such trust. Thomas v. Standiford, 49 Md. 181. And see Wallace v. Duffield, 12 R. I. 466.

All personal property of wife in possession, whether at the time of marriage or afterwards acquired, vests absolutely in the husband, unless conveyed to him or her for her sole and separate use, and he cannot be declared a trustee for his wife by any loose or general remarks made in conversations. To establish such a trust the evidence must be clear and unequivocal. Woodward v. Stephens, 51 Mo. 443.

The evidence must be clear and convincing that shall warrant setting up a resulting trust against the legal title. The declarations of a husband as to the purchase of the land, inaccurate and inconsistent with the proven facts of the case, are of doubtful admissibility in favor of the wife in a contest with her husband's creditors, and are not such unequivocal, convincing and satisfactory evidence as will establish a resulting trust in her favor against the legal title. Kline's Appeal, 39 Pa. St. 463.

Whenever the question arises as to the passing of property from the wife to the husband, it must be closely scrutinized, if the husband claims it as a gift to him; and it must clearly appear that it was a free and voluntary gift by the wife to the husband, and if the evidence does not clearly establish that the same was a gift, then the husband is liable to the wife for all such property as went into his hands and was used by him. Sasser v. Sasser, 73 Ga. 275.

A having entered into articles of agreement for the purchase of certain land, B, his wife, agreed to advance a large part of the purchase money, with the understanding that the conveyance of the land was to be made to her. The deed was, however, prepared with

the name of A as grantee, and notwithstanding his wife's protest A declined to allow it to be altered, had it executed in that form, and paid as part of the consideration, certain of his wife's money, which she had entrusted to him. Subsequently A made and delivered to B a promissory note for that amount of her money which he had used in the purchase of the land. Held, that the above facts were sufficient to raise a resulting trust for the benefit of B to the extent of the money contributed by her to the purchase of the land. Rapp's App., 100 Pa. St. 531.

But where the husband is permitted by the wife to have the management of her separate property, secured to her by a marriage settlement, to receive rents, etc., very strict proof of his having paid to and settled with her, during her lifetime, for the sums received, is not required; but from the confidential nature of the connection, the most favorable presumptions are indulged towards him. Methodist Ch. v. Jaques, 3 Johns. Ch. (N. Y.) 77. And see Snell v. Elam, 2 Heisk. (Tenn.) 82. And see *supra*, V, 9-17.

2. While the rules of law require the most satisfactory and convincing evidence to establish a resulting trust, it is now well settled that such a trust may be established upon the admissions of the trustee sought to be charged as such. Pillow v. Thomas, 1 Baxt. (Tenn.) 120; Raybold v. Raybold, 20 Pa. St. 308; Baumgartner v. Guessfield, 38 Mo. 36.

And the declaration of one executor is sufficient to raise a trust. Wallace v. Duffield, 2 S. & R. (Pa.) 521.

Though the deed recites the consideration to have been received from the nominal purchaser, yet the *cestui que trust* will be allowed to prove, by the trustee himself, that it was her money. Pinney v. Fellows, 15 Vt. 525.

In order to constitute a trust in respect to money or personal estate, no formal writing or agreement is necessary. Any declaration or admission by the person in possession of the fund will have that effect, if founded on a consideration, and if the intention be evinced with sufficient clearness. Such

documents;¹ and even circumstantial evidence, as that the means of the nominal purchaser were so limited that it was impossible for him to pay the purchase money.²

5. Lapse of Time.—Mere lapse of time is no bar to the enforcement of a resulting trust, if good excuse is given; but, otherwise, equity will not enforce after great delay.³

6. Notice.—A *bona fide* purchaser of a trust estate for a valuable consideration without notice takes the estate discharged of the trust.⁴

declarations or admissions are evidence of the trust, not only against the party who made them, but also for the purpose of charging lands afterwards purchased by another person. *Day v. Roth*, 18 N. Y. 448; *Harrold v. Lane*, 53 Pa. St. 268.

See *supra*, §§ V, 9-17.

But the burden of proof is on the trustee. *Watson v. Thompson*, 12 R. I. 466.

See *supra*, V, 11.

1. A trust in real estate in a grantee may be proved by an endorsement made by him on an envelope enclosing the deed; also by an unexecuted deed for the premises prepared by the direction of the grantee. *Raybold v. Raybold*, 20 Pa. St. 308.

2. If it can be proved that land standing in the name of her husband at the time of his death was purchased with the wife's money, then, as between her and the heirs at law, or volunteers claiming under her husband, a trust would result to her, being implied by law from the intentions of the parties and the justice of the case, and which, being excepted out of the statute of frauds, may be proved by parol. *Brooks v. Dent*, 1 Md. Ch. 523.

A wife gave her husband \$1,000 to invest for her, and pay her the income, and, both in conversation and in wills made by him afterwards, he recognized it as something to be repaid. *Held*, that the relation of trustee and *cestui* was created and that no satisfaction or release of the obligation was shown by the fact that the wife afterwards borrowed \$900 from the husband and repaid it without asking for an accounting as to the \$1,000. *Rusling v. Rusling's Exrs.* (N. J.), 8 Atl. Rep. 534.

Where there is no direct proof that the wife furnished the purchase money, or that the husband agreed to hold the land in trust for her, the manner in which he used and improved it, such as clearing and cultivating it, is admissible

in evidence to enable the jury to determine how he in fact held it. *Goldsberry v. Gentry*, 92 Ind. 194.

The giving of notice by the wife, that she claimed the benefit of the exemption law out of the property, and the subsequent renting of it from the purchaser, though strong evidence against the wife, would not estop her from setting up a resulting trust in the land. *Fillman v. Divers*, 31 Pa. St. 429.

Where without her husband's knowledge and against his will, the wife took in her own name the title to lands for which he paid the purchase money and all the taxes and assessments, and costs of improvements, and he continuously occupied the property up to her death. *Held*, that a trust resulted in his favor and that he was entitled to relief as against her heirs at law. *Gogherty v. Bennett*, 37 N. J. Eq. 87; *Harden v. Darwin*, 66 Ala. 55; and see *supra*, V, 9-17.

3. *Harris v. McIntyre*, 118 Ill. 275. In *Henkle v. Floring*, 114 Ill. 554, fifteen years was *held* to be no bar, while in *Rogers v. Saunders*, 16 Me. 92; s. c., 33 Am. Dec. 635, three years was *held* to be a bar. Where a bill showed equity on its face, a lapse of twenty years from creation of the trust was *held* not to bar that equity. *Smith v. Ramsay*, 1 Gilm. (Ill.) 373. *Vide* also *Barwell v. Barwell*, 34 Beav. 371; *King v. Cushman*, 41 Ill. 31; *Schoonmaker v. Van Wyke*, 31 Barb. (N. Y.) 457; *Midmer v. Midmer*, 26 N. J. Eq. 299; *Jennings v. Shacklett*, 30 Gratt. (Va.) 705; *Barksdale v. Finney*, 14 Gratt. (Va.) 338; *Kennedy v. Kennedy*, 25 Kan. 151; *Dow v. Jewel*, 18 N. H. 340; s. c., 45 Am. Dec. 371; *Hennessey v. Walsh*, 55 N. H. 515; *Best v. Campbell*, 62 Pa. St. 478; *Herr's Estate*, 1 Grant's Cas. (Pa.) 272.

4. A purchaser of a trust estate, without notice of the trust, will be protected to the extent of his payments made before notice. *Beck v. Uhrich*,

7. Trustee Incurring Expenses About Trust Estate.—Where the trustee has incurred expenses or made permanent improvements he will be allowed to retain the estate until his advances are paid.¹

VII. RESULTING TRUSTS OF THE THIRD CLASS—When the Trusts of a Conveyance Are Not Declared or Fail.—This class includes² gifts or

13 Pa. St. 636; *Talbott's Exrs. v. Bell's heirs*, 5 B. Mon. (Ky.) 320; s. c., 43 Am. Dec. 126; *Bunting v. Ricks*, 2 Dev. & Bat. Eq. (N. Car.) 130; s. c., 32 Am. Dec. 699, and cases cited in notes.

To establish a resulting trust against a purchaser at a sheriff's sale against the alleged trustee, it is necessary to establish not only the existence of the trust, but also that the defendants who had purchased the title of the trustee had knowledge of the trust at the time of the purchase. *Fillman v. Divers*, 31 Pa. St. 429.

Where a husband holding the title to real estate purchased with funds of his wife so as to make him a trustee for her, survives her, marries again and dies intestate, his widow takes by descent and not by purchase, and is bound by the trust, whether she had notice of it or not. *Derry v. Derry*, 74 Ind. 560.

The husband is accountable for the rents and profits of the wife's real estate received by him, and lands purchased by him with the moneys of the wife are deemed to be held in trust for her, though purchased in his own name; and a third person to whom the husband had conveyed an estate so purchased, with notice of the manner of his acquiring it, was held to be chargeable with the trust. *Methodist Ch. v. Jones*, 1 Johns. Ch. (N. Y.) 450; *Brooks v. Dent*, 1 Md. Ch. 523; *Pritchard v. Wallace*, 4 Sneed (Tenn.) 405, 70 Am. Dec. 254; *Barron v. Barron*, 24 Verm. 375; *Lyon v. Akin*, 78 N. Car. 258; *Goldsberry, Admr. v. Gentry*, 92 Ind. 193; *Tilford v. Torrey*, 53 Ala. 120.

If a guardian of minor children uses his wards' money to purchase land and takes a deed acknowledging the receipt of the consideration paid by him, "guardian of the minor children" of A., but running to himself, his heirs and assigns, without otherwise referring to his guardianship, this is sufficient to give notice to creditors of the guardian that the land is held by him in trust. *Bancroft v. Consen*, 13 Allen (Mass.) 50. *Vide also*, *Baldwin v. Johnson*, 1 Saxt. (N. J.) 441; *Durling v. Hammer*, 20 N. J. Eq. 220; *Watson v. Thompson*,

12 R. I. 466; *Everdson v. Mayhew*, 65 Cal. 163; *Edgar v. Donally*, 2 Munf. (Va.) 387; *Catherwood v. Watson*, 65 Ind. 576; *Barrett v. Bamber*, 81 Pa. St. 247; *Coder v. Huling*, 27 Pa. St. 84; *Louisville Bank v. Gray*, 84 Ky. 565.

1. *Bodwell v. Nutter*, 63 N. H. 446; *Rines v. Bachelder*, 62 Me. 95.

2. **English Authorities.**—*Aston v. Wood*, L. R. 6 Eq. 419; *Symes v. Hughes*, L. R., 9 Eq. 475; *Richards v. Delbridge*, L. R., 18 Eq. 11; *Wild v. Benning*, L. R., 2 Eq. 577; *Fisk v. Att'y Gen'l*, L. R., 4 Eq. 521; *Haigh v. Kaye*, L. R., 7 Ch. 469; *Pawson v. Brown*, L. R., 13 Ch. Div. 202; *Cruse v. Barley*, 3 P. Wms. 20; *Robinson v. Taylor*, 2 Bro. Ch. 589; *Stubbs v. Sargon*, 3 My. & Cr. 507; *Stansfield v. Habergam*, 10 Ves. 273; *Ripley v. Wentworth*, 7 Ves. 425, 435; *Gibbs v. Rumsey*, 2 V. & B. 294; *Ommaney v. Butcher*, 1 T. & R. 260, 270; *Wood v. Cox*, 2 My. & Cr. 684; *Fowler v. Garlike*, 1 Russ. & M. 232; *Dawson v. Clarke*, 18 Ves. 247, 254; *Morice v. Bp. Durham*, 10 Ves. 537; *Pratt v. Sladden*, 14 Ves. 193, 198; *Sidney v. Shelley*, 19 Ves. 352, 359; *Collins v. Wakeman*, 19 Ves. 683; *Dunnage v. White*, 1 J. & W. 563; *Stoathouse v. Bate*, 2 V. & B. 396; *Brookman v. Hales*, 2 V. & B. 45; *Woollett v. Harris*, 5 Madd. 452; *Atty. Gen. v. Windsor*, 8 H. L. Cas. 369; s. c. 24 Beav. 679; *Gloucester v. Osborn*, 1 H. L. Cas. 272; s. c. 3 Hare 131; *Goodere v. Lloyd*, 3 Sim. 538; *Taylor v. Haygarth*, 14 Sim. 8; *Flint v. Warren*, 16 Sim. 124; *Coard v. Holderness*, 20 Beav. 147; *Onslow v. Wallis*, 1 Macn. & G. 506; *Barrs v. Fewkes*, 2 Hem. & M., 60; *Leslie v. Duke Dev.*, 2 Bro. Ch. 187; *Vezey v. Jamison*, 1 S. & S. 69; *Ellis v. Selby*, 1 My. & Cr. 286; *Williams v. Kershaw*, 5 Cl. & Fin. 111; *Ackroyd v. Smithson*, 1 Bro. Ch. 503; *Spink v. Lewis*, 3 Bro. Ch. 355; *Hutcheson v. Hammond*, 3 Bro. Ch. 128; *Williams v. Coade*, 10 Ves. 500; *Muckleston v. Browne*, 6 Ves. 52, 63; *Davenport v. Coltman*, 12 Sim. 588, 610; *Childers v. Childers*, 1 De G. & J. 482; *Philpotts v. Philpotts*, 10 C. B., 85; *Flitcroft's Case*, 21 Ch. D. 519, 525.

conveyances of property by will or deed, stated to be upon some particular trust, but no trust is declared;¹ or upon trusts there-

United States Courts.—*Phillips v. Crammond*, 2 Wash. (U. S.), 441; *Taylor v. Benham*, 5 How. (U. S.), 270; *Osterman v. Baldwin*, 6 Wall. (U. S.), 116; *King v. Mitchell*, 8 Pet. 349; *Baptist Association v. Hart's Exrs.*, 4 Wheat. (U. S.) 1; *Fontain v. Ravanel*, 17 How. (U. S.), 369; *Mumma v. Potomac Co.*, 8 Pet. (U. S.) 281, 286.

State Courts.—*Bennett v. Hutson*, 33 Ark. 762; *Brown v. Jones*, 1 Ark. 188; *Kennedy v. Nunan*, 52 Cal. 326; *McAlister v. Willey*, 52 Ind. 3826; *Ford's Exrs. v. Lewis*, 10 B. Mon. (Ky.) 127; *Howard v. Am. Peace Soc.*, 49 Me. 288; *Dashiell v. Att'y Gen'l*, 6 Har. & J. (Md.) 1; *Needles v. Martin*, 33 Md. 609, 618; *Wildeman v. Mayor & City Council Balto.*, 8 Md. 551; *Nichols v. Allen*, 130 Mass. 211; *Olliffe v. Wells*, 130 Mass. 221; *McElroy v. McElroy*, 113 Mass. 509; *Shaw v. Spencer*, 100 Mass. 388; *Sturtevant v. Jaques*, 14 Allen (Mass.) 526; *Easterbrooks v. Tillinghast*, 5 Gray (Mass.) 17; *Sanderson v. Stearns*, 6 Mass. 37; *Loring v. Elliott*, 16 Gray (Mass.) 568; *Stone v. Hobart*, 8 Vick. (Mass.) 464; *Hall v. Cushing*, 9 Pick. (Mass.) 395; *Nash v. Cutler*, 19 Pick. (Mass.) 67; *Pratt v. Beaupre*, 13 Minn. 187; *Alsworth v. Cordby*, 3 Miss. 32; *Leiper v. Hoffman*, 26 Miss. 615; *Stratt v. Uhrig*, 56 Mo. 482; *Baldwin v. Campbell*, 9 N. J. Eq. 891; *Cutler v. Tuttle*, 19 N. J. Eq. 562; *Hogan v. Jaques*, 19 N. J. Eq. 123; *Power v. Cassidy*, 79 N. Y. 602; *Hawley v. Tames*, 5 Paige (N. Y.) 318; *Proseus v. McIntyre*, 5 Barb. (N. Y.) 425; *Leggett v. DuBois*, 5 Paige (N. Y.) 114; *Austin v. Brown*, 6 Paige (N. Y.) 448; *Dillaye v. Greenough*, 45 N. Y. 438; *Ayres v. Church*, 3 Sandf. Ch. (N. Y.) 357; *Yates v. Yates*, 9 Barb. (N. Y.) 345; *Bascom v. Albertson*, 34 N. Y. 584; *Lemmond v. Peoples*, 6 Ired. Eq. (N. Car.) 137; *Mullen v. Bowman*, 1 Coll. (N. Car.) 197; *Miller v. Atkinson*, 63 N. Car. 537; *Griffin v. Graham*, 1 Hawks. (N. Car.) 96; *State v. McGowan*, 2 Ired. Eq. (N. Car.) 9; *Kerlin v. Campbell*, 15 Pa. St. 500; *Farley v. Shippen*, Wythe (Va.) 135; *Hale v. Home*, 21 Gratt. (Va.) 112.

1. 2 Story's Eq. Jur. (13th ed.), § 1200. *Brown v. Jones*, 1 Atk. 188; *Stanisfield v. Habergam*, 10 Ves. 273; *Hawley v. James*, 7 Paige (N. Y.) 213; *Bogert v. Hertell*, 4 Hill (N. Y.) 492;

Hewitt v. Wright, 1 Bro. Ch. 86; *Robinson v. Taylor*, 2 Bro. Ch. 589; *North v. Valk*, C. W. Dud. Eq. 212.

Testator bequeathed as follows: "I give to the trustees of Mount Zion Chapel, where I attend, £3,500, and appoint as trustees to the same A and G; and I direct that their receipt shall be a sufficient discharge to my executors; and the money to be appropriated according to statement appended." There was no statement appended. *Held*, that the gift was not intended to be for A and G beneficially; that the court could not presume a charitable object in the bequest; and if not charitable, that object is so indefinite that the gift must fail. *Aston v. Wood*, L. R., 69 Eq. 419.

What Is a Sufficient Declaration.—D was possessed of leasehold business premises and stock in trade; shortly before his death purported to make a voluntary gift in favor of his grandson E, who was an infant and who assisted in the business, by the following memorandum signed and endorsed on the lease: "This deed and all thereto belonging I give to E from this time forth, with all the stock in trade." The lease was delivered to E's mother on his behalf. *Held*, that there was no valid declaration of trust of the property in favor of E. *Richards v. Delbridge*, L. R., 18 Eq. 11.

A bequest to "the suffering poor of the town of Auburn" is not void for uncertainty; nor because no trustee to execute the trust is expressly named in the will. *Howard v. Am. Peace Soc.*, 49 Me. 288; *Saunderson v. Stearns*, 6 Mass. 37; *Stone v. Hobart*, 8 Pick. (Mass.) 464; *Hall v. Cushing*, 9 Pick. (Mass.) 395; *Nash v. Cutler*, 19 Pick. (Mass.) 67.

So of a bequest to the "General Assembly of the Presbyterian church in Confederate States" for the benefit of bible and tract societies. *Frierson v. Gen. Assembly Presbyterian Church*, 7 Heisk. (Tenn.) 683.

So a bequest to the overseers of a "Friends preparatory meeting," in trust for the benefit of the Friends of a particular place. *Dexter v. Gardner*, 7 Allen (Mass.) 243.

So a devise of land and money for the purpose of maintaining a "school house and school to be taught by a female or females, wherein no book of instruc-

after to be declared, but no such declaration is made;¹ or upon some trust which has failed either in whole or in part and become inoperative;² or the particular trusts are so uncertain, indefinite

tion is to be used to teach except spelling books and the bible." *Tainter v. Clark*, 5 Allen (Mass.) 66.

So a bequest to trustees of a sum "to be by them applied for the promotion of agricultural or horticultural or philanthropic purposes, at their discretion." *Rotch v. Emerson*, 105 Mass. 431.

So a devise to an executor in trust to apply the residue "to the education of colored children in the State of Indiana. *Ex parte Lindley*, Ex., 32 Ind. 367.

And a devise and legacy to "Bishop Thomas Atkinson, bishop of North Carolina, and his heirs in trust for the poor orphans of the State of North Carolina, and the said bishop and his successors, have the right to select such orphans, and he shall direct and control said trust in the best way for the support of said orphans and the formation of their morals and education," creates a trust for a specified object in behalf of a definite class and is valid. *Miller v. Atkinson*, 63 N. Car. 537.

When the "remaining portion" of an estate is by will given to a legatee "to be disposed of as I have already directed," without proof of a further declaration of the trust, the interest so undisposed of is held by the trustee as a resulting trust for the heirs at law. *Robinson v. McDiarmid*, 87 N. Car. 455.

No Trust Declared as to Residue.—

Where an assignment is made for the benefit of creditors those creditors who have received dividends out of the property assigned are, in the absence of any stipulation to the contrary, entitled to any unclaimed dividends in the hands of the trustees and, *semble*, also to the original debtor. *Wild v. Baring*, L. R., 2 Eq. 577.

If lands are given to a body, which is itself an object of charity, but given subject to the payment of specific sums to other objects of charity, the increased income will belong to the body to which the lands have been given, and the other objects can claim nothing beyond the specific charges. *Atty. Gen. v. Windsor*, 8 H. L. C. 369.

1. *Brookman v. Hales*, 2 V. & B. 45; *Sidney v. Shelley*, 19 Ves. 352; *Biddulph v. Williams*, 1 Ch. Div. 203; *Emblin v. Freeman*, Pr. Ch. 541; *City*

of London *v. Garway*, 2 Vern. 571; *Collins v. Wakeman*, 2 Ves. jun. 683; *Fitch v. Weber*, 6 Have. 145; *Shaw v. Spencer*, 100 Mass. 388; *Sturtevant v. Jacques*, 14 Allen 526.

2. When a trust is ineffectually declared, or fails, the party taking it becomes trustee for carrying out the purposes of other trusts in the will, or for those who are to take under the disposition of law. *Stonehouse v. Evelyn*, 3 P. Wms. 252; *Cooke v. Stationers' Co.*, 3 My. & K. 262; *Dunage v. White*, 1 J. & W. 563; *Southouse v. Bate*, 2 V. & B. 396; *Eastbrooks v. Tillinghast*, 5 Gray (Mass.) 17; *Drew v. Wakefield*, 54 Me. 291; *Lusk v. Lewis*, 32 Miss. 297; *Cushney v. Henry*, 4 Paige (N. Y.) 345; *Hawley v. James*, 5 Paige (N. Y.) 318; *Pennoyer v. Shelden*, 4 Blatchf. (U. S.) 316; *Haskell v. Freeman*, 1 Wins. (N. C.) 34.

Therefore a bequest by a citizen of Virginia to "The Baptist Association, that for ordinary meets at Philadelphia annually, which I allow to be a perpetual fund for the education of youths of the Baptist denomination who shall appear promising for the ministry," the association not being an incorporated body at the testator's death could not take this trust as a society. *Baptist Association v. Hart's Exrs.*, 4 Wheat. (U. S.) 1. See also *State v. Warren*, 28 Md. 338; *Grimes v. Harmon*, 35 Ind. 198.

So where there is a qualified conversion by will, that portion of the fund which fails of its object does not pass with the residue, but results to the party who would have been entitled to the real estate if unsold. 2 *Story Eq. Jur.* (13th ed.), § 793; *Bogert v. Hertell*, 4 Hill (N. Y.) 492; *Williams v. Coade*, 10 Ves. 500; *Harker v. Reilly*, 4 Del. Ch. 72. See title EQUITABLE CONVERSION AND RECONVERSION.

And where a devise was made to a man on condition of his marrying a daughter of a certain person, who never had a daughter, the devisee holds the land as a resulting trust for the heirs of the testator. *King v. Mitchell*, 8 Pet. (U. S.) 326. And so a devise to a corporation thereafter to be created was void. *Zeisweiss v. James*, 63 Pa. St. 465.

and vague that they cannot be carried into effect;¹ or they lapse;² or are illegal³—in all of these cases a trust, either with reference to the whole property or to the residuum, results in favor of the grantor, or the heirs, residuary devisees or legatees,

1. Where Trust Is Uncertain.—A direction by testator to his trustees to apply the residue of his personal estate to and for such benevolent, charitable and religious purposes as they in their discretion should think most advantageous and beneficial, and for no other use, intent or purpose, is void for uncertainty. 5 Cl. & Fin. 111; *Fowler v. Garlike*, 1 R. & M. 232; *Ellis v. Selby*, 1 My. & Cr. 286; *Vesey v. Jamison*, 1 Sim. & Stu. 69; *Gloucester v. Osborn*, 1 H. L. Cas. 272.

A will, after several bequests to individuals and to charitable corporations, contained the following clause: "After payment of the foregoing legacies, and all expenses and charges in the settlement of my estate, should there be any surplus, I give and bequeath the same to my executors and the survivor of them, or their successors, if any such should be appointed to administer on my estate, to be by them distributed to such persons, societies or institutions as they may consider most deserving." By a separate clause two persons were appointed executors. *Held*, that the executors took the bequest in trust; that the trust was not a charitable one, and was too indefinite to be carried into effect; and that the next of kin took by way of resulting trust. *Nichols v. Allen*, 130 Mass. 211; *Olliffe v. Wells*, 103 Mass. 221.

Testator, after bequeathing legacies to various persons, concludes his will: "In case there is any money remaining I should wish it to be given in private charity." *Held*, that private charity was an object too indefinite to give the crown jurisdiction, or to enable the court to execute the trust. *Ommaney v. Butcher*, 1 T. & R. 260; *Leslie v. Duke Dev.* 2 Bro. Ch. 187.

A devise to trustees for "the education of free colored persons in the city of Baltimore" *held* void for uncertainty. *Needles v. Martin*, 33 Md. 609; *Dashiell v. Atty. Gen.*, 5 H. & J. 392; s. c., 6 H. & J. 1.

Wildeman v. Mayor & City Council Baltimore, 8 Md. 551; and so of a devise "for the propagation of the gospel in foreign lands." *Carpenter v. Miller*, 3 W. Va. 174; and so a devise of

a certain portion of the income annually to the trustees of Hillsborough school to be by them applied towards feeding, clothing and educating the poor children of Caroline county was *held* void for uncertainty as to the persons to take under it. *Dashiell v. Atty. Gen.*, 6 Har. & J. (Md.) 1.

But where, from proceeds of sale of his estate, testator directed one third of residuary estate "to be divided among such Roman Catholic charities, institutions, schools or churches in the city of New York" as the majority of his executors should decide, and in such proportions as they should think proper, this was not void for uncertainty. *Power v. Cassidy*, 79 N. Y. 602.

2. Testatrix gave a legacy to a charitable institution which was dissolved in her lifetime. *Held*, that the legacy lapsed and fell into the residue, and could not be applied *cy pres*. *Fisk v. Atty. Gen.*, L. R., 4 Eq. 521.

Renewal of a college lease by tenant for life, with a power of appointment, in her own name and at her expense, has not the effect of an appointment in her favor. And by the death of her appointee therefore in her lifetime a resulting trust by lapse for the representative of the author of the power. *Brookman v. Hales*, 2 V. & B. 45.

3. Where the words of a will are not merely those of advice or request, but declare a trust which is void or unlawful, the legatee holds the property for next of kin, and if there is none, then for the State. *Ford v. Dangerfield*, 8 Rich. (S. Car.) Eq. 95.

A bequest to such persons as the judges of another State may appoint after testator's death to receive it is ineffectual for any purpose if unlawful, as it was in the State of his domicile (N. Y.). *Bascom v. Albertson*, 34 N. Y. 534.

Where a trust has been created for an illegal purpose, the court will not in general interfere; it will do so where the illegal purpose fails to take effect. *Symes v. Hughes*, L. R., 9 Eq. 475; *Haigh v. Kaye*, L. R., 7 Ch. 469; *Pawson v. Brown*, 13 Ch. 202.

Where land paid for by a father is conveyed to his son for the purpose of

or personal representatives of the testator.¹ The essential element is the intention of the grantor or testator.²

defrauding creditors of the former, no trust will result to the father in consequence of his having paid the consideration money; but as between father and son and those claiming under the father, such conveyance is absolute and vests in the son the entire legal and equitable estate. *Proseus v. McIntyre*, 5 Barb. (N. Y.) 424.

No trust results where the grantor conveys fraudulently though without consideration to evade the payment of his debts. Nor will chancery interfere in such case, but leave the parties where they have placed themselves. *Ford's Exrs. v. Lewis*, 10 B. Mon. (Ky.) 127.

The implication of law that the grantee takes the conveyance in trust for the person who furnishes the purchase money, may be rebutted by proof that the title was put in the grantee for the purpose of protecting the property from the creditors of him who paid the purchase money. 4 Halst. Ch. (N. J.) 891.

A conveyance designed to defraud creditors will not be declared a resulting trust in favor of a party thereby seeking to be benefited. *Cutler v. Tuttle*, 19 N. J. Eq. 549.

Where an alien, for the purpose of evading the law of the State prohibiting him from taking and holding real property, purchases land and takes a conveyance thereof in the name of a third person without any written declaration of trust, a resulting trust will not arise in favor of the purchaser; as equity will never raise a resulting trust in fraud of the rights of the State or of the laws of the land. *Leggett v. Dubois*, 5 Paige (N. Y.) 114.

The law never casts either a legal or an equitable estate upon a person who has no right to hold it; although such estate may, for the benefit of the State, be vested in an alien, until office found by an express contract or conveyance. *Leggett v. Dubois*, 5 Paige (N. Y.) 114.

And see *supra*, V, 5, p. 14, notes 3-4; *infra*, XI.; XII.

1. In England questions of some difficulty often arise as to whether a trust in property results to the heir or next of kin or legal representatives, since in that country the heir and next of kin and legal representatives are not the same persons. If real property, the trust results to the heir; if personal

property, to the next of kin or the legal representatives. Such questions are not important in the United States, for the reason that in most if not in all of the States, the same persons take both real and personal estate of an ancestor in the same rights, and it is comparatively unimportant whether the trust results as real or personal property. 1 Perry on Trusts (3d ed.), § 160 a. And see 1 Lewin on Trusts (8 Eng. ed.), p. *156.

2. **Intention.**—Intention is an essential element in the species of resulting trusts. It is never expressed in direct terms; but where the legal estate in property is disposed of, conveyed or transferred, the intent appears or is inferred from the terms of the disposition, or from accompanying facts and circumstances, that the beneficial interest is not to go or be enjoyed with the legal title. In such case a trust results in favor of the person for whom the equitable interest is assumed to have been intended and whom equity deems to be the real owner. This person is the one from whom the consideration actually comes, or who represents, or is identified with the consideration. Thus if a conveyance be by deed a trust will result to the grantor; if it be by will, the trust will result to the testator's residuary devisees or legatees, or his heirs or personal representatives, according to the nature of the property and of the dispositions. 2 Pomeroy's Eq. Jur. 606; 1 Perry on Trusts (3rd ed.), § 158; Lewin on Trusts (8 Lond. ed.), ch. 9, § 1, pt. 12, *et seq.*

There is a substantial distinction between giving property expressly *for* a particular purpose and giving it *subject* to a particular purpose. If the intention appears from the whole instrument that the donee is to take the beneficial interest, even though subject to the particular object or purpose designated, then no trust will result to the donor, if that object or purpose should fail. 2 Pomeroy's Eq. Jur. 606, note 4.

If lands be devised to A and his heirs *upon trust to pay debts*, this is simply the creation of a trust, and the residue will result to the heir; but if the devise be to A and his heirs *charged with debts*, the intention is to devise beneficially subject to the charge, and what-

VIII. RESULTING TRUSTS OF THE FOURTH CLASS.—This class of resulting trusts embraces voluntary conveyances without any consideration, and it appears from the circumstances that the grantee was not entitled to take beneficially.

It was formerly the doctrine, that where a feoffment was made without any consideration, or a merely nominal one, the use resulted to the feoffor, and it was thought that the same rule would apply to voluntary declarations of trust.¹ But the rule now is, that where the instrument is perfectly executed and is intended to operate at once, no trust results to the grantor merely from the fact that the conveyance is a voluntary one, unless the attendant circumstances show that the grantee was not intended to take beneficially.²

ever remains after the charge has been satisfied will belong to the devisee. 1 Lewin on Trusts (8 Lond. ed.), ch. 9, § 1, pl. 11; *King v. Denison*, 1 V. & B. 272; *Downer v. Church*, 44 N. Y. 647.

1. *Bennett v. Hutson*, 33 Ark. 762. *Burt v. Wilson*, 28 Cal. 632; *Mason v. Baker*, 1 A. K. Marsh. (Ky.) 208; *Bryant v. Mansfield*, 22 Me. 360; *Philbrook v. Delano*, 29 Me. 410; *Gerry v. Stimson*, 60 Me. 186; *Stewart v. Iglehart*, 7 Gill & J. (Md.) 132; *Groff v. Rohrer*, 35 Md. 327; *Cairns v. Colburn*, 104 Mass. 274; *Blodgett v. Hildreth*, 103 Mass. 484; *Harvey v. Varney*, 98 Mass. 118; *Bartlett v. Bartlett*, 14 Gray (Mass.) 278; *Flint v. Selden*, 13 Mass. 448; *Dunica v. Coy*, 28 Mo. 525; *Muller v. Davis*, 50 Mo. 572; *Farrington v. Barr*, 36 N. H. 86; *Hutchins v. Heywood*, 50 N. H. 491; *Cutler v. Tuttle*, 19 N. J. Eq. 553, 562; *Ownes v. Ownes*, 23 N. J. Eq. 60; *Baldwin v. Campfield*, 8 N. J. Eq. 891; *Wheeler v. Kirtland*, 23 N. J. Eq. 18; *Closs v. Bopp*, 23 N. J. Eq. 270; *Sourbye v. Arden*, 1 Johns. Ch. (N. Y.) 240; *Botsford v. Burr*, 2 Johns. Ch. (N. Y.) 405; *Rathbun v. Rathbun*, 6 Barb. (N. Y.) 98; *Squire v. Harder*, 1 Paige (N. Y.) 494; s. c., 19 Am. Dec. 446; *Leggett v. Du Bois*, 5 Paige (N. Y.) 114; *Bunn v. Winthrop*, 1 Johns. Ch. (N. Y.) 329; *Sprague v. Woods*, 4 W. & S. (Pa.) 192; *Wilson v. Cheshire*, 1 McCord (S. Car.) 233; *Pinney v. Fellows*, 15 Vt. 538; *Chamberlayne v. Temple*, 2 Rand (Va.) 384; *Dyer v. Dyer*, 2 Cox 92; *Cottingham v. Fletcher*, 2 Atk. 156; *Chaplin v. Chaplin*, 3 P. Wms. 233; *Muckleston v. Brown*, 6 Ves. 68; *Pitts' Case*, cited Amb. 266; *Curtis v. Perry*, 6 Ves. 747; *Haigh v. Kaye*, L.R., 7 Ch.

469; 1 *Perry on Tr.* (3rd ed.), § 161; *Cruise Dig.*, tit. c. 1, § 52; tit. 11, c. 4, § 16; *Dyer v. Dyer*, 2 Cox 92; *Pinney v. Fellows*, 15 Vt. 538; *Botsford v. Burr*, 2 Johns. Ch. (N. Y.) 405.

This doctrine had no application to conveyances which operated under the statute of uses, since a use was raised in favor of the immediate grantee by a "bargain and sale" between strangers, and by "a covenant to stand seized to uses" between relatives. If the doctrine has any place in the conveyancing system of this country, so that a trust should result to the grantor from absence of a consideration, it can only be where the deed contains words of grant or transfer, and does not recite or imply consideration, and does not in the *habendum* clause or elsewhere declare any use in favor of the grantee and the conveyance is not intended as a gift. 2 *Pom. Eq. Juris.*, § 1035.

Where a husband executes a voluntary conveyance to his wife without qualification or reservation, equity will not presume a resulting trust in his favor. *Groff v. Rohrer*, 35 Md. 327; *Gerry v. Stimson*, 60 Me. 186; *Davis v. Baugh*, 8 Pac. Law J. 903; *Bragg v. Geddes*, 93 Ill. 39; *Farrington v. Barr*, 36 N. H. 86; *Graves v. Graves*, 29 N. H. 129; *Bartlett v. Bartlett*, 14 Gray (Mass.) 277; *Titcomb v. Morrill*, 10 Allen (Mass.) 15; *Cairns v. Colburn*, 104 Mass. 274; *Rathbun v. Rathbun*, 6 Barb. (N. Y.) 98; *Bank of U. S. v. Housman*, 6 Paige (N. Y.) 526; *Squire v. Harder*, 1 Paige (N. Y.) 494; *Miller v. Wilson*, 15 Ohio 108; vide *Advancement*, §§ 13-18.

2. **No Consideration.**—No trust, of which a court of equity can take cognizance, results merely from the want of consideration for a deed. *Philbrook*

I. Voluntary Conveyance for Illegal or Fraudulent Purposes.—A voluntary conveyance, whether a common law or a modern con-

vey. *Delano*, 29 Me. 410; *Jenkins v. Pye*, 12 Pet. (U. S.) 241.

Accordingly, an uncompleted sale, where a deed has been executed and the consideration has not been paid, and where there is no intention of a gift or sale on time, makes a resulting trust in favor of the vendor; not for the purchase money, but for the whole land. Equity will treat it as no sale and hold the vendee as trustee of the dry legal title, and a purchaser from such vendee with notice of the facts will acquire no title. *Bennett v. Hutson*, 33 Ark. 762.

And if A and wife convey land to B without other consideration than the promise of B that he will immediately reconvey the land to A's wife, this raises a constructive trust in favor of A's wife. *Cox v. Ashman*, 76 Ind. 218.

But where two partners are embarrassed with debts and one executes a deed to the other, absolute on its face, without a consideration expressed, of both his individual property and interest in the partnership property, for the purpose of enabling the grantee to raise money by mortgaging the same to pay the firm's debts, there is no express trust, nor does a trust arise by implication of law. *Burt v. Wilson*, 28 Cal. 632.

If a quit claim deed of land of an assignee in bankruptcy recites a consideration, and contains an *habendum* to the grantee to the grantee's use, and the usual covenants, in the absence of fraud on the part of the grantee, no trust results to the grantor, although he received no consideration in fact. *Gore v. Learoyd*, 140 Mass. 524.

By a deed of bargain and sale, or any other form of conveyance duly recorded, a use may be raised in any one in whose favor it is expressly declared by the deed, without a consideration. *Sprague v. Woods*, 4 W. & S. (Pa.) 192.

The deed may be founded on some consideration and yet still come within the technical definition of voluntary conveyance; the statement of a mere pecuniary consideration certainly would not be allowed to affect the construction or operation of a deed. *Young v. Peachy*, 2 Atk. 256.

Failure of Consideration.—The owner

of land, without valuable consideration, deeded it to a city in trust for a public levee, and afterwards for \$2,500 gave a second deed, which recited the first, and stated that he had certain ferry rights in the premises, and that it was desirable that the city should hold it free of such claim. In an action brought by the grantor's heirs to recover the land because the city no longer used it for the purposes for which it was conveyed, *held*, that the grantor conveyed all his interest in the property, and that there was no resulting trust. *Coffin v. Portland (Oreg.)*, 17 Pac. Rep. 580.

So where a father turned over valuable property to his son to use in business for the advantage of both, and it was provided that the father was to become a member of the son's family, and afterwards the son treated his father as a menial, and it became probable that he would be deprived of the necessities of life and be turned into the street, *held*, that the averment of these facts stated a trust enforceable in equity. *Chadwick v. Chadwick*, 59 Mich. 87.

So where a son conveys land to his father in consideration that the latter shall devise to him certain property by will, which agreement is not complied with by the father, there will be a resulting trust in favor of the son, and he may recover the land. *Russ v. Mebius*, 16 Cal. 350.

Where Trust Will Not be Declared.—But where the trust deed is declared by a writing executed and delivered, and the estate is vested in the complainant, and the object of the trust is to compel a naked trustee to convey the property held in trust to the *cestui que trust*, it will not bar the relief sought, that the conveyance to the trustee was made for the purpose of delaying and defrauding the complainant's creditors. *Ownes v. Ownes*, 8 C. E. Green. (23 N. J. Eq.) 60.

And courts of equity have recognized and established this distinction between conveyances and executory contracts: Where the title is vested, they never avoid it for want of consideration; and, on the other hand, they never enforce an executory contract without consideration—they treat it as a nullity. *Ownes v. Ownes*, 23 N. J. Eq. (8 C. E.

veyance, if made for a fraudulent or illegal purpose, will give rise to no resulting trust to the grantor.¹

Green) 60; Bunn v. Winthrop, 1 Johns Ch. (N. Y.) 329; Wright v. Miller, 4 Seld. (N. Y.) 9.

In a deed of conveyance to a son-in-law, the consideration stated was his marriage and natural love and "natural love and affection" of the grantor for his daughter and the grantee; and the purpose expressed in the deed was to advance the grantee in life; *held*, that no trust in the estate conveyed arose in favor of the daughter. Thompson v. Thompson, 18 Ohio St. 73.

How Far Such Conveyance Is Binding.--

A conveyance, without consideration, in fraud of the law is not a nullity, but binds parties and privies. Randall v. Phillips, 3 Mason (U. S.), 378.

1. If, instead of a declaration of trust, the instrument executed had been a mere contract to reconvey property; or if the bill had been filed to establish a trust, either as a resulting trust or on a parol agreement; then the defence that the conveyance had been made to delay and defraud creditors would bar the relief. Ownes v. Ownes, 8 C. E. Green (15 N. J. Eq.) 60.

Where one purchases land in fraud against an existing statute, and has the title conveyed to another, there is no resulting trust in favor of such purchaser. Miller v. Davis, 50 Mo. 572.

A voluntary deed executed by a father, to give a colorable qualification to his son to kill game, is kept in his possession during his life without being used or made known to the son, *held*, in equity, an imperfect instrument. Cecil v. Butcher, 2 J. & W. 573. But in Souverbye v. Arden, 1 John. Ch. (N. Y.) 240; it was *held* by CHANCELLOR KENT, after a full discussion of the authorities cited in the text, that a voluntary settlement was always binding on the grantor, when fairly made, unless where clear and positive proof that he never parted nor intended to part with the possession of the deed; and that there must be other circumstances besides the mere fact of retention to show that it was not intended to be absolute. So in Tolar v. Tolar, 1 Dev. Eq. (N. Car.) 456, it was *held* that where a voluntary deed to a son, fairly obtained, afterwards gets into the possession of the donor and is destroyed, that equity would compel a second conveyance to

be executed. See Way's Settlement, 10 Jur. N. S., 1166.

A conveyance in fraud of creditors will not be declared a resulting trust in favor of a party seeking to be benefited. Cutler v. Tuttle, 19 N. J. Eq. 550; Baldwin v. Campfield, 4 Halst. (N. J.) 891; and a contract, whether executed or executory, for the conveyance of either real or personal property to conceal it from attachment by the grantor's creditors, although voidable by them is good between the parties, even if the grantee shared in the fraudulent intent. Harvey v. Varney, 98 Mass. 118. But a court of equity will not enforce an executory contract when the consideration is founded on fraud, or is *malum in se*, or *malum prohibitum*. It would not create a trust in such case. Ownes v. Ownes, 8 C. E. Green (23 N. J. Eq.) 60.

A debtor conveyed an estate to his father without consideration, and to prevent it from being attached by his creditors, and immediately afterwards, at the verbal request of some of his father's other children, and with the knowledge but without any consent of his father agreed that the estate should be held in trust for one of the brothers who was a creditor of the grantor. *Held*, that no trust was thereby created which could be enforced against the father, or against his heirs after his death. Bartlett v. Bartlett, 14 Gray (Mass.) 277.

Where a person, largely indebted, purchased land, paid the purchase money, and took a conveyance to his children, *held*, that a trust resulted to him for the benefit of his creditors. Brown v. McDonald, 1 Hill (S. Car.) Ch. 297; Dunica v. Coy, 24 Mo. 167.

A fearing his property might be reached by someone with whom he was in difficulties, conveyed it by deed absolute in form to a married woman. After the danger had passed, she reconveyed it by a deed in which her husband did not join. The deeds did not disclose a trust. *Held*, that A could not compel a conveyance from the woman and her husband. Tatge v. Tatge, 34 Minn. 272.

But those taking under a deed absolute in form are not chargeable as trustees because of the grantor's

2. Evidence.—In conveyances by deed, parol evidence is not admissible to contradict or control the statements of a consideration. To allow parol evidence to raise a resulting trust in such cases would violate the express provisions of the statute of frauds.¹

embarrassments when he made the deed, and general promises to deal honorably with him, there being no fraud. *Orwig v. Merrill*, 69 Iowa 733.

An insolvent debtor who buys real estate, taking therefor a deed to another in secret trust for himself, cannot enforce the trust, although part of the purchase money was a gift to him, and part raised from bad debts which his creditors could not have collected. *Robinson v. Robinson*, 17 Ohio St. 480.

1. *1 Perry on Trusts* (3rd ed.), §§ 76, 162 and 163. Where the conveyance is expressed to be for a valuable consideration, parol evidence cannot be received to show that the purchaser was intended to be merely a trustee for the vendor. *Hill on Trustees*, 112; *Farrington v. Barr*, 36 N. H. 86.

Evidence of the object and purpose for which a conveyance was made is not admissible to convert the deed purporting to be an absolute conveyance into one of any trust not expressed therein. *Gerry v. Stimson*, 60 Me. 186; *Flint v. Selden*, 13 Mass. 448.

The implication of law that a grantee takes the conveyance in trust for the person who furnishes the purchase money, may be rebutted by proof that the title was put in the grantee for the purpose of protecting the property from the creditors of him who furnished the purchase money. *Baldwin v. Campfield*, 4 Halst. Ch. (N. J.) 891.

On a judicial declaration that a trust in favor of a religious society which has for many years held land conveyed on such trust is void for uncertainty, the property does not revert to the grantor, nor can the grantees hold it for their own personal use and benefit; but the individuals who contributed the purchase money are, by resulting trust, the beneficial owners and entitled to have the property sold and the proceeds distributed in proportion to the sums contributed. *Heiskell v. Trout* (W. Va.), 8 S. E. Rep. 557.

Secret Trust—What Requisite to Establish.—When a party seeks to establish and enforce a secret trust on the face of an absolute deed, it must be

shown that the purpose was an honest one, and where an intention to screen property from the vigilance of creditors of the husband is averred by the wife and the rules of law arising from such conduct are sought to be avoided on the ground that the property was not subject to the demands of such creditors, it is incumbent on the wife to show clearly the absence of such liability. *Patton v. Beecher*, 62 Ala. 580.

According to the circumstances of the case as established in evidence, a resulting trust for the donor may be supported as to part of the property, which is the subject of a voluntary grant, and not supported as to the remainder. *Cook v. Fountain*, 3 Sw. 585.

Where the grantor has made out in evidence a case for a trust against the grantee, it is of course open to the latter to rebut that case, if he can, by counter-evidence of his own. And for this purpose parol declarations are clearly admissible; for their object is to support and not to contradict the legal title and the deed. *Cook v. Fountain*, 3 Sw. 5967. Such evidence may also be drawn from other circumstances, such as the nature of the property and the conduct and situation of the parties, and also the provisions of the deed.

Where, however, the purpose contemplated by the deed, though illegal, or such as the court would not sanction is abandoned or not acted upon by the parties, it seems that the court will not recognize that purpose as evidence of an intention that the donee should not take beneficially, and on that ground will establish a trust in favor of the grantor. Or at any rate it will interpose so far as to grant an injunction against suing on the deed at law until the hearing of the cause. *Birch v. Blugrave*, Amb. 262; *Platamore v. Staple*, Coop. 250.

The testimony of a subscribing witness to a deed that he did not know the bargain on which it was given, and that he did not see any consideration paid or any security given, is competent to show that the conveyance was voluntary. *Lyford v. Thurston*, 16 N. H. 399.

IX. STATUTORY PROVISIONS.—In several of the States, implied trust are expressly abolished by statute, and in such cases a new trust is generally declared in favor of creditors, and in favor of the person paying the purchase money, when the title is taken in the name of another, without his consent, or in violation of a trust.¹

X. CONSTRUCTIVE TRUSTS.—Division.—Constructive trusts may be divided into three classes, to be determined according to the circumstances under which they arise. First, trusts that arise from actual fraud. Second, trusts that arise from constructive fraud, and, third, trusts that arise from some equitable principle independent of the existence of fraud.²

1. Indiana.—The statute of *Indiana* is as follows:

§ 2974. When a conveyance for a valuable consideration is made to one person, and the consideration therefor paid by another, no use or trust shall result in favor of the latter; but the title shall vest in the former, subject to the provisions of the next two sections.

§ 2975. Every such conveyance shall be presumed fraudulent as against the creditors of the person paying the consideration therefor; and where a fraudulent intent is not disproved, a trust shall in all cases result in favor of prior creditors, to the extent of their just demands, and also in favor of subsequent creditors, if there be sufficient evidence of fraudulent intent.

§ 2976. The provisions of the section next before the last shall not extend to cases where the alienee shall have taken a conveyance in his own name without the consent of the person with whose money the consideration was paid; or where such alienee, in violation of some trust, shall have purchased land with moneys not his own; or where it shall be made to appear that by agreement, and without any fraudulent intent, the party to whom the conveyance was made, or in whom the title shall vest, was to hold the land, or some interest therein, in trust for the party paying the purchase money or some part thereof. Rev. Stat. Ind. (Meyers & Co., 1888), §§ 2974–2976 inc.

Similar Statutes.—There are similar provisions in *Kansas*. Comp. Laws (Dassler's ed. 1885), §§ 6502–6504 inc. *Kentucky*, Gen'l Stats. (Bullitt & Feland's ed. 1888), p. 828, § 19 and p. 588, § 20; *Michigan*, Howell's Annotated Stats. (1882), §§ 5569–5571 inc.; *Minnesota*, Stats. (1878), p. 553, § 7–9 inc.; *New York*, Rev. Stat. (Banks & Bro. 7th ed. 1882), vol. 3, p. 2180, 2181, §§ 51–53 inc.; *Wisconsin*, Rev. Stat.

(1878), §§ 2077–2079 inc. And see Pub. Stats. *Massachusetts* (1882), p. 792, § 3; Rev. Stat. *Maine* (1883), p. 605, § 12.

Other Provisions.—In *California* resulting trusts are confined to those of the first class. Civil Code (1880), § 853. So in *Dakota*, Civil Code (Levissee's ed. 1884), § 280.

The Civil Code of *California* (1880) further provides that no implied or resulting trust can prejudice the rights of a purchaser or innocent incumbrancer of real property for value without notice of the trust, § 856. There are similar provisions in *Dakota*; Civil Code (Levissee's ed. 1884), § 281; *Michigan*, Howell's Annotated Stats. 1882), § 5572; *Minnesota*, Stats. (1878), p. 553, § 10; *New York*, Rev. Stat. (Banks & Bro., 7th ed. 1882), vol. 3, p. 2181, § 54; *Wisconsin*, Rev. Stat. (1878), § 2080.

Georgia.—The Code of *Georgia* provides as follows:

Trusts are implied—

1. Whenever the legal title is in one person, but the beneficial interest, either from the payment of the purchase money or other circumstances, is either wholly or partially in another.

2. Where from any fraud one person obtains the title to property which rightly belongs to another.

3. Where from the nature of the transaction it is manifest that it was the intention of the parties that the person taking the legal title shall have no beneficial interest.

4. Where a trust is expressly created, but no uses are declared or extend only to a part of the estate, or fail from any cause, a resulting trust is implied for the benefit of the grantor or testator or his heirs. Code Ga. (Lester, Rowell & Hill's ed. 1882), § 2316.

2. 1 Perry on Tr. (3rd ed.) 195. This enumeration and division seems to be

XI. CONSTRUCTIVE TRUSTS OF THE FIRST CLASS.—Actual Fraud.—Wherever the holder of the legal title to property has been a party to actual fraud in obtaining it, he will be construed, by equity, as the holder of such legal title in trust for the person or persons equitably entitled thereto.¹

the most complete of all those given by the text writers, who differ widely in their conception of what trusts are constructive.

Bispham, after defining constructive trusts as those "which arise purely by construction of equity, and are entirely independent of any actual or presumed intention of the parties," goes on to say: "Nor have constructive trusts, as here considered, any element of fraud in them. Equity, indeed, as we shall see, makes use of the machinery of a trust for the purpose of affording redress in cases of fraud. . . . But in such cases the interference of courts of equity is called into play by fraud as a distinct head of jurisdiction; and the complainant's right to relief is based upon that ground, the defendant being treated as a trustee merely for the purpose of working out the equity of the complainant." Bispham's Eq. (4th ed.) 133.

According to Pomeroy they always arise from fraud. That author says: "Constructive trusts include all those instances in which a trust is raised by the doctrines of equity for the purpose of working out justice in the most efficient manner, where there is no intention of the parties to create such a relation, and in most cases contrary to the intention of the one holding the legal title, and where there is no express or implied written or verbal declaration of the trust. They arise when the legal title to property is obtained by a person in violation, express or implied, of some duty owed to the one who is equitably entitled, and when the property thus obtained is held in hostility to his beneficial rights of ownership. As the trusts of this class are imposed by equity, contrary to the trustee's intention and will, upon property in his hands, they are often termed *trusts in invitum*; and this phrase furnishes a criterion generally accurate, and sufficient for determining what trusts are truly constructive." He then goes on to show how, when the suggested criterion is applied, that all true constructive trusts are based on fraud, actual or constructive. 2 Pomeroy's Eq. Jur. 616.

Story (2 Eq. Jur. (13th ed.) 604)

speaks of them as "those implied trusts (or perhaps, more properly speaking, those constructive trusts), which are independent of any such intention [of the parties] and are forced upon the conscience of the party by the mere operation of law."

The author of the note to Adams' Eq. (7th Am. ed.) 36, says that "the chief instance of this occurs where property has been acquired by fraud, actual or constructive," and that all the cases "reduce themselves to the general principle, that wherever a man cannot hold property beneficially, and for himself, except by fraud, or in contravention of equity, he holds it as trustee for those who, in contemplation of equity, are entitled thereto."

This is the doctrine of the text and is also the view of Lewin. Lewin on Trusts, ch. 10, § 1, *180.

1. As to what constitutes such fraud, see title FRAUD.

Actual fraud is described by Labes as "any cunning, deception or artifice used to circumvent, cheat or deceive another," and this description is declared by Story to be "beyond doubt sufficiently descriptive" of positive or actual fraud. 1 Story's Eq. Jur. (13th ed.) 200, 201.

In cases of this class the leading principle of equity is by way of equitable construction to convert the fraudulent holder of property into a trustee for the benefit of the party rightly entitled thereto, and to preserve the property itself as a fund for purposes of recompense. 1 Perry on Tr. (3rd ed.) 197.

In all cases of fraud, and where cases have been carried on *mala fide*, there is a resulting trust by operation of law; but unless there is something more than is implied from the violation of a parol agreement, equity will not decree the purchaser to be a trustee. Robertson v. Robertson, 9 Watts (Pa.) 32.

Where one procures a title which he could not have obtained except by a confidence reposed in him, and abuses the confidence, he becomes a trustee *ex maleficio*, per AGNEW, J., in Seichrist's App., 66 Pa. St. 237, 241. See

1. Constructive Trusts Arising from Wrongful Appropriation or Conversion Into a Different Form, of the Property of Another.—Where the property of a party has been wrongfully applied, or a trust fund has been wrongfully converted into another species of property, if its identity can be traced it will be held in its new form liable to the rights of the original owner or *cestui que trust*.¹

also *Baier v. Berberich*, 6 Mo. App. 537.

1. 2 Story's Eq. Jur. (13th ed.) 606; 2 Pomeroy's Eq. Jur. 626.

According to the latter authority they arise where one person having money or any kind of property belonging to another in his hands, wrongfully uses it for the purchase of lands, taking title in his own name; or if a trustee or other fiduciary person wrongfully converts the trust fund into a different species of property, taking to himself the title; or where an agent or bailee wrongfully disposes of his principal's securities, and with the proceeds purchases other securities in his own name.

Ex parte Dumas, 1 Atk. 232; *Lane v. Dighton*, Amb. 409; *Burdett v. Willett*, 2 Vern. 638; *Fox v. Mackreth*, 2 Bro. Ch. 400; *Taylor v. Plumer*, 3 M. & Sel. 562; *Lench v. Lench*, 10 Ves. 511, 517; *Rolfe v. Gregory*, 4 De G. J. & S. 576; *Pennell v. Deffell*, 4 De G. M. & G. 372; *Ex parte Cooke*, L. R., 4 Ch. D. 123; *In re Hallett's Estate*, L. R., 13 Ch. D. 123; *Thompson v. Perkins*, 3 Mason (U. S.) 232; *Friedlander v. Johnson*, 2 Woods (U. S.) 675; *Smith v. Perry*, 56 Ala. 120; *Tilford v. Torrey*, 53 Ala. 120; *Shelton v. Lewis*, 27 Ark. 190; *Wells, Fargo & Co. v. Robinson*, 13 Cal. 133; *Cookson v. Richardson*, 69 Ill. 137; *Dodge v. Cole*, 97 Ill. 338; *Clapp v. Emery*, 98 Ill. 531; *Tracy v. Kelley*, 52 Ind. 535; *Clifford v. Farmer*, 79 Ind. 529; *Shaw v. Spencer*, 100 Mass. 382; *Bank v. Barry*, 125 Mass. 20; *Michigan Air Line Ry. Co. v. Mellen*, 44 Mich. 321; *Perrin v. Lepper* (Mich.), 40 N. W. Rep. 859; *Schlaefel v. Corson*, 52 Barb. (N. Y.) 510; *Murray v. Ballou*, 1 Johns. Ch. (N. Y.) 566; *Murray v. Lylburn*, 2 Johns. Ch. (N. Y.) 441; *Bartlett v. Drew*, 57 N. Y. 587; *Newton v. Porter*, 69 N. Y. 133; *Holden v. Bank*, 72 N. Y. 286; *Hastings v. Drew*, 76 N. Y. 9; *Newton v. Taylor*, 32 Ohio St. 399; *Matthews v. Heyward*, 2 S. Car. 239; *Burks v. Burks*, 7 Baxt. (Tenn.) 353.

The rule applies, however much the trust property may be altered in its form or nature. The test is, can it be identi-

fied? *Rennell v. Deffell*, 4 De G. M. & G. 372, 388.

In accordance with this principle, where a factor sold the goods of his principal, taking negotiable securities in payment, and before these fell due, failed, and assigned the securities to his assignee for the benefit of creditors, and the latter recovered the money on them, the assignee was held by the court to be trustee of the fund for the principal. *Thompson v. Perkins*, 3 Mason (U. S.) 232.

So where a son acting as agent for his mother invested her estate in grain and other commodities. *Clapp v. Emory*, 98 Ill. 523, 531.

So when the confidential agent of an aged and illiterate man, having his principal's money to invest, made a loan of a portion of it, taking a note and mortgage to himself and when the debt became due foreclosed the mortgage, and bid in the property, he was held to hold the title to the land in favor of the principal. *Cookson v. Richardson*, 69 Ill. 137.

And where township bonds were delivered by a railroad company to one of its directors to pay for depot buildings which he had erected and agreed to convey, but did not do so, the court held that he was a trustee of the bonds, or if they had been sold, of their proceeds, for the benefit of the railroad company. *Mich. Air Line Ry. Co. v. Mellen*, 44 Mich. 321.

In *Fox v. Mackreth*, 2 Bro. Ch. 319, a trustee for the sale of estates for payment of debts, who purchased them himself by taking an undue advantage of the confidence reposed in him by the plaintiff, and previous to the completion of the contract sold them at a highly advanced price, was decreed to be a trustee for the original vendor, as to the sums produced by such second sale.

So in *Wells, Fargo & Co. v. Robinson*, 13 Cal. 133, a confidential agent having been entrusted by his principal with money to buy land, appropriated the money to his own use and invested it in bonds. After the death of the

But where such property is wrongfully sold to a *bona-fide* purchaser, for value and without notice, he takes it discharged of the trust, and the trust attaches to the proceeds in the hands of the vendor so long as they can be identified.¹

2. Constructive Trusts Arising from a Conveyance or Devise Obtained by Fraud.—Wherever by any fraudulent practice, a deed, bequest or devise has been procured to be made to any person, equity will construe such fraudulent grantee, legatee or devisee a trustee of the legal title for the benefit of the party or parties equitably entitled thereto, and will compel him to account on equitable principles and to make a reconveyance of the property.²

agent his administrator was *held* to hold the bonds in trust for the principal.

When property of a corporation has been divided among its stockholders, before all its debts have been paid, a judgment creditor may maintain an action against a stockholder to reach whatsoever was so received by him. *Bartlett v. Drew*, 57 N. Y. 587.

A certificate of stock expressed in the name of E. Carter, trustee, was by him pledged to secure his own debt. The pledgee was by the terms of the certificate put on inquiry as to the character and limitations of the trust, and if he takes them does so at his peril. *Shaw v. Spencer*, 100 Mass. 382.

But if money is delivered to a person to pay debts, that he converts it to his own use does not enable the heirs of the party who reposed confidence to convert it into a trust fund. *Doyle v. Murphy*, 22 Ill. 502.

No Direct Fiduciary Relation Need Exist.—The owner of negotiable securities stolen, and afterwards sold by the thief, may follow and claim the proceeds in the hands of the felonious taker, or of his assignees with notice, and this right continues and attaches to any securities or property in which the proceeds are invested, so long as they can be traced and identified, and the rights of a *bona-fide* purchaser do not intervene. The law will raise a trust *in invitum* out of the transaction in order that the substituted property may be subjected to the purposes of indemnity and recompense. *Newton v. Porter*, 69 N. Y. 133.

See also *supra*, V., 1-6, *infra*, XII., 2, and notes.

1. 2 Pomeroy's Eq. Jur. 626; 2 Story's Eq. Jur. (13th ed.) 606; *Newton v. Porter*, 69 N. Y. 133. See cases cited in preceding note.

2. 1 Perry on Tr. (3rd ed.) 198; 2 Pomeroy's Eq. Jur. 629; *Hidden v. Jordan*, 21 Cal. 92; *Sandfoss v. Jones*, 35 Cal. 481; *Cameron v. Ward*, 8 Ga. 245; *Fishbeck v. Gross*, 112 Ill. 208; *Harris v. McIntyre*, 118 Ill. 275; *Arnold v. Cord*, 16 Ind. 177; *Nelson v. Worrall*, 20 Iowa 469; *Kibby v. Cold*, 63 Iowa 663; *Martin v. Martin*, 16 B. Mon. (Ky.) 8; *Hunt v. Roberts*, 40 Me. 187; *Laing v. McKee*, 13 Mich. 124; *Jones v. McDougal*, 32 Miss. 179; *Fraser v. Child*, 4 E. D. Smith (N. Y.) 153; *Cousins v. Wall*, 3 Jones Eq. (N. Car.) 43; *Coyote v. Ruble*, 8 Oreg. 284; *Hoge v. Hoge*, 1 Watts (Pa.) 163; *Hodges v. Howard*, 5 R. I. 149; *Troll v. Carter*, 15 W. Va. 567; *Coyle v. Davis*, 20 Wis. 564.

The doctrine is clearly expressed in *Hammond v. Pennock*, 61 N. Y. 145, as follows: Where a party has come into the possession of property under a contract based upon a misrepresentation or suppression of a material fact, he may be treated as a fraudulent trustee of such property, and compelled to transfer the proceeds so far as they can be traced and to account for such as cannot be traced.

And in *Christy v. Sill*, 95 Pa. St. 380, it was said that one who has obtained another's property by fraud is a trustee for him *ex maleficio*, not of the title (which he never acquired), but of the thing in his manual possession, and that to establish such a constructive trust no confidential relation is necessary.

Deed Obtained by Fraud.—If a grantee in a deed has obtained it by fraud he will be *held* by a court of equity a trustee for the real owner. *Troll v. Carter*, 15 W. Va. 567; *Hendrix v. Munn*, 46 Tex. 141; *Newell v. Newell*, 14 Kan. 202; *Beach v. Dyer*, 93 Ill. 295.

Accordingly a vendor who undertakes to sell a full title for a valuable consideration when he has less than a fee-simple, but afterwards acquires the fee, holds it in trust for his vendee, and will be decreed to convey it to his use; and if the vendee mortgages his title, the perfection of the title to the vendor enures to the benefit of the mortgagee. *Clark v. Martin*, 49 Pa. St. 299.

So where one, pretending to act as the agent and protector of infants' rights, in that character obtains a conveyance of land in his own name, but, which was intended for their benefit. *Roller v. Spilmore*, 13 Wis. 26.

So where through fraud and perjury a person acquires title to a tract of public land to which another had a pre-emption right. *Hollinshead v. Simms*, 51 Cal. 158.

Where a party while negotiating for the purchase of certain mortgages obtained possession of them, and then fraudulently representing himself to the mortgagors to be the owner, obtained a deed in fee of the premises, *held*, that the title so obtained must be held in trust for the mortgagees. *DeLeon v. Higuera*, 15 Cal. 483.

W lent S, a squatter on land, \$40 to enter the land. S, not finding the land agent, handed W the money back, telling W to enter the land for him and hold the deed as security for its payment. W, without S's knowledge, entered the land in his own name, and after S had improved it to the value of \$2,500 conveyed to D, who was cognizant of the facts. *Held*, that S was entitled to redeem the land on payment of \$40 with interest. *Ward v. Spivey*, 18 Fla. 847.

R C owned a carriage factory in Mississippi before the war, and placed the title to the property in A, who was surety on his note. When the war broke out, R C entered the southern army, and his father induced his brother, J C, who was loyal, to take charge of the business. When the note was paid, J C had the title conveyed by A to him, stating that he was the agent of R C; and if the title was put in R C, it would be subjected to his debts. Twenty years afterwards R C filed a bill to have J C declared a trustee, and to compel an accounting. *Held*, that J C was a trustee, and should be compelled to account. *Clark v. Clark* (Miss.), 1 So. Rep. 835.

A conveyed a mine to B, by absolute deed, it being agreed by parol that B

should operate and sell the mine, paying himself first from the proceeds, then paying a debt due him from A, then A's other creditors, the balance remaining to be returned to A. B further promised to execute a declaration of trust. *Held*, a constructive trust which equity would declare and enforce on parol proof, notwithstanding the statute of frauds. *Hall v. Linn*, 8 Colo. 264.

Under Civil Code Cal., § 1572, defining as actual fraud a promise made without intention of performing it, and with intent to induce another to enter into a contract, an oral promise made by a wife on a conveyance of land by her husband to reconvey the same when requested, with no intention to keep such promise, is such actual fraud as to give rise to a trust and bring the promise within the statute of frauds, excepting from its operations trusts arising by operation of law. *Brison v. Brison* (Cal.), 17 Pac. Rep. 689.

But where defendant, by falsely pretending to represent one to whom a Spanish claim to land had been confirmed, obtained a conveyance of it by a compromise with the city, it was *held* that the true representative, having afterwards failed in proceedings to establish his title against that of the city, could not charge the defendant as his trustee by offering to pay the compromise money. *Maguire v. Page*, 23 Mo. 188.

Where a person having land warrants in his hands, under an agreement to enter them for the joint benefit of the owner and himself, entered public lands and took the title in his own name, a resulting trust arises in favor of the other, in proportion to his interests in the warrants. *Reynolds v. Sumner* (Ill.), 18 N. East. Rep. 334.

Legacy Obtained by Fraud.—Bennett at the time of his death, was in possession of certain securities and money standing in his own name, but which he held in trust for his daughter. The latter, before her death, wished to make a will leaving this property to her nephew. At the request of her father and on his representation that he would hold the property as trustee for the nephew, she refrained from making a will, and shortly afterwards died. On the death of Bennett subsequently to that of his daughter, action was brought against his administrator to recover the funds, the nephew asserting that transaction raised a trust in his favor, which was denied by the administrator. The court

decided in favor of the plaintiff. *Williams v. Fitch*, 18 N. Y. 546.

So where A, wishing to leave a sum of money to B, consulted with V, his nephew, on the subject, and the latter induced him to include the sum in the bequest to be made to himself by promising to hand it over to the beneficiaries, and the request was so made, there being no declaration of trust in the will; after the death of the testator V refused to pay over the money, but assigned the entire legacy at a nominal consideration to one of his children on certain express trusts; it was held that V or his children held the fund in trust for the intended beneficiaries. *Williams v. Vreeland*, 29 N. J. Eq. 417.

Devise Obtained by Fraud.—If a devisee fraudulently obtains a devise, representing to the testator that it should be held for the use of another, a trust is thereby established in the devisee. *Hoge v. Hoge*, 1 Watts (Pa.) 163. See *Church v. Ruland*, 64 Pa. St. 432.

A testatrix, by will, gave the bulk of her estate to her lawyer, her doctor and her priest, as tenants in common, with the intention that they should apply the amount in accordance with certain directions which could not be carried out because of the statute against perpetuities. The execution of the will was obtained by the fraud of the devisees, who denied having made any agreement or promise and claimed the property themselves. Held, that they should be deemed trustees *ex maleficio* for the heirs and next of kin of the testatrix. *O'Hara v. Dudley*, 95 N. Y. 403; s. c., 47 Am. Rep. 53.

And where A, to whom B had by will devised all her property, prevented the making of a codicil devising a certain portion thereof to C, by promising that he would hold for C's benefit and make a conveyance to her, and after the death of B refused to convey, it was held to be such fraud in obtaining the devise as would raise a constructive trust in C's favor, which a court of equity would enforce. *Dowd v. Tucker*, 41 Conn. 197.

So where a testator desiring that his property should go to his own heirs, was induced by his wife to give her some of the personalty, and will her the residue of his estate in form absolutely, in consideration of her promise to use it for certain purposes during her life, and to transfer all that remained to his heirs, it was held that her failure to transfer to the heirs was a fraud on

them and on the testator, and that a constructive trust arose which equity would enforce, notwithstanding the statute of frauds. *Gilpatrick v. Gildden* (Me.), 16 Atl. Rep. 464.

But compare *Bedilian v. Seaton*, 3 Wall. Jr. (U. S.) 279. In that case the facts were that one Seaton, a few days before his death, sent for two friends of his to come to his house to draw his will for him, intending to leave all his property to his natural daughter, the wife of plaintiff. They did not arrive, and his heirs at law, his two brothers, constantly asserted that his illness was not dangerous, and that as to the property, the daughter should have every cent of it. The two friends failed to arrive, and under the circumstances no will was executed. After the death of Seaton his brothers conveyed one-third of the property to plaintiff's wife. Plaintiff filed her bill for an accounting and for a conveyance of the balance of the property. This was refused, the court holding that the circumstances were not such as to constitute fraud; that no actual fraud was shown, and that even if the promises made by the heirs at law had been fraudulent, it would not present the case of a trust which adheres to land in the possession of persons having notice, but only that of a contract of which equity would compel the execution.

Wills or Deeds Fraudulently Destroyed.—On the same principle, wherever a party has destroyed or suppressed a deed or will or other evidence of title, and is in possession of the property, he will be declared a trustee for the rightful owner of the suppressed paper. 1 Perry on Tr. (3rd ed.) 219; *Tucker v. Phipps*, 3 Atk. 359; *Bailey v. Stiles*, 1 Gr. Ch. (N. J.) 20.

Other Cases.—A party sold land in consideration of the grantee's agreement to pay off certain debts of the vendor, and the grantee gave the money necessary for that purpose to a third person, who agreed to discharge the indebtedness, and the vendor conveyed on the representation of such third party that he had paid all the debts, when, in fact, he had only paid part of them. Such third party held the fund in trust for the payment of the debts. *Jenkins v. Doolittle*, 69 Ill. 415.

Certain parties who, by fraudulently representing that the entire assets and stock of a corporation belonged to them, obtained a decree dissolving the corporation, and took possession of its

3. Constructive Trusts Arising from Fraudulent Representations of Purchaser that He Is Purchasing for Another.—A similar trust arises where any person, by falsely asserting that he is purchasing or acting for another, or by making any other false representations, thereby secures property at a lower cost than he otherwise would,¹ or where the purchaser has made fraudulent

assets, *held*, liable in equity to be decreed trustees *ex maleficio* as respected *bona-fide* stockholders. *Bailey's App.*, 96 Pa. St. 253.

On the same general principle when a conveyance is obtained for fraudulent ends or under oppressive circumstances, the party deriving title is converted into a trustee, if necessary, for administering relief. *Huxley v. Rice*, 40 Mich. 73.

General Remarks.—In such cases fraud is inferable from the refusal of the devisee, grantee or legatee to convey when requested so to do by the party entitled, the inference being from such refusal that, at the time of making the agreement or promise, he did not intend to keep it. *Dowd v. Tucker*, 41 Conn. 197.

And when the constructive trustee has spent money on the land, he has a right to demand that it be refunded before making a conveyance. *Hollinshead v. Simms*, 51 Cal. 158.

The court will order the trustee to hold the title, or execute the trust in such manner as to protect the rights of the defrauded party. *Beach v. Dyer*, 93 Ill. 295.

And no trust will be raised against a grantee in a fraudulent conversion unless he was a party to the fraud. *Beach v. Dyer*, 93 Ill. 295.

It is immaterial whether the false assertion be made knowingly or ignorantly. *Hazard v. Irwin*, 18 Pick. (Mass.) 95; *Hammett v. Emerson*, 27 Me. 308; *Pratt v. Philbrook*, 33 Me. 17; *Doggett v. Emerson*, 3 Story (U. S.) 700, 733.

Other Remedies.—In such cases equity will often employ other remedies where they are equally efficient. Thus deeds may be set aside. *Tyler v. Black*, 13 How. (U. S.) 231; *Bridgman v. Green*, 2 Ves. Sr. 627; *McAllister v. Barry*, 2 Hayw. (N. Car.) 290; *Harris v. Williamson*, 4 Hayw. (Tenn.) 124; *Walker v. Dunlop*, 5 Hayw. (Tenn.) 271. And contracts rescinded. *Boyce v. Grundy*, 3 Pet. (U. S.) 210; *Smith v. Richards*, 13 Pet. (U. S.) 26; *Pitts v. Cottingham*, 9 Port. (Ala.) 675;

Prescott v. Wright, 4 Gray (Mass.) 461.

Trust Must Arise from Fraud.—This trust must arise from fraud, a mere breach of a parol agreement will not create it. 2 *Pomeroy's Eq. Jur.* 631; 1 *Perry on Tr.* (3rd ed.) 199; *Hoge v. Hoge*, 1 Watts (Pa.) 213; *Mix v. King*, 55 Ill. 435.

Thus where a testator made a will leaving the bulk of his property to his wife, the understanding was that she was to make equitable distribution of what she did not consume to her children. The widow made conveyances of some of the property. The children endeavored to have the will set aside and a trust declared. There was no evidence of fraud in procuring the making of the will, and the court *held* that no trust was therefore raised. *Allmon v. Pigg*, 82 Ill. 149.

1. Purchaser at Execution Sale.—If a purchaser at an auction sale represents that he is buying for some other person, as for the judgment debtor or his family, under an execution whereby competition is prevented, he will be *held* a trustee for such persons. 1 *Perry on Tr.* (3d. ed.) 201; *Miller v. Antle*, 2 Bush (Ky.) 407; *Crutcher v. Hord*, 4 Bush (Ky.) 360; *Roach v. Hudson*, 8 Bush (Ky.) 410; *Brannin v. Brannin*, 18 N. J. Eq. 212; *Brown v. Lynch*, 1 Paige (N. Y.) 147; *Peebles v. Reading*, 8 S. & R. (Pa.) 484, 492; *Seichrist's Appeal*, 66 Pa. St. 437; *Pearson v. East*, 36 Ind. 27; *Tankard v. Tankard*, 84 N. Car. 286.

Even though the agreement to hold for the debtor was within the statute of frauds. *Ragan v. Campbell*, 2 Mackay (D. C.) 28.

At an auction sale of land belonging to the estate of a deceased person, two daughters of the deceased caused it to be publicly announced that they and their three brothers were destitute of a home, and that they desired to purchase the land for the joint benefit of themselves and their three brothers aforesaid. This announcement was made for the purpose of suppressing competition at the

sale, and actually had the effect of enabling them to bid off the land for less than its real value by \$1,050. A short time after the sale the two daughters aforesaid resold the land for \$1,050 more than they paid therefor. *Held*, that a trust accrued whereby their three brothers were entitled to maintain a bill in equity for their proportionate share of the \$1,050. *McRarey v. Huff*, 32 Ga. 681.

So where the execution creditor made statements that he would purchase a slave of the debtor, and hold him as a security for his debt and interest, whereby others were deterred from bidding, the creditor was a constructive trustee for the debtor and his other creditors. *Lloyd v. Curren*, 3 Humph. (Tenn.) 462.

And so of a person who undertakes to act as the guardian of an infant and obtains a conveyance in his own name which was intended for their benefit. *Roller v. Spillmore*, 13 Wis. 26.

And so where such a person, at a sale of personal property of the estate of the father of the infant, bid in and obtained the same at a very low price, professedly for her benefit, but before he was actually appointed guardian. *Belcher v. Saunders*, 34 Ala. 9.

So where the assertion of the purchaser was that he was buying for the wife and children of the debtor. *Gilmore v. Johnson*, 29 Ga. 67.

In *Baier v. Berberich*, 6 Mo. App. 537, Berberich being accommodation endorser for John T. Baier and who had given deeds of trust whereby the property here in question was about to go to sale, agreed with the plaintiffs to buy in the property at the sale for the benefit of Mrs. Baier and to convey to her. Both plaintiff and defendant took steps to deter bidders from attending the sale, whereby persons who intended to bid were kept away, and in this manner the defendants obtained the property at considerably less than its value. The transaction was *held* to create a constructive trust.

So one who procures an assignee in insolvency, the creditors and the debtors to allow him to purchase the debtor's property at a public sale for a nominal sum by advising them as their attorney that thereby a sacrifice will be prevented, and by orally promising to hold and manage it until it can be sold more advantageously, is a constructive trustee for their benefit. *Broder v. Conklin* (Cal.), 19 Pac. Rep. 513.

So where a man who purchased land at a tax sale induced other bidders to refrain from bidding, saying that he wished the land for the owner, who was his neighbor, he will be charged as trustee for the latter or the sale will be set aside. *Merrett v. Poulter* (Mo.), 9 S. W. Rep. 586.

A defendant in an execution was induced to waive his claim to the exemption law, by the promise of the creditor that if he would do so he might retain part of his land. The creditor was the purchaser at the sheriff's sale. *Held*, that he held part of the land in trust for the execution debtor. *Beegle v. Wentz*, 55 Pa. St. 369.

The assignee of one who purchases land at a tax sale, agreeing to hold it in trust for the original owner, is to be treated as a mortgagee in possession. *Berlien v. Bieler* (Mo.), 9 S. W. Rep. 916.

Where persons have made an agreement in writing under which one of their number is to purchase land at a sheriff's sale and to hold it for the benefit of all, and, if not redeemed, convey to each his portion upon payment of his share of the purchase money; if one of the persons purchases on his own account, subsequently to the sale referred to, an outstanding judgment against the same defendant whose land had been sold previously, he will be *held* to have taken it in trust for the common benefit. *Jenkins v. Frink*, 30 Cal. 586.

There Must Be Fraud in the Transaction.—Such a purchase, however, does not raise a constructive trust unless fraud be clearly shown to have been perpetrated on the defendant at the time of the sale. *Kraft v. Smith* (Pa.), 11 Alt. Rep. 370; *Minot v. Mitchell*, 30 Ind. 228.

Even where a relative of the execution defendant bought a house taken in execution at less than its value, stating that he bought for the defendant, but not, in fact, affecting the sale by his statements, the agreement not being in writing, it was *held* that no express trust was raised in favor of the defendant; and as the sale was valid and there was no understanding with the defendant that the purchase was to be for his benefit, and no advance by him of any part of the purchase money, and no fraud, there was no resulting trust in his favor. *Gilbert v. Carter*, 10 Ind. 16.

So where the plaintiff, an uneducated colored man of good common sense,

sold his lot at a judicial sale and procured the defendant, an intelligent business man, to pay the money and take title, the plaintiff intending to redeem, and taking a lease for life from the defendant, paying taxes, etc., which lease was read to the plaintiff, who signed it willingly and paid the rent for years without expressing dissatisfaction, it was held that the evidence justified a finding of no fraud, and that the defendant was, therefore, not a constructive trustee. *Nesbitt v. Cavender* (S. Car.), 8 S. E. Rep. 193.

Compare Soggins v. Heard, 31 Miss. 426. In this case no fraud appeared. The land brought a fair price, and it does not seem that competition was hindered. There was a mere verbal agreement on the part of the purchaser to hold for the execution debtor. The court held this to raise a trust, saying: "The defendant, upon the faith of such an agreement, may have ceased his efforts to raise the money for the purpose of paying off the execution, and thus preventing a sale of his property . . . But it is said the agreement . . . was void under the statute of frauds. The statute has reference alone to a sale of lands, and not to a contract to purchase by one person for the benefit of another." To the same effect, see *Arnold v. Cord*, 16 Ind. 176.

Where Parties Are Fraudulently Kept from Attending Sale.—So if the purchaser by fraud prevents other purchasers from attending the sale, a constructive trust will arise. 1 Perry on Tr. (3rd ed.) 201; *Price v. Reeves*, 38 Cal. 457; *Gilmore v. Johnson*, 29 Ga. 67; *Pearson v. East*, 36 Ind. 27; *Martin v. Southard*, 4 J. J. Marsh. (Ky.) 491; *Soggins v. Heard*, 31 Miss. 426; *Boyn-ton v. Housler*, 73 Pa. St. 453; *Wolford v. Herrington*, 74 Pa. St. 311; *Cowperthwaite v. Carbondale Bank*, 102 Pa. St. 397; *Brannin v. Brannin*, 18 N. J. Eq. 212.

Where Competition Is Prevented by Fraudulent Agreement.—So a constructive trust will arise where one, in order to prevent competition, fraudulently agrees with another that he will purchase in their joint names, but gets a conveyance to himself at a less price. In such case the purchaser is a constructive trustee for the party defrauded.

An execution was issued against Wolford, his wife holding an unrecorded deed for land levied on as his; on the

eve of the sheriff's sale, Herrington, knowing of the deed, told the wife that her title was doubtful, and if she would allow him to buy the land at the sheriff's sale he would execute a writing, before the property was struck off, declaring that he bought for her. He bought the property, but refused to execute the writing. Held, that he was trustee *ex maleficio* for the wife. *Wolford v. Herrington*, 74 Pa. St. 311.

So if A agrees, by parol, with B, to purchase a certain tract of land of a third person, in his own name, for the benefit of both, and A enters into this agreement *mala fide*, for the purpose of obtaining the land at a less price than he could probably do with B for a competitor, there is a resulting trust in favor of B, and equity will compel a conveyance by A to B, according to the terms of the contract. *McCulloch v. Cowher*, 5 Watts & Serg. (Pa.) 427.

See *Ferguson v. Williamson*, 20 Ark. 272; *Adams v. Bradley*, 12 Mich. 346; *Rothwell v. Dawes*, 2 Black (U. S.) 613.

And see *Coe v. Bradley*, 49 Me. 388.

Mortgagee's Sale.—And a similar trust will arise where at a mortgagee's sale a purchaser prevents competition by announcing that he is purchasing for the mortgageor.

Where a brother redeemed his sister's land sold on foreclosure, representing that it was for her benefit, and afterwards rented it with her consent, and stated to several persons that he had redeemed it for her, and paid taxes on it out of the wages of her son, whom he employed, held, that she might redeem for the amount of his advances. *Bush v. Walker* (Ky.), 6 S. W. Rep. 717.

A's land was to be sold under a deed of trust. By agreement with B, A was to furnish what money he could, and B was to buy in the property, and hold it for a few months, when A was to have the lot on the payment of \$100 over and above B's expenditures. A furnished B with some money and B bought in the property, taking title in name of his wife. Subsequently he refused to convey, on being tendered the amount, denying the agreement and trust, and asserting that the purchase was with the separate money of the wife. This evidence was held to justify the finding that B held the land as constructive trustee of A. *Dupree v. Estelle* (Tex.), 10 S. W. Rep. 93.

misrepresentations which are in any way material to the transaction.¹

4. Constructive Trusts Arising from Keeping Back Valuable Information.—So one standing in a fiduciary relation to another may become a trustee by construction of law by keeping back from him valuable information.² The same rule may apply where no fiduciary relation exists.³

See also *Brown v. Dysinger*, 1 Rawle (Pa.) 408; *Bergh v. Wentz*, 73 Pa. St. 369; *Wolford v. Herrington*, 86 Pa. St. 39; *Dennis v. McCagg*, 32 Ill. 429; *Brown v. Lynch*, 1 Paige (N. Y.) 147; *Ryan v. Dox*, 34 N. Y. 307; *Jenckes v. Cook*, 9 R. I. 520.

Fraud.—But no such trust will arise in the absence of fraud. *Sharp v. Long*, 28 Pa. St. 443; *Kellum v. Smith*, 33 Pa. St. 158.

Extent of Trust.—This trust attaches to the property, not only in the hands of the purchaser, but also his heirs at law, and to his vendee taking with actual or constructive notice of the trust. *Tankard v. Tankard*, 84 N. Car. 286.

1. Where Fraudulent Misrepresentations Are Material.—A sold land bounding on the Ohio river to B, who laid it out for a town, and the lots were sold at auction. At the sale the auctioneer stated that the land lying upon the river was for the benefit and use of the town, and A recognized this trust by his acts. *Held*, that if A did hold the legal title to land on the river, he held it as trustee for the benefit of the town, and the grant of a ferry with a landing place on this land to the trustees of the town was good. *Dover v. Fox*, 9 B. Mon. (Ky.) 200.

So where Z bought a lot of M by articles, took possession, and made improvements; being unable to make the payments he sold part to S by parol, the division line being fixed by them. M, with the consent of Z, made the deed of the whole to S, he agreeing to hold the other part in trust for Z and to convey to him on being refunded the purchase money, and Z continued in possession of his part, and on tender of the purchase money S refused to convey. it was *held* that he held in trust for Z, and would be compelled to convey. *Seichrist's Appeal*, 66 Pa. St. 237.

A, who desired to convey land to his wife, conveyed to B, induced by B's oral promise to convey it to A's wife on request. *Held*, a trust, which equity would enforce, notwithstanding the statute of frauds. *Fishbeck v. Gross*, 112 Ill. 208.

So where one agrees, pending ejectment, to pay a certain judgment out of the proceeds of the land, title of land so recovered will be held by him in trust to pay judgment. *Weaver's Appeal*, (Pa.), 11 Cent. Rep. 160.

But where the declaration of the purchaser was that on the return of the absent owner he would let him repurchase the property at the price paid by the purchaser, and on his return the owner refused so to purchase, the purchaser held the property discharged of the trust. *Roach v. Hudson*, 8 Bush (Ky.) 410.

A and B were partners in possession of a stock range on public land and owners of stock. A died. B was of weak mind, without knowledge of business and illiterate. C with B's consent became A's administrator and assumed to wind up the partnership affairs. He caused the stock to be sold to D for \$2,000, misrepresenting to the probate court that a sale was necessary, and then induced B to enter the land and to sell to him for \$500. C and D then sold land and stock to a third party for \$12,500. *Held*, it appearing that D participated in the fraud, that equity would charge C and D as trustees for the amount gained. *Griffith v. Godey*, 113 U. S. 89.

And see *McNew v. Booth*, 42 Mo. 189; *Grumley v. Webb*, 44 Mo. 444.

2. An agent employed by his principal to purchase land, did so, taking title to himself. Subsequently, on suit against him being threatened, he offered a compromise, which by fraudulent misrepresentations he induced his principal to accept, and by which he remained in possession of a large part of the property. On bill afterwards brought by the principal, the agent was held a constructive trustee for the principal, owing to the fraud, by which the compromise was obtained. *Wellford v. Chancellor*, 5 Gratt. (Va.) 39.

And see *Matthews v. Bliss*, 22 Pick. (Mass.) 48; *Miller v. Welles*, 23 Conn. 21, 33.

3. *Jenkins v. Eldredge*, 3 Story (U. S.) 181.

XII. CONSTRUCTIVE TRUSTS OF THE SECOND CLASS.—Constructive trusts of the second class are those which arise from constructive fraud.¹ They differ from those previously discussed, in that the constructive trustee need not have been guilty of any actual fraud, but the fraud is presumed by equity from the relations of the parties or the circumstances of the case.²

1. Constructive Trusts Arising from the Acquisition of Trust Property by a Purchaser with Notice or a Volunteer.—The most frequent illustration of this class of constructive trusts is where property which is impressed with a trust, express or implied, is conveyed or assigned by the trustee to persons with notice, actual or constructive, of such trust,³ or to any person whomso-

1. *Supra*, X. See title FRAUD.

2. 2 Pomeroy's Eq. Jur. 621. See title FRAUD.

3. 2 Pomeroy's Eq. Jur. 621; Adair v. Shaw, 1 Sch. & Lef. 243, 262; Mansell v. Mansell, 2 P. Wms. 678; Leigh v. Macauley, 1 Y. & C. 260; Pennell v. Deffell, 4 De G. M. & G. 372, 388; Mayor v. Murray, 7 De G. M. & G. 497; Ernest v. Croysdill, 2 De G. F. & J. 175; Rolfe v. Gregory, 4 De G. J. & S. 576; Smith v. Barnes, L. R., 1 Eq. 65; Boursot v. Savage, L. R., 2 Eq. 134; *In re* European Bank, L. R., 5 Ch. App. 358; *Ex parte* Cooke, L. R., 4 Ch. D. 123; *In re* Hallitt's Estate, L. R., 13 Ch. D. 696; Mechanics' Bank v. Seton, 1 Pet. (U. S.) 399; Russell v. Clark, 7 Cranch (U. S.) 69, 97; Wormley v. Wormley, 8 Wheat. (U. S.) 421; Oliver v. Piatt, 3 How. (U. S.) 333; Caldwell v. Carrington, 9 Pet. 86; Jones v. Shaddock, 41 Ala. 262; Pindall v. Trevor, 30 Ark. 249; Griffin v. Blanchard, 17 Cal. 70; Price v. Reeves, 38 Cal. 457; Scott v. Umbarger, 41 Cal. 410; Sharp v. Goodwin, 51 Cal. 219; Boyd v. Brinckin, 55 Cal. 427; Mercier v. Hemme, 50 Cal. 606; Wells v. Francis, 7 Colo. 396; Ward v. Spivey, 18 Fla. 847; Planter's Bank v. Prater, 64 Ga. 609; Musham v. Musham, 87 Ill. 80; McVey v. McQuality, 97 Ill. 93; Ryan v. Doyle, 31 Iowa 53; Pugh v. Bell, 1 J. J. Marsh. (Ky.) 398, 403; Liggett v. Wall, 2 A. K. Marsh. (Ky.) 149; Wright v. Dame, 22 Pick. (Mass.) 55; Winona & St. Peter R. R. Co. v. St. Paul & Sioux City R. R. Co., 26 Minn. 179; Smith v. Walser, 49 Mo. 250; Eaton v. George, 42 N. H. 375; Dey v. Dey, 26 N. J. Eq. 182; Murray v. Ballou, 1 Johns. Ch. (N. Y.) 566; Swinburne v. Swinburne, 28 N. Y. 568; Newton v. Porter, 69 N. Y. 133; Tankard v. Tankard, 84 N. Car. 286; Peebles v. Reading, 8 Serg.

& R. (Pa.) 495; Hood v. Fahnstock, 1 Pa. St. 470; Wilkins v. Anderson, 11 Pa. St. 399; Viele v. Blodgett, 49 Vt. 270.

The only thing to be inquired into by a court of equity is whether the property bound by the trust has come into the hands of persons who were either bound to execute the trust or to preserve the property for the persons entitled to it. Trusts are enforced, not only against those persons who rightfully are possessed of the trust property as trustees, but also against all persons who come into the possession of the property bound by the trust, with notice of the trust. REDESDALE, C., in Adair v. Shaw, 1 Sch. & Lef. 243, 262.

It is, I apprehend, an undoubted principle of this court that as between *cestui que trust* and trustee, and all parties claiming under the trustee otherwise than by purchase for a valuable consideration, without notice, all property belonging to a trust, however much it may be changed or altered in its character, and all the fruit of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust. Pennell v. Deffell, 4 De G. M. & J. 372, 388.

Real Property.—In accordance with these principles, one who, by a blunder in the terms of a deed, obtains the legal title to land, with full knowledge of the fact that the equitable ownership is in another, will hold as trustee for the latter, and a grantee with notice from the legal owner will be affected with the same trust. Smith v. Walser, 49 Mo. 250.

So if a person enter land knowing it to have been previously appropriated. Benzein v. Lenoir, 1 Law Rep. (N. Car.) 504.

Mercier purchased and was entitled to a conveyance of an interest in a rancho from Lewis. Hemme, knowing of this transaction, subsequently purchased the same interest from Lewis. Hemme subsequently sold to Seaton, who was a *bona-fide* purchaser for value, without notice. *Held*, that Hemme was a constructive trustee for Mercier, and having sold to Seaton, was liable for the damage sustained. *Mercier v. Hemme*, 50 Cal. 606.

So where land belonging to the United States is duly entered and paid for at the land office, but the entry is wrongly cancelled by the land officers, a person making a subsequent entry with knowledge of the first, and acquiring the legal title to the land, will be *held* as trustee for the first occupant. *Forbes v. Hall*, 34 Ill. 159.

So the assignee of a title bond, who is notified at the time the transfer is made, that one of the tracts of land embraced in the bond has been previously sold to another, and who afterwards takes to himself a conveyance for the entire tract, will be *held* in equity a trustee of the legal title for the benefit of the prior purchaser. *Dickinson v. Any*, 25 Ala. 424.

A sold a tract of land to B, taking part of the purchase money in cash and notes for the rest, and giving to B a title bond for a conveyance on payment of the notes. B sold to C and assigned the bond. C sold and assigned to D, who entered into the possession of the land and continued in possession till his death. The year following D's widow paid to A the amount of the notes and procured from A a deed to B, who quit-claimed to her without consideration. She afterwards, for less than the land was worth, quit-claimed it to E. D's heirs at law brought suit against E to recover the land. It appeared that E had knowledge of D's occupancy during his lifetime. *Held*, that the land should be charged in E's hands with a trust in favor of D's heirs, subject to the rights of D's widow, by will or otherwise, which passed by her deed to E. *McVey v. McQuality*, 97 Ill. 93.

The Central Pacific Railroad Company issued and distributed a circular inviting people to settle and to make improvements on its lands, and promising those that should do so that they should be preferred as purchasers when the lands should be offered for sale. The defendant settled upon the land in

controversy, and filed his application to purchase the same in the office of the company, as directed by the circular, and made valuable improvements thereon. The company, without notifying the defendant that the price of the lands had been fixed, and without giving him the option to purchase, sold the land to the plaintiff, who took with notice of defendant's equities. *Held*, in an action of ejectment, wherein the defendant filed a cross complaint setting forth the above facts and praying that the plaintiff be compelled to convey to him, that the offer by the company and the acceptance of it by the defendant created a valid contract, and that the plaintiff took the legal title impressed with a trust in favor of the defendant, and should be compelled to convey the same to him. *Boyd v. Brinckin*, 55 Cal. 427.

And equity will charge land paid for in part with money known to have been stolen from a bank, with a trust in favor of the bank, for the amount so used. *Bank v. Barry*, 125 Mass. 20.

Partition Deed.—And where the interest of a tenant in common is impressed with a trust upon partition made, the part so set off in severalty to such tenant in common will be subject to the trust. *Breit v. Yeaton*, 101 Ill. 342.

But where the transaction was free from any fraud, and there is no confidential relation, no trust will be raised. *Jordan v. Moore* (Miss.), 3 So. Rep. 737.

Personal Property.—The same principles apply in the case of personal property. Accordingly, a purchaser from the husband of a promissory note belonging to the wife's separate estate, with notice express or implied of the wife's equitable rights, will be held a trustee for her benefit. *Smyth v. Oliver*, 31 Ala. 39.

So if a person lending money to a trustee on a pledge of trust stocks and selling the stocks for payment of the loan, will be compelled to account for them, if he have actual or constructive notice that the trustee was abusing his trust and applying the money lent to his own purposes. *Duncan v. Jaudon*, 15 Wall. (U. S.) 165.

So if a debtor deposits in the hands of his surety a note on a third person, as an indemnity against liability, and the surety transfers such note to another person who is cognizant of the trust, the latter becomes a trustee, by implication of law, for the benefit of the creditor as to the sums collected on the note. *Martin v. Bank*, 31 Ala. 115.

ever without consideration,¹ or has come into the hands of the heir, devisee or legatee of such trustee.² In such cases the holder of the property shall hold it impressed with the original trust,³ and the *cestui que trust* may follow it, as long as it can be

And where a bill single, not rendered negotiable by endorsement, is given by the payee to an agent for collection, and he sells it for a fair consideration to a third person, and he to another who sues thereon in the name of the payee to his use, a court of equity will hold him as trustee for the payee and compel him to account for the proceeds of the judgment. *May v. Nabors*, 6 Ala. 24.

But where there is authority to third parties to transfer stock, expressing on its face that it is given for full consideration, but the stock is impressed with a secret trust, if the trustee transfers such stock, the transferee is not to be held a trustee unless knowledge of the trust is brought home to him. *Foster v. Ambler* (Fla.), 5 So. Rep. 263.

And see title NOTICE.

1. Transfer of Trust Property Without Consideration.—In *Williams v. Vreeland*, 29 N. J. Eq. 417, Vreeland had obtained a bequest by fraud and consequently held it in trust for Williams, the party defrauded. He assigned the legacy for a nominal consideration to one of his children on certain express trusts. The assignee was held to be a trustee of the property for the original *cestui que trust*.

So where a purchaser of land died without completing his payments, and afterwards the vendor resold one-half of the lot to the widow of the original purchaser at a price much less than its value, and she, on payment, obtained a conveyance, held, that she took the legal title in trust for the heirs of her husband. *Musham v. Musham*, 87 Ill. 80.

So if a person has himself appointed administrator of an estate, and at a sale of the property of the estate purchases the same through a third person who pays no money, and agrees to hold the title for the administrator, such third person and all who purchase from him with notice, hold the property in trust for the heirs. *Scott v. Umbarger*, 41 Cal. 410.

And where a mortgagor, for the purpose of fraudulently defeating the rights of a second mortgagee, furnished the funds for the purchase of the property at

a sale under the first mortgage, equity will treat the voluntary purchaser as trustee of the mortgagor and subject the title in his hands to the rights of the second mortgagee. *Shinn v. Shinn*, 15 Ill. App. 141.

Notes were given for the purchase money of land, one of which was transferred by the holder to a third person as collateral security for a debt. After the death of the original holder, the notes not being paid, his administrator brought proceedings to foreclose the vendor's lien upon both notes. Under a decree of foreclosure the land was bought in by the heirs of the decedent and no money paid. Held, that a trust was created in favor of the holder of the one note as collateral, as to one-half the land. *Phelps v. Jackson*, 31 Ark. 272.

And see *Mansell v. Mansell*, 2 P. Wms. 681; *Anderson v. Nesbitt*, 2 Rawle (Pa.) 114; *Hassey v. Wilke*, 55 Cal. 525; *Mallagh v. Mallagh* (Cal.), 19 Pac. Rep. 256.

2. See cases cited in preceding notes. 2 Pomeroy's Eq. Jur. 621.

When a mortgagor is in possession of lands under an agreement with the purchaser at the foreclosure that he should have time to pay the debt, and upon payment that there should be a reconveyance to him, upon his death there is a resulting trust for the benefit of the heirs of the mortgagor. *Gaines v. Saunders* (Ark.), 7 S. W. Rep. 301.

When a person named in a will as trustee dies before the testator, the title to the lands embraced in the trust descends to the heir at law charged with the trust. *Woodruff v. Woodruff* (N. J.), 16 Atl. Rep. 4.

And see *Smith v. Ramsay*, 1 Gilm. (Ill.) 373; *Pritchard v. Wallace*, 4 Sneed (Tenn.) 405; s. c., 70 Am. Dec. 254; *Goldsberry v. Gentry*, 92 Ind. 193; *Coleman v. Eastman*, 5 Paige (N. Y.) 561; *Statesville Bank v. Simonton*, 86 N. Car. 187; *Tankard v. Tankard*, 84 N. Car. 286; *McKihney v. Burns*, 31 Ga. 295.

3. See cases cited in preceding notes. See also title NOTICE. And see *Rolfe v. Gregory*, 4 De G. J. & S. 562; *Price v. Reeves*, 38 Cal. 457.

identified, until it comes into the hands of a *bona-fide* holder for value and without notice,¹ when the trust will be transferred to the fund in the hands of the trustee.² Where, however, the property is money, and the trustee has paid it, as his own, for an antecedent debt, to one who receives it *bona-fide* as a general payment, and not as a special fund, the money becomes free from the trust.³

2. Constructive Trusts Arising from the Wrongful Acquisition of Trust Property by a Trustee or Other Fiduciary.—In all cases where a person clothed with a fiduciary character takes advantage of the relation, and thereby acquires the title to the property, he is construed to hold it in trust for the original beneficiary,⁴ as

1. Purchase for Valuable Consideration and Without Notice.—A purchaser of trust property for a valuable consideration and without notice takes it discharged of the trust. *Griffin v. Blanchard*, 17 Cal. 70.

A grantee will not be declared a trustee to hold the land for a party who has been defrauded by the conveyance, unless he was a party to the fraud. *Beach v. Dyer*, 93 Ill. 295; *Newton v. Newton*, L. R., 6 Eq. 135; *Dotterer v. Pike*, 60 Ga. 29; *Mercier v. Hemme*, 50 Cal. 606; *Clarke v. Hackethorne*, 3 Yeates (Pa.) 269; *Reed v. Dickey*, 2 Watts (Pa.) 459; *Viele v. Blodgett*, 49 Vt. 276; *Hubbard v. Burrell*, 41 Wis. 365; *Foster v. Ambler* (Fla.), 5 So. Rep. 263; *Shiveley v. Parker*, 9 Oreg. 500; *Eaton v. George*, 42 N. H. 375.

But in order to take the property discharged of the trust the purchaser must be ignorant of it, not only at the time of the purchase, but also when he pays his money and takes his deed. *Scott v. Umbarger*, 41 Cal. 410. Although it appears that the burden is on the party asserting the trust to clearly show notice on the part of the party to be charged. *Wilkins v. Anderson*, 11 Pa. St. 399.

Although the records may not show the trust, if they are sufficient to put the purchaser on inquiry he takes subject to the trust. *Hassey v. Wilke*, 55 Cal. 525.

2. See *supra*, XI., 1, and notes; *Hubbard v. Burrell*, 41 Wis. 365; *Mercier v. Hemme*, 50 Cal. 606; *Foster v. Ambler* (Fla.), 5 So. Rep. 263.

3. *Justh v. Bank of Commonwealth*, 56 N. Y. 478. Here trust funds were paid to the defendant, the consideration being an antecedent debt. The transferee, however, had no notice of the trust and took the fund *bona-fide*. The

court held that no constructive trust was raised, saying that if the fund has been paid either for a new consideration or an antecedent debt to one without notice no trust can be established.

This case was followed in *Stephen v. The Board of Education*, 79 N. Y. 183, where A had borrowed money from B on a forged mortgage, which he used in paying a debt to one who had no knowledge of the fraudulent transaction. A bill was brought against the latter to have him declared a trustee, but it was held that he took discharged of the trust.

See also *Burnett v. Gustafson*, 54 Iowa 86; s. c., 37 Am. Rep. 190. In that case the owner of certain cattle covered by a mortgage, shipped them out of the State and sold them, applying the proceeds to paying a note which he owed to a bank in another county of the State. The cashier of the bank to whom payment was made supposed that the money was the proceeds of the sale of cattle, but had no actual knowledge of the facts of the mortgage which was not recorded in that county. Held, that the bank could not be compelled to account for the amount to the holder of the mortgage.

Compare *Foster v. Ambler*, 5 So. Rep. 263, where MAXWELL, C. J., says (p. 273) that an antecedent indebtedness is not a sufficient consideration to enable the purchaser to take discharged of the trust.

4. 2 Pomeroy's Eq. Jur. 627; 1 Perry on Tr. (3rd ed.) 235, *et seq.*; *Heath v. Crealock*, L. R., 18 Eq. 215; *Buckley v. Welford*, 2 Cl. & Fin. 102; *Mumma v. Potomac R. Co.*, 8 Pet. (U. S.) 281; *Kelley v. Greenleaf*, 3 Story (U. S.) 93; *Koehler v. Transportation Co.*, 2 Black (U. S.) 715; *Taliaferro v. Taliaferro*, 6 Ala. 404; *Pindall v. Trevor*, 30 Ark.

long as the original property can be identified.¹

(1) PERSONS TO WHOM THE RULE EXTENDS.—The rule extends to trustees,² attorneys,³ administrators, executors and guardians,⁴

249; *Dyer v. Jacoway*, 42 Ark. 186; *Wells v. Robinson*, 13 Cal. 133; *Scott v. Umbarger*, 41 Cal. 410; *Guertero v. Ballerino*, 48 Cal. 118; *Tracy v. Colby*, 55 Cal. 67; *Church v. Sterling*, 16 Conn. 388; *Chastain v. Smith*, 30 Ga. 96; *Follansbe v. Kilbreth*, 17 Ill. 522; *Cookson v. Richardson*, 69 Ill. 137; *Stewart v. Duffy*, 116 Ill. 47; *Valette v. Tedeus* (Ill.), 14 N. East Rep. 52; *Goldsberry v. Gentry*, 92 Ind. 193; *Reickhoff v. Brecht*, 51 Iowa 633; *Storm Lake Bank v. Mo. Val. Life Ins. Co.*, 66 Iowa 617; *Rose v. Hayden*, 65 Kan. 106; *Keith v. Kellum* (Kan.), 35 Fed. Rep. 243; *Bryan v. McNaughton* (Kan.), 16 Pac. Rep. 57; *Oldhams v. Jones*, 5 B. Mon. (Ky.) 458; *Risk v. Risk* (Ky.), 9 S. W. Rep. 712; *Price v. Thompson*, 84 Ky. 219; *Brown v. Dwelley*, 45 Me. 52; *Jones v. Dexter*, 130 Mass. 380; *Wales v. Newbould*, 9 Mich. 45; *Mich. R. R. Co. v. Mellen*, 44 Mich. 321; *King v. Remington* (Minn.), 29 N. W. Rep. 352; *Kennedy v. Keating*, 34 Mo. 25; *Blauvelt v. Ackerman*, 20 N. J. Eq. 141; *LeGendre v. Byrnes* (N. J.), 14 Atl. Rep. 621; *Coleman v. Eastman*, 5 Paige (N. Y.) 561; *Bliss v. Matteson*, 45 N. Y. 22; *Smith v. Frost*, 70 N. Y. 65; *Holden v. N. Y. & Erie Bank*, 72 N. Y. 286; *Bennett v. Austin*, 81 N. Y. 308; *Hun v. Cary*, 82 N. Y. 65; *Wood v. Robe*, 96 N. Y. 414; s. c., 14 Am. Rep. 640; *Safford v. Hynds*, 39 Barb. (N. Y.) 625; *B. N. Y. & E. R. R. Co. v. Sampson*, 47 Barb. (N. Y.) 533; *Fulton v. Whitney*, 5 Hun (N. Y.) 16; *Atkins v. Withers*, 94 N. Car. 581; *Newton v. Taylor*, 32 Ohio St. 399; *Barrett v. Bamber*, 81 Pa. St. 247; *Rabb v. Flenniken* (S. Car.), 7 S. E. Rep. 597; *Miller v. Birdsong*, 7 Baxt. (Tenn.) 531; *Treadwell v. McKeon*, 7 Baxt. (Tenn.) 201; *Broyles v. Nowlin*, 59 Tenn. 191; *Smith v. Boquet*, 27 Tex. 507; *Whitwell v. Warner*, 20 Vt. 425; *State v. Rusk*, 21 Wis. 212.

1. *Mills v. Post*, 76 Mo. 426; *Bank v. Gray*, 12 Lea (Tenn.) 459.

2. **Trustee.**—*Heath v. Crealock*, L. R., 18 Eq. 215; *Smith v. Frost*, 70 N. Y. 65; *Rabb v. Flenniken* (S. Car.), 7 S. E. Rep. 597.

A trustee who buys in property under an encumbrance prior to that held by him as trustee, and at a price

below its real value, is always considered as doing it for the use and benefit of his *cestui que trust*. *Fulton v. Whitney*, 5 Hun (N. Y.) 16.

So a trustee cannot buy either directly or indirectly, property held by him in trust, and if he exchange trust property and takes title thereto in his own name, such property will be considered trust property to the extent of the trust property exchanged therefor. *Blauvelt v. Ackerman*, 20 N. J. Eq. 141.

3. **Attorney and Client.**—*Savery v. King*, 5 H. L. Cas. 627; *Jortin v. S. E. Ry. Co.*, 4 De G. M. & G. 270; *Hesse v. Briant*, 6 De G. M. & J. 623; *Cameron v. Lewis*, 56 Miss. 76.

In order to rebut the presumption of a trust the attorney must show that he has done as much to protect his client's interests as he would have done in the case of a client dealing with a stranger. Cases cited *supra*.

The rule is applied with especial strictness where the client is illiterate. *Cookson v. Richardson*, 69 Ill. 137.

Accordingly an attorney employed to foreclose a mortgage, who purchases the property at a sale, is a trustee. *Reickhoff v. Brecht*, 51 Iowa 633.

So of an attorney purchasing at a ground rent sale. *Barrett v. Bamber*, 81 Pa. St. 247.

See *Coleman v. Eastman*, 5 Paige (N. Y.) 561; *Buckley v. Wilford*, 2 Cl. & Fin. 102.

But the client has the option to accept or avoid the sale. 1 *Perry on Trusts* (3rd ed.), § 166; 1 *Story's Eq. Jur.*, §§ 312, 313; *Manning v. Hayden*, 5 Sawy. (U. S.) 361; *Case v. Carrol*, 35 N. Y. 388; *Berrien v. Lane*, 1 Hoff. Ch. (N. Y.) 428; *Howell v. Baker*, 4 Johns. Ch. (N. Y.) 120; *Nesbitt v. Lockman*, 34 N. Y. 169; *Hawley v. Cramer*, 4 Cow. (N. Y.) 730; *Evans v. Ellis*, 5 Den. (N. Y.) 643; *Harper v. Perry*, 28 Iowa 60; *Hess v. Vass*, 52 Ill. 481; *Trotter v. Smith*, 59 Ill. 244; *McDowell v. Milroy*, 69 Ill. 500; *Wade v. Pettibone*, 11 Ohio 60.

4. **Administrators, Executors and Guardians.**—*Holden v. N. Y. & E. Bank*, 72 N. Y. 286.

So the acts of one who, without administering on the estate, assumes its

agents,¹

management, are to be treated as the acts of a duly constituted administrator, and where the acts of the latter raise a constructive trust the acts of the former have the same effect. *Risk v. Risk* (Ky.), 9 S. W. Rep. 712.

If a person procures himself to be appointed administrator of an estate, and at a sale of the property of the estate purchases the same through a third person, who pays no money, and agrees to hold the title for the administrator, the sale is a fraud on the heirs, and such third person, and all who buy from him with notice, hold the property in trust for the heirs. *Scott v. Umbarger*, 41 Cal. 410; *Guerrero v. Ballerino*, 48 Cal. 118.

Where an administrator invested funds of the estate in improving his wife's land, with her consent and connivance, *held*, that equity would not suffer the property to be aliened, but would hold it for application to the claims of creditors, distributees or sureties of the administrator, if, on his final settlement, he appeared to be in default. *Dyer v. Jacoway*, 42 Ark. 186.

And where a widow, before appointment of any administrator, took and used assets of the estate in partially paying for land purchased by her, giving her note for the remainder with surety, who afterwards paid it, taking from the widow a title bond of the vendor, who also executed to him a deed, *held*, that the surety held the land in trust for the benefit of the creditors and distributees of the decedent, subject to the prior lien in his own favor to the extent of the sum paid by him, which might be set off by rents of the land accruing after his deed, he to be liable for any excess thereof over the sum. *Miller v. Birdsong*, 7 Baxter (Tenn.) 531.

So of a guardian. *Broyles v. Nowlin*, 59 Tenn. 191.

But where a guardian, being indebted to his ward, purchased land with his own funds, declaring that it was for the ward, whom he put in possession but took a deed in his own name, *held*, that no trust resulted to the benefit of the ward, in the absence of proof that the land was taken in satisfaction of the debt. *Taliaferro v. Taliaferro*, 6 Ala. 404.

1. Agent.—*Pindall v. Trevor*, 30 Ark.

249; *Cookson v. Richardson*, 69 Ill. 137; *Follansbe v. Kilbreth*, 17 Ill. 522; *Stewart v. Duffy*, 116 Ill. 47; *Wells v. Robinson*, 13 Cal. 133; *Chastain v. Smith*, 30 Ga. 96; *Church v. Sterling*, 16 Conn. 388; *Brown v. Dwelley*, 45 Me. 52; *Safford v. Hynds*, 39 Barb. (N. Y.) 625; *Smith v. Boquet*, 27 Tex. 507; *Oldhams v. Jones*, 5 B. Mon. (Ky.) 458; *Kleunder v. Fenske*, 53 Wis. 118; *Rose v. Hayden*, 35 Kan. 106; *Keith v. Kellam* (Kan.), 35 Fed. Rep. 243.

A party will not be permitted to purchase property and hold it for his own benefit, when he has a duty to perform in relation thereto which is inconsistent with his character as a purchaser on his own account. *King v. Remington* (Minn.), 29 N. W. Rep. 352.

A, being aware that B wished to obtain shares in a certain company, represented to B that he, A, could procure a certain number of shares at £3 a share. B agreed to purchase at that price, and the shares were thereupon transferred in part to him and in part to his nominees, and he paid A £3 a share. He afterwards discovered that A was in fact the owner of the shares, having just bought them for £2 a share. *Held*, that on the facts A was agent for B; and A ordered to pay back to B the difference between the prices of the shares. *Kimber v. Barber*, L. R., 8 Ch. 56.

An agent who, for a certain remuneration, undertook to collect the rents and exercise control over the property of his principal while the latter was absent and relied entirely on his discretion, judgment and integrity, had no right to interfere with the title to the property, or place himself in an attitude of antagonism to the interests of his principal. By purchasing the property under such circumstances, he made himself liable as a trustee in relation thereto, for the benefit of his principal. *Grumley v. Webb*, 44 Mo. 444; *Le Gendre v. Byrnes* (N. J.), 14 Alt. Rep. 621.

So a land agent employed by his principal to negotiate in regard to the purchase of certain land, purchased the property for himself and partner with his own money, and took title in the name of his partner. *Held*, that the purchase money furnished by the agent was a loan only, and the agent and his partner may hold the title as security

directors¹ and promoters² of corporations, and to all others in a fiduciary relation.³

for the money advanced, but cannot hold adversely to the principal, merely because she has not advanced the purchase money, when, at the time of employing the agent, the amount could not be known, and when no statement of the purchase money or the expenses therefor has been made. *Bryan v. McNaughton* (Kan.), 16 Pac. Rep. 57.

And an agent for the collection of successive mortgages who acquires a title under a foreclosure of one of the earlier of them, holds this as a constructive trustee for the later mortgages. *Rees v. Wallace*, 113 Ill. 589.

Husband as Agent for Wife.—Where the title was taken by the husband under a mere oral agreement to hold it for his wife, the trust is nevertheless valid. *Goldsberry v. Gentry*, 92 Ind. 193; *Brisson v. Brisson* (Cal.), 17 Pac. Rep. 689; *Newton v. Taylor*, 32 Ohio St. 399.

And where a husband, acting as the agent of his wife, takes in his own name, without her knowledge, a deed of property intended to have been conveyed to her in compromise of a claim due to an estate upon which she is administratrix, he will in equity be held a trustee for the parties interested in the property. *Wales v. Newbould*, 9 Mich. 45; *Rupp's Appeal*, 100 Pa. St. 531.

Where Agent Is Not Trustee.—The agent of a devisee of certain real estate in which there was a reversion subject to sale in case of devisee's death without issue, purchased the reversion at a public sale by the testator's executor, with his own funds. Held, that the agent was not trustee of the reversion for his principal, there being no agreement to that effect. *Kennedy v. Keating*, 34 Mo. 25.

1. Directors of Corporations.—1 Story's Eq. Jur. (13th ed.) 232, note. *Great Luxembourg Ry. Co. v. Magnay*, 25 Beav. 586; *Nant-y-Glo & Blaينا Iron Works Co. v. Grave*, L. R., 12 Ch. D. 738; *Mumma v. Potomac R. Co.*, 8 Peters (U. S.) 281; *Dodge v. Woolsey*, 181 How. (U. S.) 331; *Mich. Ry. Co. v. Mellen*, 44 Mich. 321.

While the officers and directors of a corporation are constantly spoken of as trustees, they are not, however, true trustees with the corporation or the stockholders as their true *cestuis que trust*, since they hold neither the

legal title to the corporate property nor that of the stock. Directors are clothed with a double character, that of trustees and that of agents. It is of the utmost importance to discriminate exactly between these two characters and determine accurately for whom, over what subject-matter and to what extent they are trustees; for upon this trust relation primarily depend the equitable remedies which may be obtained against them by the corporation or by the stockholders, while from their function of agency is derived their power to act for the corporation. *Pom. Eq. Juris.*, vol. 3, § 1089; *Great Luxembourg Ry. Co. v. Magnay*, 25 Beav. 586.

Although directors undoubtedly stand in the position of agents and cannot bind their companies beyond the limits of their authority, they also stand, in some degree, in the position of trustees. There is no inconsistency in this double view of the position of directors. They are agents and cannot bind their companies beyond their powers. They are trustees and are entitled to be indemnified for the expenses incurred by them within the limits of their trust. *Ex parte Chippendale*, 4 De G. M. & G. 19, 52; *Kelley v. Greenleaf*, 3 Story (U. S.) 93; *Hun v. Cary*, 82 N. Y. 65, 70.

Accordingly, where C had been appointed agent or commissioner of construction to secure the right of way for a railroad company and takes title in the name of L, a director of the company, it was held that the effect of the conveyances to L was to create a valid trust in favor of the company resulting by implication of law, in relation to the lands described in those deeds. *Buffalo, N. Y. & Erie R. R. Co. v. Lampson*, 47 Barb. (N. Y.) 533.

The officers and directors of a corporate body are trustees of the stockholders, and in securing to themselves an advantage not common to all the stockholders, they commit a plain breach of duty. *Koehler v. Black River Iron Co.*, 2 Black (U. S.) 715; *Bliss v. Matteson*, 45 N. Y. 22.

2. Promoters of Companies.—*Bagnall v. Carlton*, 6 Ch. Div. 372; *New Sombrero Co. v. Erlanger*, 5 Ch. Div. 73; s. c., 3 App. Cas. 1218.

3. The rule that a trustee cannot purchase at a public sale where the trust estate is interested in having the

property bring the highest price applies to all persons invested with a fiduciary power, as well as to trustees proper. *Price v. Thompson*, 84 Ky. 219.

A county surveyor and abstract maker, employed to examine and procure the title of a tract of land, occupies such a fiduciary relation towards his employers. *Valette v. Tedeus* (Ill.), 14 N. East. Rep. 52.

So a bank comptroller holds the securities deposited with him under the banking laws as trustee for the banks and bill holders. *State v. Rusk*, 21 Wis. 212.

But the relation between a man and the woman he is engaged to marry is not such a fiduciary relation. *Atkins v. Withers*, 94 N. Car. 581.

One who, without authority, assumes the management of property in which others are beneficially interested, becomes in equity a trustee, by construction, for their benefit, and during the continuance of such management is subject to the same rules and remedies as other constructive trustees. *Bennett v. Austen*, 81 N. Y. 308.

C, a trustee, employed a broker, who had notice of the trust, to sell out consols and invest the proceeds in railway stock. The broker sold the consols for cash, bought railway stock to the same amount for the settling day, and received the price of the consols in a cheque which he paid into his account at his banker's. He stopped payment before the settling day and went into liquidation. C claimed so much of the broker's balance at his banker's as was attributable to the price of the consols. *Held*, on appeal, that as the price of the consols was known by the broker to be trust money it could be followed, and that the claim must be allowed. *Ex parte Cooke*, L. R., 4 Ch. Div. 123.

A judge who orders a sale and has power to confirm or set it aside comes within the reason of the rule that trustees, strictly so called, and other fiduciaries, cannot make a valid purchase of any part of the estate in respect to which they have duties to perform. *Tracy v. Colby*, 55 Cal. 67, 91.

The clerk of a broker employed to make sale of land, who has access to the correspondence between his principal and the vendor, stands in such a relation of confidence to the latter that, if he becomes the purchaser, he is chargeable as trustee for the vendor,

and must reconvey or account for the value of the land. 22 N. Y. 327.

If, on the dissolution of a firm, one partner sells the partnership assets by public auction to a person who afterwards, in pursuance of a secret arrangement made with him before the sale, reconveys them to him, he will be held in equity to account to the other partner as if no sale had been made, although such partner was present at the sale and made a bid for the assets himself. *Jones v. Dexter*, 130 Mass. 380; *Wyman v. Hooper*, 2 Gray (Mass.) 141.

On the same principle when the interest of the plaintiff in real estate was sold on execution, and the time for redemption by him had expired before he learned of the sale, and in order to enable his mother to redeem for his benefit, and upon her oral promise to convey to him upon being paid certain loans and advances, and by the advice of her attorney, his former guardian, having recently come of age, he confessed a judgment to her for an amount much less than the value of the land which she claimed as a loan, but which he insisted was a gift, and she thereupon redeemed and got the sheriff's deed, but refused to reconvey on being tendered the amount of the judgment and her advances, it was *held* that, by reason of the confidential relation, she should not be permitted to invoke the statute of frauds, but must reconvey. *Wood v. Robe*, 96 N. Y. 414; s. c., 48 Am. Rep. 640.

And if, under an agreement to convey lands, part of which belong to the grantor and part to an infant, the grantor receives part payment and with this payment purchases a mortgage which covers the infant's share, that he may obtain title by foreclosure, the mortgage will not be held in trust for the infant, but will be the individual property of the grantor, inasmuch as the consideration paid therefor was the money of the grantor and not of the infant, whose property was not affected by the contract. *Johnson v. Dougherty*, 18 N. J. Eq. 406.

Plaintiff was the owner of certain real estate purchased of a corporation of which defendant was an officer and director. The corporation derived its title from certain heirs, but the purchase price had not all been paid. These heirs brought suit to compel payment or a sale of the land. Payment not being made a sale was

(2) ELECTION—EVIDENCE.—As in other cases of constructive trusts, the *cestui que trust* may elect to enforce the trust or to follow the fund.¹ Trusts of this description may be established by parol.²

(3) TRUSTEE MAKING A PROFIT OUT OF THE TRUST ESTATE.—The same principles apply to cases where the trustee makes a profit out of the trust estate.³

ordered. Defendant had assured plaintiff, when the action was begun, that the company would protect the rights of its grantees and make their title good. At the sale defendant became the purchaser of the land and then refused to confirm plaintiff's title. *Held*, that by his assurances to plaintiff defendant voluntarily assumed a confidential relation in the nature of a trustee, and as between the parties, the title to the property should be in precisely the same situation it was when defendant assured plaintiff his rights should be protected. *Allen v. Jackson* (Ill.), 13 N. E. Rep. 840.

No Trust Where There Is No Confidential Relation.—Where a clerk in a store pilfers from his employer, and with the money purchases land, he cannot be *held* as the trustee of the land for the benefit of his employer, so as to enable him to compel a conveyance of the legal title. *Campbell v. Drake*, 4 Ired. (N. Car.) Eq. 94.

If a party abstracts securities not entrusted to him and substitutes forged securities in their place, this does not create the relation of trustee and *cestui que trust*. *Doyle v. Murphy*, 22 Ill. 522.

Where Cashier Is Trustee, Relation Does Not Extend to the Bank.—It does not follow from the fact that a bank cashier was A's agent in such a sense that his purchase of A's land at a tax sale would inure to A's benefit, that the bank's purchase would so inure to A's benefit. *Storm Lake Bank v. Missouri Valley Life Ins. Co.*, 66 Iowa 617.

No Trust Raised.—But where the assignee of a bond for the conveyance of land, held by him as collateral for the payment of sums due on account, the account not being paid, pays the sum due to the obligor and takes a deed to himself, there is no resulting trust, and he will hold the land for the amount due to him. *Ramsdell v. Emery*, 46 Me. 311.

The bill alleged that H, complainant's brother, on the distribution of her fath-

er's estate, assumed to act as her guardian, or trustee, and as such received her distribution share. He had bought a part of the property of the estate and as part payment assumed to pay the amount of complainant's share; afterwards H made an arrangement with decedent, another brother, by which decedent succeeded to the trusteeship. The latter bought of H property which formerly belonged to the estate and assumed the payment of complainant's share, and gave her his note therefor. At the time of the distribution complainant was sixteen years of age, of weak understanding, and has since been incapable of transacting business. Decedent had recognized the trust until his death and had made payments thereunder. *Held*, that the allegations were insufficient to establish a trust. *Cameron v. Cameron* (Ala.), 3 So. Rep. 148.

1. *Nant-y-Glo & Blaina Iron Works Co. v. Grave, L. R.*, 12 Ch. Div. 738; *McLarren v. Brewer*, 51 Me. 402.

2. *Church v. Sterling*, 16 Conn. 388; *Swinburne v. Swinburne*, 28 N. Y. 568.

The agent must show affirmatively that he has not abused the trust. *LeGendre v. Byrnes* (N. J.), 14 Atl. Rep. 621.

In order to show that the purchase was made with trust funds it may be shown that the trustee had no means wherewith to purchase. *N. Y. & B. Ferry Co. v. Moore*, 18 Abb. N. Cas. (N. Y.) 106.

To charge a priest as such trustee of church property, the facts which constitute such a trust must be proved as in other cases. *St. Patrick's R. C. Church v. Daly*, 116 Ill. 76.

See *Hummell v. Bank of Monroe* (Iowa), 37 N. W. Rep. 954.

As to what evidence is not sufficient, see *Frelinghuysen v. Nugent* (N. J.), 36 Fed. Rep. 239.

3. By a trustee in this sense is meant a person who acts representatively, or whose office is to advise and operate, not for himself, but for others. This principle applies to and includes executors, administrators, guardians, attor-

XIII. CONSTRUCTIVE TRUSTS OF THE THIRD CLASS.—The third class of constructive trusts includes those which arise by pure construction of equity, for the purpose of carrying out certain equitable principles, and entirely independent of fraud. Fraud may or may not be present, but in the former case the interference of courts of equity is not called into play by its presence, but the jurisdiction attaches from the very nature of the transaction itself, or the relations of the parties.¹

neys at law, general and special agents, assignees, commissioners, sheriffs, and all persons, judicial or private, ministerial or counselling, who may in any respect have a concern in the business entrusted to them. *Rea v. Copelin*, 47 Mo. 76.

If trustees or executors buy up any debt or incumbrance to which the trust estate is liable for a less sum than is actually due thereon, they will not be allowed to take the benefit themselves, but the creditors or legatees, or other *cestuis que trust*, shall have the advantage of it. *Darcy v. Hall*, 1 Vern. 49; *Ex parte Lacey*, 6 Ves. 628; *Morret v. Paske*, 2 Atk. 54; *Carter v. Horne*, 1 Eq. Ca. Ab. 7; *Dunch v. Kent*, 1 Vern. 260; 2 De G. & J. 327; *Pooley v. Quilter*, 4 Drew. 184.

The *cestui que trust* is entitled to all the profits or advantages of the speculation or investment made with the trust property in the name of the trustee. Stock speculations; buying and selling land; commercial adventure, as in fitting out a vessel for a voyage; trust property put into the trade of another person from which he is to derive certain stipulated gains, or employ it himself for the purposes of his own business or trade; in all these cases, while the fiduciary is liable for all losses, he must account to the *cestui que trust* for all clear profits. *Docker v. Somes*, 2 M. & K. 664; *Frank's Appeal*, 5 Pa. St. 190; *Brown v. Ricketts*, 4 Johns. Ch. (N. Y.) 527; *Blauvelt v. Ackerman*, 5 C. E. Green (20 N. J. Eq.) 141; *Titherington v. Hodge*, 81 Ky. 286.

The profits of such a transaction must enure to the benefit of the *cestui que trust*, though the loss must fall entirely on the trustee. *Deegan v. Capner* (N. J.), 15 Atl. Rep. 819.

If a trustee or person acting for another sells the trust estate, and becomes himself the purchaser, the *cestuis que trust* are entitled, as a matter of course, to have the purchase set aside, and this even though the sale was at

auction, for a fair price, and the executor did not purchase for himself, but a third person by previous arrangement became the purchaser, to hold in trust for the separate use of the wife of the executor, who was one of the *cestuis que trust* and had an interest in the land under the will of the testator. *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.) 252.

And where in a conveyance no deed had actually been made by the trustee, and the property was afterwards forfeited and given back to the trustee for breach of condition, it enured to the benefit of the trust fund and not of the trustee. *Blauvelt v. Ackerman*, 20 N. J. Eq. 141.

And where one of the co-owners of a boat made a private bargain for the transportation of freight, there was a trust in the profits for the other co-owners. *Dohrman v. Copelin*, 47 Mo. 76.

Where a trustee retired from his trust in consideration of his successor paying him a sum of money, it was *held* that the money so paid must be treated as forming part of the trust estate, and be accounted for by the retiring trustee. *Sugden v. Crossland*, 3 Sm. & G. 192.

It is even said that a *cestui que trust* cannot give a benefit to his trustee. *Vaughton v. Noble*, 30 Beav. 34, 39; *Mason v. Martin*, 4 Md. 124; *Andrews v. Hobson*, 23 Ala. 219; *Green v. Winter*, 1 Johns. Ch. N. Y. 26. It has, however, been *held* that a trustee may buy from the beneficiary or accept a gift from him, where the transaction is beyond all suspicion of fraud; but the courts will exercise the closest scrutiny in all such cases, and require the trustee to show that the transaction was fair and reasonable. *Pennock's Appeal*, 14 Pa. St. 446; *Harrington v. Brown*, 5 Pick. (Mass.) 519; *Smith v. Isaac*, 12 Mo. 106; *Stuart v. Kissam*, 2 Barb. N. Y. 493. And see *Griffith v. Godey*, 113 U. S. 89; *Pennell v. Deffell*, 4 De G. M. & J. 372; *Burhans v. Beam*, 39 N. J. Eq. 593. 1. *Bispham's Eq.* (4th ed.) 132; 1

1. Constructive Trusts from a Conveyance Made through Mistake.—A frequent illustration of trusts of this class is where a conveyance has been made through ignorance, accident or mistake. In such cases equity will relieve, even though there be no fraud, if necessary through the medium of a constructive trust.¹

2. Constructive Trusts from the Renewal of Leases by a Fiduciary.—Another very frequent class of such trusts arises from the rule that "wherever one is placed in such relation to another, by the act or consent of that other or the act of a third person, or of the law, that he becomes interested for him or interested with him in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interest he has become associated;"² of this the best illustration is the renewal of a lease by a trustee or other person in a confidential relation (as, *e. g.*, a partner), in his own name and with his own funds. In such case such person will be construed to hold the renewal in trust for the *cestui que trust* or other persons interested.³ And the same principles apply to a pur-

Perry on Trusts (3rd ed.) 195. See *supra*, X. and notes.

1. As to what constitutes such a mistake as equity will relieve against, see titles ACCIDENT and MISTAKE. See also *Mellish v. Robertson*, 25 Vt. 603; *Loss v. Obry*, 22 N. J. Eq. 52; *Bloodgood v. Sears*, 64 Barb. (N. Y.) 76; *Sawyer v. Hovey*, 3 Allen (Mass.) 331. See 2 Pomeroy's Eq. Jur. 620.

Where, through the mistake of an executor, and without paying for it, a purchaser obtained more land than he was entitled to, he was construed to hold the surplus land as trustee for those beneficially interested. *Anderson v. Nesbit*, 2 Rawle (Pa.) 114.

So in *Hubbard v. Burrell*, 41 Wis. 365, a deed of certain property was intended to be given as a trust deed, but by inadvertence no trust was expressed in the deed, for which no consideration was given, the grantee was held a trustee for the intended beneficiaries.

So where the executor of a deceased owner of land sold it, and received the payment therefor, but the purchaser died before he took a deed, and a deed was afterwards given to his widow and executrix, held, that she took the land as trustee of the heirs. *Hoel v. Coursey*, 26 Miss. 511.

So a deed by mistake conveyed too great an interest. The grantee sold, and was held a trustee for the grantor as to the proper part of the proceeds. *Andrews v. Andrews*, 12 Ind. 348.

And if land of an intestate is sold, and his widow redeems it within two

years with her own money, a trust will be implied in favor of the heirs; and upon refunding the redemption money, or their just proportion of it, they will become entitled to the estate in fee, subject to the widow's right of dower. *Clark v. Cantwell*, 3 Head (Tenn.) 202.

If an absolute and unconditional deed is made to secure a debt due from grantor to grantee, the law will imply a resulting trust; and if the amount of the debt is tendered within a reasonable time after its becoming due, a reconveyance will be decreed, or, if the land has been sold by the grantee for more than the debt, *assumpsit* will lie against him for the surplus. If the debt is not paid within a reasonable time, the grantee will hold discharged of the trust. *Richardson v. Woodbury*, 43 Me. 206.

And a vendor who retained the legal title of the real estate, but assigned the notes given for the unpaid purchase money, held, to be a trustee of the land for the benefit of the assignee. *Felton v. Smith*, 84 Ind. 485.

2. *Bispham's Eq.* (4th ed.) 133.

3. *Bispham's Eq.* (4th ed.) 133; 1 *Perry on Tr.* (3rd ed.) 238; 2 *Pomeroy's Eq. Jur.* 623; *Keech v. Sandford* (*Rumford Market Case*), Sel. Cas. in Ch. 61; s. c., 1 *Leading Cas. in Eq.* (*White & Tudor*, 4th Am. ed.) 48, 62; *Rakestraw v. Brewer*, 2 P. Wms. 511; *Moody v. Matthews*, 7 Ves. Jr. 174; *Featherstonehaugh v. Fenwick*, 17 Ves. Jr. 298; *Clements v. Hall*, 2 De G. & J.

173; Clegg v. Edmonson, 8 De G. M. & G. 787; Clegg v. Fishwick, 1 Macn. & G. 294; Baker v. Whiting, 3 Sumn. (U. S.) 475; Laffer v. Naglee, 9 Cal. 662; Gower v. Andrew, 59 Cal. 119; King v. Cushman, 41 Ill. 31; Winkfield v. Brinkham, 21 Kan. 682; Curry v. Curry (Ky.), 9 S. W. Rep. 831; Leach v. Leach, 18 Pick. (Mass.) 68; Grumley v. Webb, 44 Mo. 444; Irwin v. Harris, 6 Ired. Eq. (N. Car.) 221; Hudson v. Wallace, 1 Rich. Eq. (S. Car.) 1; Matthews v. Dragand, 3 Dessaus. (S. Car.) 25; Galbraith v. Elder, 8 Watts (Pa.) 81; Lacey v. Hale, 37 Pa. St. 360; Frank's Appeal, 59 Pa. St. 190; Barnett v. Bamber, 81 Pa. St. 247; Davone v. Fanning, 2 Johns. Ch. (N. Y.) 252; Holridge v. Gillespie, 2 Johns. Ch. (N. Y.) 30; VanHorne v. Fonda, 5 Johns. Ch. (N. Y.) 388, 407; Everton v. Tappen, 5 Johns. Ch. (N. Y.) 497; Phyfe v. Wardell, 5 Paige (N. Y.) 268; Armour v. Alexander, 10 Paige (N. Y.) 571; Dougherty v. VanNostrand, 1 Hoff. Ch. (N. Y.) 68; Gibbes v. Jenkins, 3 Sand. Ch. (N. Y.) 130; Wood v. Perry, 1 Barb. (N. Y.) 114; Bennett v. VanSyckle, 4 Duer (N. Y.) 462; Struthers v. Pearce, 51 N. Y. 357; Mitchell v. Reed, 61 N. Y. 123.

The leading case is *Keech v. Sandford* (more commonly known as the *Rumford Market Case*), Sel. Cas. in Ch. 61; s. c., 1 Leading Cas. in Eq. (White & Tudor, 4th Am. ed.) 44, 62. In that case the trustee applied in the first instance for the renewal of the lease for his beneficiary, who was an infant; but the renewal was refused on the ground that, the subject-matter of the lease being the profits of a market, there could be no distress, and the lessee's remedy must be on the covenant alone, by which the infant could not be bound. The trustee then renewed for himself; and it was *held*, on bill filed, that he must still be regarded as trustee for the infant, LORD KING saying: "I must consider this as a trust for an infant, for I very well see, if a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed to the *cestui que* use. Though I do not say there was fraud in this case, yet he (the trustee) should rather have let it run out than to have had the lease to himself. This may seem hard that the trustee is the only person of all mankind who might not have the lease; but it is very proper that the rule should be strictly pursued, and not in the least relaxed; for it is

very obvious what would be the consequences of letting trustees have the lease on refusal to renew to *cestui que* use."

MITCHELL v. REED.—A very important American case is *Mitchell v. Reed*, 61 N. Y. 123, which was an action brought to have certain leases obtained by the defendant, during the existence of a copartnership between him and plaintiff for terms to commence at its termination, of premises leased and occupied by the firm, declared to have been taken for the partnership, and to have it adjudged that the defendant held them as trustee for the partnership.

The facts were that the plaintiff and defendant were partners in business in New York, occupying certain premises under leases which were to expire at the same time with the copartnership. Two years before that time the defendant, without notice to the plaintiffs, procured in his own name renewal leases commencing at the termination of the partnership leases and of the partnership. Upon the discovery of the transaction the plaintiff brought action as above described. The court decided in favor of the plaintiff.

DWIGHT, C., after an elaborate discussion of the cases, thus summed up the principles on which they were based:

"1. A trustee holding a lease, whether corporate or individual, holds the renewal as a trustee and as he held the original lease:

"2. This does not depend upon any right which the *cestui que* trust has to a renewal, but upon the theory that the new lease is, in technical terms, a 'graft' upon the old one, and that the trustee 'had a facility' by means of his relation to the estate, for obtaining the renewal, from which he shall not personally profit.

"3. The doctrine extends to commercial partnerships, and one of the several partners cannot, while a partnership continues, take a renewal lease clandestinely, or 'behind the backs' of his associates for his own benefit. It is not material that the landlord would not have granted the new lease to the other partners or to the firm.

"4. It is of no consequence whether the partnership is for a definite or an indefinite period. The disability to take the lease grows out of the partnership relation. While that lasts the renewal cannot be taken for individual purposes,

though the lease does not commence until after the expiration of the partnership.

"5. It cannot necessarily be assumed that the renewal can be taken by an individual member of the firm, even after dissolution. The former partners may still be tenants in common; or there may be other reasons of a fiduciary nature why the transaction cannot be entered into."

See *Phyfe v. Wardell*, 5 Paige (N. Y.) 268, 279. This was a case in which was involved the renewal of a lease by parties to whom an interest in the premises had been conveyed by the original holder of the lease, in order that they might obtain a renewal without prejudice to the rights of a sub-lessee of the original holder. The parties to whom the interest was conveyed secured a renewal in their own names and proceeded to eject the sub-lessee, by which the original holder was obliged to make good the loss or damage sustained by him. The case did not involve a trust, but the prayer was for a specific performance of the contract and indemnity against the claim of the sub-lessee, and for the enforcement of his lien for the unpaid purchase money upon the legal interest in the premises which the defendants in the case acquired under their new lease. The relief asked depended on the same principles as that under discussion. CHANCELLOR WALWORTH thus states the rule: "The rule on this subject is, that if a person who has a particular or special interest in a lease, obtains a renewal thereof from the circumstance of his being in possession as tenant, or from having such particular interest, the renewed lease is, in equity, considered as a mere continuance of the original lease, subject to the additional charges upon the renewal, for the purpose of protecting the equitable rights of all parties who had any interest, legal or equitable, in the old lease."

MR. CHANCELLOR KENT said: "If a mortgagee, executor, trustee, tenant for life, etc., who has a limited interest, gets an advantage by being in possession, or 'behind the back' of the party interested in the subject, or by some contrivance in fraud, he shall not retain the same for his own benefit, but hold it in trust." *Holridge v. Gillespie*, 2 Johns. Ch. (N. Y.) 30, 33.

So where, during the existence of a continuing partnership of undetermined duration, three or four copartners, with-

out the knowledge of the other, obtain a new lease in their own name, of premises leased and used by the firm, the same becomes partnership property, and upon dissolution the other partner is entitled to his proportion of its value. *Struthers v. Pearce*, 51 N. Y. 357.

But the court cannot compel the continuing partners to take the lease at a valuation. *Dougherty v. Van Nostrand*, 1 Hoff. Ch. (N. Y.) 68.

On the same principle, where one possessed of a renewable term mortgaged it to another, who gained a new term from the landlord to commence after the old one; this new one was held subject to the old equity of redemption. *Rakestraw v. Brewer*, 2 P. Wms. 511.

So where an intestate had contracted for the purchase of a tract of land with the unexpired term of a ferry charter annexed to it. Shortly after his death the ferry was re-chartered in the name of his wife who was his administratrix. Held, that she received the charter as a trustee for the estate and was accountable for the rents and profits. *Husen v. Wallace*, 1 Rich. Eq. (S. Car.) 1, 7.

And the principle has even been extended to the case of a confidential clerk who, pending negotiations by his employer for a renewal of the lease of the premises occupied by him for the purposes of his business, obtained such renewal in his own name and that of another with notice of the facts. *Gower v. Andrew*, 59 Cal. 119.

The good-will of the State to give actual settlers the benefit of their improvements and the pre-emptive right to purchase the lands upon which they have settled is a fair subject of contract, and such contracts are governed by the same principles as contracts respecting the good-will of the renewal of leases. *Armour v. Alexander*, 10 Paige (N. Y.) 571.

A forfeiture of a lease fraudulently effected through the agency of a third person, to defeat the interest of a mortgagee by way of sublease, cannot inure to the benefit of such third person; if the latter takes a new lease he will be held a trustee for the benefit of the sub-lessee. *Aspinwall v. Jones*, 117 Mo. 209.

Where A, being bound in equity to lease land to B, makes a lease thereof to C, C will be decreed the trustee thereof for B and to assign the lease to him. *Westfall v. Singleton*, 1 Wash. (Va.) 227.

chase by such trustee.¹

1. Accordingly, where one of two holders of a leasehold in partnership purchases the fee in his own name and with his own money, it enures equally to the other on payment by him of his share of the purchase money. *Laffan v. Naglan*, 9 Cal. 662.

So where an agreement had been made to purchase land for the firm, and one of the partners purchased the said land in his own name, it was *held* to enure to the benefit of the firm. *Lacy v. Hale*, 37 Pa. St. 360; *Settembre v. Putnam*, 30 Cal. 490.

And where R, with his own money, bought certain mining claims, with the understanding that he would transfer the same to a company of which he was one, which company was to own these claims with other claims, which were to be worked together, it being necessary to so work them to secure water rights to make the whole valuable, *held* that R, after securing in his own name claims which, if held by him in severalty, would greatly injure the other claims of the company, might be required to convey to the company on being tendered the money he paid for such claims. *Coyote Gold Co. v. Ruble*, 8 Oreg. 284.

So of a trustee who purchases an outstanding title. *King v. Cushman*, 41 Ill. 31.

Or buys up incumbrances at an undervalue. *Matthews v. Dragand*, 3 Des-saus. (S. Car.) 25, 28.

And an attorney at law, who has been consulted professionally respecting the title to lands, cannot afterwards become the purchaser of these lands from the State or a third person, and set up such title against that of his client, but the same shall enure to the benefit of his client. *Galbraith v. Elder*, 6 Watts (Pa.) 81. And see *Frank's Appeal*, 59 Pa. St. 190.

So where one of several co-obligors obtained by assignment a note and mortgage by which they were mutually bound, which note had been paid by two of the said co-obligors, it was *held* that he held the note and mortgage in trust for himself and his co-obligors, and that the said trust enured to those who paid the joint note. *Curry v. Curry* (Ky.), 9 S. W. Rep. 831.

The owner of one of two conflicting land grants gave to the owner of the other, one W, a power of attorney to

dispose of the land granted to him. This grant was rejected by the board of land commissioners. W's was confirmed. *Held*, that W, upon the rejection of said grant, ceased to be a trustee for its owner and was free to take under his grant the land covered by both grants. *Pico v. Warner* (Cal.), 14 Pac. Rep. 377.

Stimpson gave a deed of release of his interest as a tenant in common of certain premises to Baker; at the time of this conveyance Whiting was in possession of the premises, claiming them in his own right by virtue of a purchase under a tax sale. Whiting was one of the tenants in common of the premises and was the agent of Stimpson and the other tenants in common. It was *held* that he ought to be construed the holder of the legal title for Stimpson and his grantee to the extent of their interests, and that he ought to be decreed to convey the legal title to the premises, after being repaid his just costs. *Baker v. Whiting*, 3 Sumn. (U. S.) 475.

So where A, B and C, having agreed to purchase land, each paying a third and to divide the profits on a resale, A privately arranged with a person who had a lot for sale, that if he secured a purchaser for a part of the lot at a fixed price the seller would convey to him a certain other part, and A then secured B and C to make the purchase, telling them that the other part of the lot had been sold, and himself afterwards received a conveyance of that part. *Held*, that he held it in trust for B and C. *Hodge v. Twitchell*, 33 Minn. 389.

So where a co-tenant buys in an outstanding title in his own name he holds in trust for his co-tenants. *Van Horne v. Fonda*, 5 Johns. Ch. (N. Y.) 388; *Mandeville v. Solomon*, 33 Cal. 38.

And a quit claim deed made by one joint owner to his co-tenant, though absolute on its face, will, if intended as a mere matter of convenience in making conveyances to purchasers of portions of the land, be treated as between co-tenants as a conveyance in trust only, and not as divesting the grantor of his interest in the land. *Beadle v. Beadle*, 2 McCrary C. Ct. 586.

The apparent exceptions to the rule all show some peculiar circumstances which take them out of its application. *Mitchell v. Reed*, 61 N. Y. 123, 140; *Van Dyke v. Jackson*, 1 E. D. Smith

XIV. CONSTRUCTIVE TRUSTS—EVIDENCE.—Constructive trusts may be proved by parol evidence.¹ But it must be very strong and clear.²

XV. LIMITATIONS AND LACHES.—Constructive trusts may be barred by long acquiescence.³ The exact length of time which is necessary cannot be determined.⁴ Each case is governed by its own circumstances.⁵

(N. Y.) 140; Musselman's Appeal, 62 Pa. St. 81; Phillips v. Reeder, 18 N. J. Eq. 95; Anderson v. Lemon, 8 N. Y. 236.

1. Hoge v. Hoge, 1 Watts (Pa.) 163; Squire's Appeal, 70 Pa. St. 268; Cox v. Ashman, 76 Ind. 210; Collier v. Collier, 30 Ind. 32; Ryan v. Dox, 34 N. Y. 307; Wood v. Robe, 96 N. Y. 414; s. c., 48 Am. Rep. 640; Peterson v. Grover, 20 Me. 363; Gilpatrick v. Glidden (Me.), 16 Atl. Rep. 464; Campbell v. Dearborn, 109 Mass. 130; Hall v. Linn, 8 Colo. 464; Fishbeck v. Gross, 112 Ill. 208; Russell v. Southard, 12 How. (U. S.) 139; Ferguson v. Haas, 64 N. Car. 772; Barrell v. Haurick, 42 Ala. 60; Judd v. Mosely, 30 Iowa 423.

But this has been confined to cases where fraud or mistake is alleged. Peterson v. Grover, 20 Me. 363; Miller v. Cotten, 5 Ga. 341; Barrell v. Haurick, 42 Ala. 60.

And see cases cited under sub-heads EVIDENCE, in notes *supra*, under CONSTRUCTIVE TRUSTS. The principles are the same as those which govern evidence in RESULTING TRUSTS. *Supra*, V., 9; V., 17.

2. Collier v. Collier, 30 Ind. 32; Peterson v. Grover, 20 Me. 363; Miller v. Cotten, 5 Ga. 341.

Especially after a long lapse of time. Collier v. Collier, 30 Ind. 32. And see *supra*, V., 11; V, 17.

3. Hall v. Doran, 13 Iowa 368; Kane v. Bloodgood, 7 Johns. Ch. (N. Y.) 90; Elmendorf v. Taylor, 10 Wheat. (U. S.) 152; Sherwood v. Sutton, 5 Mason (U. S.) 143; Millen v. McIntyre, 6 Pet. (U. S.) 61; Grimsley v. Grimsley (Ga.) 5 S. E. Rep. 760.

Merely lapse of time may be no bar. Paschall v. Hinderer, 28 Ohio St. 568.

Sixteen years has been held sufficient to bar the trust where the *cestui* knew or might have known of his rights during the whole time. Hite v. Hite, 1 B. Mon. (Ky.) 177.

But where there was no such knowledge, eighteen years was insufficient. Bell v. Webb, 2 Gill (Md.) 163.

In Norris' Appeal, 71 Pa. St. 106,

twenty years was held to bar the right. See Perry v. Craig, 3 Mo. 360; Furd v. Wilson, 6 B. Mon. (Ky.) 479; Elmendorf v. Taylor, 10 Wheat. (U. S.) 152. But in Donovan v. Driscoll, 93 Pa. St. 509, a different conclusion was reached, and the *cestui* was not barred by a delay of twenty years.

So of twenty-seven years: Hayes v. Goode, 7 Leigh (Va.) 542.

So of thirty. Philips v. Belden, 2 Edw. Ch. (N. Y.) 1; Harrod v. Fountleroy, 3 J. J. Marsh. (Ky.) 548.

So of thirty-eight. Powell v. Murray, 10 Paige (N. Y.) 256. And see *supra*, V., 18.

4. No trust will be decreed in favor of an equitable owner who has neglected to assert his right and enforce the trust for such a length of time and under such circumstances, as to estop him from questioning the legal title of the other party. Hall v. Doran, 13 Iowa 368. See Donovan v. Driscoll, 93 Pa. St. 509.

Where an administrator so mixes the trust money with his own that identification is impossible and dies, and his estate is settled, those to whom it passes cannot be charged as trustees at the instance of those whose money is thus misused, but who made no claim during the settlement of the estate. McComas v. Long, 85 Ind. 549.

5. Cases of constructive trust being purely of equitable cognizance, lapse of time is no absolute bar to a suit for relief thereon; but each case depends upon its own nature and circumstances, the court taking the statute as a guide or suggestion, rather than a command. Manning v. Hayden, 5 Sawyer (U. S.) 360; Boone v. Chiles, 19 Pet. (U. S.) 177; Michoud v. Girod, 4 How. (U. S.) 503, 561, and see *supra*, V., 18.

Authorities of Implied Trusts.—Bispham's Principles of Equity (4th ed.); Story's Equity Jurisprudence (13th ed.); Pomeroy's Equity Jurisprudence; Adams' Doctrine of Equity (7th Am. ed.); Perry on the Law of Trusts and Trustees (3rd ed.); Lewin on Trusts & Hill on Trustees.

IMPLIED WARRANTY.—

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1. Implied Warranty—Definition.—An implied warranty is a contract which the law implies, as collateral to, and arising out of an express one for the sale of personal property, and wherein, by implication of law, the vendor is held to have warranted the title or quality of the property sold at the time of sale.¹

1. A warranty is an express or an implied statement of something which the party undertakes shall be part of the contract, yet collateral to the express object of it. LORD ABINGER, in *Chanter v. Hopkins*, 4 M. & W. 399. "Implied warranties arise by implied operation of law." . . . They "are not conclusions or inferences of fact

drawn by a jury; but they are the conclusions or inferences of law pronounced by the court upon facts admitted or proved before the jury." *Osgood v. Lewis*, 2 Har. & G. (Md.) 495; s. c., 18 Am. Dec. 317, 319.

In case the facts are controverted the court should instruct the jury hypothetically upon them, stating what

2. Caveat Emptor—Rule Defined.—"Let the purchaser beware" is a maxim of the common law. In cases where it applies there can be no implied warranty, and in cases where the law raises an implied warranty the rule of *caveat emptor* cannot apply. Therefore *caveat emptor* may be defined as a rule of the common law, taken to be a part of every contract for the sale of personal property in which there is neither fraud, deceit nor an implied or expressed warranty, on the part of the vendor; and in which all conditions precedent have been complied with by the vendor, and under which rule the purchaser takes the risk of loss by defects in the title, quality or quantity of the property sold to him.¹

facts, if proved, constitute an implied warranty as a matter of law. Osgood v. Lewis, 2 Har. & G. (Md.) 495; s. c., 18 Am. Dec. 317, 319.

But it has been said that the existence of an implied warranty is a question of intent for the jury. Beirne v. Dord, 5 N. Y. 95; s. c., 55 Am. Dec. 321.

What is implied in an express contract is as much a part of it as what is expressed. Bishop on Con. (Enlarged ed.), § 241.

Where there is a written contract containing no express warranty, an implied warranty must arise, if at all, from the language used in the written instrument. "It must have its source, if at all, in some language either of description or other character employed in the contract." Ottawa Battle etc. Co. v. Gunther, 31 Fed. Rep. 208, 212.

Implied warranties are created by law, or spring from the facts existing at the time of sale, from what the parties did, rather than from what they said. They are contracts, to be sure, but silent contracts; and certain rules prevail as to their existence or non-existence. Bennett's note to Benj. Sales (ed. 1888), p. 614.

A warranty in a sale of goods is not one of the essential elements of the contract, for a sale is none the less complete and perfect in the absence of a warranty. But it is a collateral undertaking, forming part of the contract by the agreement of the parties, express or implied. Benj. on Sales (Bennett's ed. 1888), § 610; 2 Schouler's P. P. (2nd ed.), § 321; Foster v. Smith, 18 C. B. 156; Mondel v. Steel, 8 M. & W. 858; Street v. Blay, 2 B. & Ad. 456; Chanter v. Hopkins, 4 M. & W. 399.

An implied warranty is one which the law deduces as an inevitable conse-

quence of the contract, notwithstanding there had been no special undertaking in the matter. 2 Schouler's P. P. (2nd ed.), § 328.

But an antecedent representation by the vendor not made a part of the terms of sale, does not constitute a warranty. Benj. Sales (Bennett's ed. 1888), § 610; 2 Schouler's P. P. (2nd ed.), §§ 321, 332.

Nor can a warranty, express or implied, be created after a sale is made by any acts, expressions or representations of the vendor, unless some new consideration be given for the warranty. Benj. on Sales (Bennett's ed. 1888), § 611; 2 Schouler's P. P. (2nd ed.), § 332.

The warranty must be upon the sale and one of the terms of the contract of sale. Hogins v. Plympton, 11 Pick. (Mass.) 97, 99.

But a mere expression of opinion, not intended as an inducement to the sale or to be relied upon by the buyer, does not constitute a warranty. Tenney v. Cowles, 67 Wis. 594.

1. "The law of England is more lenient" than the civil law, "to the vendor, its general principle being *caveat emptor*." With reference to quality, the exceptions to this principle are very few. Holland's El. Jurisp. (4th ed.) 238.

"Note, that by the civil law every man is bound to warrant the thing he selleth or conveyeth, albeit there be no express warranty; but the common law bindeth him not unless there be a warranty either in deed or in law, for *caveat emptor*." Coke Lit. 102 a.

For a case in which, because the facts did not raise an implied warranty, it was held that *caveat emptor* was the rule, see Lukens v. Freund, 27 Kan. 664; s. c., 41 Am. Rep. 429, 434.

"The rule of the common law . . . is *caveat emptor*, which implies that

the purchaser must take care to examine and ascertain the kind or quality of the article he is purchasing, or provide against any loss he may sustain from his ignorance of the kind or quality of the article sold, or from his inability to examine it fully, by an express agreement of warranty, that the article purchased is of a particular kind or quality which the parties supposed it to be." *Wright v. Hart*, 18 Wend. (N. Y.) 453.

The general rule is well understood, that in the sale of any article of merchandise, a warranty cannot be implied of the goodness of the article, from the fact that a sound fair price has been paid, or agreed to be paid; and that redress cannot be had, although the article sold is not a salable, merchantable article, unless there be a warranty of its soundness or quality, or unless the vendor has been guilty of fraud in the sale. In such sales, the purchaser can always protect himself by demanding a warranty; if that be not required, and there be no fraud on the part of the vendor, the purchaser buys at his own risk; his judgment is his only warrantor, and he has no right to call on the vendor for any damages he may have sustained, by the article being different, or of an inferior quality from that which he expected he was purchasing, the maxim of *caveat emptor* applies. *Wright v. Hart*, 18 Wend. (N. Y.) 455.

If upon a sale there be neither a warranty nor deceit, the purchaser purchases at his peril. *KENT, J.*, in *Seixas v. Woods*, 2 Cai. (N. Y.) 48; s. c., 2 Am. Dec. 215.

The first and general rule relating to warranty in cases of sale is, that the purchaser buys at his own risk—*caveat emptor*—unless the seller either gives an express warranty, or unless the law imply a warranty from the circumstances of the case, or the nature of the thing sold, or unless the seller be guilty of a fraudulent representation or concealment in respect to a material inducement to the sale. *Story on Sales* (Perkins' ed.), § 349; 2 *Schouler P. P.* (2nd ed.), § 322. And see the following cases wherein the rule of *caveat emptor* is explicitly stated. *Kingsbury v. Taylor*, 29 Me. 508; s. c., 50 Am. Dec. 607.

Emerson v. Brigham, 10 Mass. 197; s. c., 6 Am. Dec. 109 and note; *Hight v. Bacon*, 126 Mass. 10; s. c., 30 Am. Rep. 639; *Welch v. Carter*, 1 Wend. (N. Y.) 185; s. c., 19 Am. Dec. 473. And for a collections of cases from all the States on the rule *caveat emptor*, see

Bennett's note to Benj. on Sales (ed. 1888), p. 623.

One of the leading cases of the common law showing with what harshness the maxim *caveat emptor* was applied, and how far it trenchoned upon other doctrines of the law, that in modern times have resumed their true position, is *Chandelor v. Lopus*, 2 Croke Jac. 2; s. c., 1 Sm. Lea. Cas. *77.

In this case "the defendant sold to the plaintiff a stone, which he affirmed to be a bezoar stone, but which proved not to be so." It was held that no action would be against the defendant, "unless he either knew that it was not a bezoar stone, or warranted it to be a bezoar stone."

In the beginning of his note to this case MR. SMITH says: "If the plaintiff in this case were to declare upon a warranty of the stone, he would at the present day, perhaps, succeed, the rule of law being that *every affirmation at the time of sale of personal chattels is a warranty, provided it appears to have been so intended.*" 1 Sm. Lea. Cas. *78.

But notwithstanding the fact that *Chandelor v. Lopus* is imperfectly reported, 2 *Schouler's P. P.* (2nd ed.), § 347, it has many times been cited as showing the correct application of the maxim *caveat emptor*, and upon it the early New York cases were founded. *Seixas v. Woods*, 2 Caines (N. Y.) 48; s. c., 2 Am. Dec. 215 and note. Since that time, however, the limitations upon the rule of *caveat emptor* have become more clearly understood, and *Chandelor v. Lopus* can no longer be considered binding upon the exact point decided in it. *Hawkins v. Pemberton*, 51 N. Y. 198; *Dounce v. Dow*, 64 N. Y. 411; *Story on Sales* (Perkins' ed.), § 359; *Stone v. Denny*, 4 Met. (Mass.) 151, 155; 2 *Schouler's P. P.* (2nd ed.), § 343; see also notes to *Chandelor v. Lopus*, in Smith's Leading Cases, especially the American notes in the last edition.

"On the sale of personal property, where the purchaser inspects for himself the specific goods to be sold, and there is no express warranty, and the seller is guilty of no fraud and is not himself the manufacturer of the goods sold, the doctrine of *caveat emptor* applies, although the seller may suppose that the goods are bought for the purpose to which the purchaser applies them. *Hight v. Bacon*, 126 Mass. 10; s. c., 30 Am. Rep. 639.

Warranty of quality is generally not:

3. Implied Warranty Excludes Caveat Emptor, and vice versa.—The existence in a sale of an implied warranty excludes the application of the maxim *caveat emptor*, and conversely, when the maxim is applicable no implied warranty exists. This will appear clearly from a comparison of the definitions just given of "implied warranty" and "*caveat emptor*." It is evident that the cases falling under one definition cannot come within the scope of the other. But in many cases the distinction between the two doctrines is very subtle, both as to the law and fact. Yet it is important and the rule of exclusion should be carefully observed.¹

4. Caveat Venditor—Rule of Roman Law.—In contrast with *caveat emptor* stands the rule of the civil law *caveat venditor*. In terms, the two rules are the antipodes of each other.² But the limita-

implied in *executed* sales of goods, but in the absence of fraud or express warranty the rule is *caveat emptor*. *Beirne v. Dord*, 5 N. Y. 95; s. c., 55 Am. Dec. 321.

The doctrine of *caveat emptor* is founded upon the idea that the purchaser sees what he buys and exercises his own judgment. Where he has no opportunity of exercising this judgment, but relies upon the judgment of the party with whom he deals, the tendency of the modern decisions is to imply a warranty of quality. *Brantley v. Thomas*, 22 Tex. 270; s. c., 73 Am. Dec. 264 and note.

But the purchaser must attend to qualities within his knowledge and observation. *Brantley v. Thomas*, 22 Tex. 270; s. c., 73 Am. Dec. 264.

Caveat emptor is the rule of sale in the absence of express warranty, where the vendee has equal knowledge of, or equal opportunities to know the character or quality of the article sold, with his vendor. *Bartlett v. Hoppock*, 34 N. Y. 118; s. c., 88 Am. Dec. 428; *Weimer v. Clement*, 37 Pa. St. 147; s. c., 78 Am. Dec. 411; *Hyatt v. Boyle*, 5 Gill & J. (Md.) 110; s. c., 25 Am. Dec. 276.

Caveat emptor is the rule in sales where there is neither fraud nor express warranty, and the purchaser buys on inspection or with an opportunity to inspect. *Kohl v. Lindley*, 39 Ill. 195; s. c., 89 Am. Dec. 294; *Getty v. Rountree*, 2 Pin. (Wis.) 379; 2 Chand. (Wis.) 28; s. c., 54 Am. Dec. 138.

But defects visible and easy to discover will not prevent the vendee's recovery therefor if the seller has disguised them, and by his false statements has induced the vendee to buy. *Hanks v. McKee*, 2 Litt. (Ky.) 227; s. c., 13 Am.

Dec. 265 and note; *Chadsey v. Greene*, 24 Conn. 562; *Biggs v. Perkins*, 75 N. Car. 379; *Armstrong v. Bufford*, 51 Ala. 410; *Roseman v. Canovan*, 43 Cal. 110, 117.

In the foregoing cases and authorities it is deemed that the correctness of the *caveat emptor*, in the text, is fully sustained. It is true some of the authorities cited—for example the New York cases—seem to ignore some of the limitations placed upon the rule by the definition; but it is believed that in the course of this article it will be seen that the definition is substantially accurate in what it includes and excludes as the law stands to-day.

To sum up the rule, *caveat emptor* is strictly applied in all cases of the sale of an ascertained, specific chattel already existing, and which the buyer has or might have inspected. *Bowman v. Clemmer*, 50 Ind. 10; *Barnard v. Kellogg*, 10 Wall. (U. S.) 383; *Benj. on Sales* (Bennett's ed. 1888), § 644.

But beyond this there are many limitations upon the application of the maxim, which will be more fully developed later on, and are fully established by the best authorities. See *Benj. on Sales* (Bennett's ed. 1888), §§ 627, 629, 631, 636, 639, 641, 644, 645, *et seq.* Also Mr. Bennett's note, pp. 623, 630; 2 Schouler's P. P. (2nd ed.), §§ 322, 343, 345, 346, 381; *Story on Sales*, § 359.

1. Whenever the seller has given an express warranty, or the law implies a warranty from the circumstances, or the buyer can bring fraud home to the party from whom he purchased, the doctrine of *caveat emptor* fails of application. 2 Schouler's P. P. (2nd ed.), § 322.

2. The rule of the civil law, viz., *caveat venditor*, was adopted at an

tions upon the application of the rule *caveat emptor*, whereby the vendor is held in most cases to warrant the title of the property sold by him, to the exclusion of the common law maxim, have very nearly harmonized the results of the common and civil law in so far as the responsibility for the title of personal property

early period, and in reference, as it would seem, rather to those articles which are of general and ordinary use, than to such as enter extensively into the commerce of the country; while that of the common law, viz., *caveat emptor*, originating in a commercial age and among highly commercial people, naturally took the form best calculated to promote the freedom of trade. No doubt the common law rule is, upon the whole, wisest and best adapted to an advanced state of society; and yet there is a large class of cases in which that of the civil law would serve to prevent a multitude of frauds. *Hoe v. Sanborn*, 21 N. Y. 552; s. c., 78 Am. Dec. 163, 168.

The rule of the civil law is *caveat venditor*, and, therefore, if the seller wishes to secure himself from future responsibility, in case the article sold should afterwards be found to be different in kind or quality from what the parties supposed it to be, he must take care to provide against such a responsibility by a particular agreement with the purchaser. *Wright v. Hart*, 18 Wend. (N. Y.) 449, 453.

The doctrine of implied warranty is very much restricted by the common law, and in this it differs from the Roman law, which implied a warranty of title of soundness and fitness by the mere fact of sale. Proffatt's note to *Emerson v. Brigham*, 6 Am. Dec. 113.

There is unquestionably a very material difference between the rules of the civil law upon the subject of implied warranties in sales and the rules of the common law on the same subject; which last is the law of this State. By the civil law, if there was error either as to the substance of the thing which was intended to be sold or purchased, or as to any of its essential qualities, without which it would not be the article for which it was sold—as if a metal was sold for silver bullion, which afterwards turned out to be gold or brass; or if candlesticks were sold as silver and they afterwards turned out to be only plated, there would be no valid sale. *Poth. Obl. No. 18; idem*, on *Cont. of Sale*, No. 34. But by the common law the sale would be binding

in such a case, unless the article sold was in such a situation that it could not be seen and examined by the parties. *Seixas v. Woods*, 2 Cai. (N. Y.) 48; *Swett v. Colgate*, 20 Johns. (N. Y.) 196. By the civil law also, there was an implied warranty on the part of the vendor that the article sold was not only free from such defects as would render it unfit for the use for which it was purchased, but also that it was free from defects of a different kind which merely diminished its value below that of a sound article. In the first case the vendee might return the article and rescind the sale by a rehibitory action to recover back the price; and in the last case the *actio estimatoria* was given to enable him to recover the difference in value between the defective article and a sound one of the same kind. *Voet. Pand. b. 21, tit. 1, §§ 4, 5.*

The vendor might, however, in either case, exempt himself from liability by an express stipulation to that effect, unless he was aware of the defect in the article and concealed the fact from the purchaser. *Poth. Cont. of Sale*, No. 182. By the law of Scotland a purchaser is allowed to rescind the sale for a defect which renders the article unfit for the use for which it was purchased; but the principle of implied warranty against minor defects which merely diminish the value of the article, is disallowed, as hurtful to the interests of commerce. *Stair. Inst. 80, 81; Erok. Inst. b. 3, tit. 3, § 10; Lindsay v. Wilson in 1771; Morris. Dict. Dec. Sale*, No. 68. The general rules of the common law are directly in the reverse of those of the civil law; it being a settled rule of the common law, with perhaps some few exceptions, that the vendor is not bound to answer for the quality or goodness of the article sold, unless he expressly warrant it to be of a particular quality, or to be sound and good; or knows it to be otherwise, and uses some disguise or art to deceive the purchaser, or represents the article to be different from what it in fact is. 2 Bl. Com. 450; 2 Kent Com. 479. *Waring v. Mason*, 18 Wend. (N. Y.) 425, 432.

bought and sold is concerned.¹ The difference between the two rules as to a warranty of quality was and is more pronounced. By the one it is held that a sound price implies a sound article; by the other no such implication arises, and the purchaser must usually look to the quality of the thing he buys. In the one case the risk is upon the seller; in the other it is upon the buyer.²

1. The civil law rule about title cannot be treated as strictly a warranty of title. It was in reality only a warranty of peaceable possession and against eviction. Holland's *El. of Juris*. (4th ed.) 237; 2 Schouler's *P. P.* (2nd ed.), § 379; Benj. on Sales (Bennett's ed. 1888), §§ 405-409, 642; Story on Sales (Perkins' ed.), § 367, *C. & E.*; 2 Bl. Com. 451; 2 Kent's Com. *478; Freeman's note to Scott v. Hix, 62 Am. Dec. 460. But in effect, as between private individuals, the rules of the civil and common law as to an implied warranty of title arising from the sale of chattels are not essentially different, although the attainment of the final result may be sustained upon different grounds under the one rule, from those advanced as the basis of the other. Benj. on Sales (Bennett's ed. 1888), § 410, 639. And so says Mr. STORY, thus: "The doctrine of the Roman law in respect to warranty of title, though different in terms from the common law was, in substance, the same." Story on Sales (Perkins' ed.), § 367, *C. & E.* But although the effect of the Roman law was, as is that of England, to imply a warranty of title in sales between private individuals, where there are no circumstances to show that the vendor does not sell as owner, yet the distinction now made in the United States between a vendor in and out of possession was not recognized. Story on Sales (Perkins' ed.), § 367 g.

2. The civil law maxim that a sound article is warranted by a sound price, was not the maxim of the common law and has not been adopted by this court. If the buyer, instead of requiring an explicit warranty, chooses to rely on his own inspection, or the opinion of the vendor, if mistaken as to quality he has only himself to blame. *Weimer v. Clement*, 37 Pa. St. 147; s. c., 78 Am. Dec. 411, 412; *Eagan v. Call*, 34 Pa. St. 236; s. c., 75 Am. Dec. 653; Holland's *El. Juris*. (4th ed.), 237, 238.

It has been frequently, but, as I apprehend, inaccurately, said that, under the civil law, a warranty is implied

from the payment of a "sound price" for the article sold. Although paying a sound price may prove that the purchaser was not, it does not prove that the vendor was, cognizant of any defect. It can, therefore, have no tendency to show which of the two parties ought to bear the loss. Where, however, the price paid is less than the value of the article, supposing it to be sound, this shows that the purchaser was apprised of the defect and that the parties contracted with reference to it. In such cases, therefore, no warranty arises. It is in this aspect alone that the price paid becomes of importance. But because the want of a "sound price" would thus prevent a warranty, it has been illogically inferred that the payment of a "sound price" was the foundation of the warranty. The truth is, that the civil law raises the warranty, because it presumes knowledge on the part of the vendor; and the want of a sound price prevents a warranty because it proves equal knowledge on the part of the vendee.

The theory of the civil and of the common law, in respect to these implied warranties, is entirely different. The civil law holds that the warranty enters into and forms an integral part of the contract of sale itself, as will be seen by referring to Pothier's definition of a sale, and his statement of the obligation of the vendor to warrant against latent defects, which he deduces directly from that definition. The definition he gives seems to be somewhat strained for the purpose of embracing that obligation. See Pothier on Contracts of Sale, prelim. art. and pt. 2, ch. 1, § 4.

But the common law, with, as I conceive, better logic, derives the obligation from the general doctrine which holds vendors responsible for every species of deception. That this is the true source of this warranty at the common law will be rendered apparent by reference to three early cases, two of which have been already referred to, viz: *Dale's Case*, Cro. Eliz. 44; *Furnis v. Leicester*, Cro. Jac. 474; and

5. Principles of Implied Warranty—Not Exceptions to Caveat Emptor, etc.—In recent times the expanding common law has very nearly found a middle ground between the rules *caveat emptor* and *caveat venditor*; that is, it has placed each of them on its own true basis by the recognition of fundamental legal principles, intermediate between them, and pursuant to which the one rule or the other is applied, in effect, according to the manifest intention of the parties and the policy of the law in seeking to promote justice. This has been accomplished through the development of the doctrines of implied warranty and their application to cases once firmly bound within the harsh limits of the maxim *caveat emptor*. It is now the rule that in certain classes of cases the vendor is held to warrant the existence of those attributes of title and quality to and in the property sold of which he assumes to have knowledge or about which he alone has the means of knowledge, or concerning which it is the policy of the law to charge him with knowledge; while, on the other hand, the vendee is still bound by the maxim *caveat emptor* in those cases where he has fair opportunities of ascertaining the facts about the title or quality of the property he buys or is put upon notice of a possible defect therein.¹ Out of the application of such princi-

Cross v. Gardner, Carth. 90; s. c., 1 Show. 68.

These cases show by what gradations a strong principle of justice overcame at length the technical rules of the common law, and forced the courts to sustain an action for a deceit without any averment or actual proof of wilful deception. Hoe v. Sanborn, 21 N. Y. 552; s. c., 78 Am. Dec. 163, 168.

In Louisiana the rule of the civil law both as to title and to quality prevails, it being there provided: "There are things which, although not essential to the contract, yet are implied from the nature of such agreement, if no stipulation be made respecting them, but which the parties may expressly modify or renounce, without destroying the contract or changing its description; of this nature is warranty, which is implied in every sale, but which may be modified or renounced, without changing the character of the contract or destroying its effect." La. Civil Code, art. 1764.

Another provision of the same code is: "Whether the defect in the thing sold be such as to render it useless, and altogether unsuited to its purpose, or whether it be such as merely to diminish the value, the buyer may limit his demand to the reduction of the price." La. Civil Code, art. 2541. See also 1 Parsons on Con. (5th ed.) 584.

So in South Carolina there has been a marked tendency to apply the rule of the civil rather than the common law, but it is submitted that the cases seeming to maintain this doctrine can usually be sustained upon the principles now almost universally invoked as establishing implied warranties of quality. Timrod v. Shoollbred, 1 Bay (S. Car.) 324; s. c., 1 Am. Dec. 620; Whitefield v. McLeod, 2 Bay (S. Car.) 380; s. c., 1 Am. Dec. 650; Houston v. Gilbert, 3 Brevard (S. Car.) 63; s. c., 5 Am. Dec. 542; Vanderhost v. MacTaggart, 1 Brev. (S. Car.) 269; s. c., 2 Am. Dec. 667; Smith v. McCall, 1 McCord (S. Car.) 220; s. c., 10 Am. Dec. 666; 1 Parsons Con. (5th ed.) 584. See also Bailey v. Nickols, 2 Root (Conn.) 407; s. c., 1 Am. Dec. 83 and note; Benj. on Sales (Bennett's ed. 1888), pp. 623, 624.

1. This statement of the principles upon which the doctrines of implied warranty rest is believed to be approximately correct. Its purpose is to lay the foundation for an accurate apprehension of the more specific development of principles that is to follow. In a general way it is fully supported by authority. "The tendency of all the modern cases on warranty is to enlarge the responsibility of the seller, to construe every affirmation by him to be a warranty, and frequently to imply a warranty on his part from acts and

circumstances, wherever they were relied upon by the buyer. The maxim of *caveat emptor* seems gradually to be restricted in its operation, and limited in its domain, and beset with the circumvallations of the modern doctrine of implied warranty, until it can no longer claim the empire over the law of sales, and is but a shadow of itself." Story on Sales (Perkins' ed.), § 359. The preceding review of cases under the law of warranty tends to show that the implied warranty, properly so called, of sales, concerns itself chiefly with quality; while matters of kind and quantity, as fulfilling a buyer's description, are brought rather within the rule of conditions precedent. Leaving out questions of title, the judicial confusion appears to have chiefly arisen in staying the disastrous consequences which attend a conventional *caveat emptor*—a rule which was obviously designed by the fathers of the common law, not to trick the buyer out of the subject-matter he had bargained for, but to throw him upon the exercise of his own mental faculties in ascertaining its true qualities; not to give sellers as a class an undue advantage, but to make them purchase with their wits about them. *Caveat emptor* only goaded the buyer in case he had misused his own opportunities of inspection; where he had imprudently trusted to good luck or the seller's scruples. Did the minds of both parties meet upon a specific thing, such as a horse, a sack of flour, a piece of cloth, or an article of furniture? For, in the olden time, most chattels bargained for and sold were of this simple character, visible and tangible. Then the buyer could not exonerate himself from blame if the seller had given him a chance to handle, examine, poise, talk over such attributes as he thought fit, and ask for an express warranty to cover every doubtful point; the seller transferred ownership in the specific thing, and that was enough.

But if the circumstances were such that the buyer's opportunity of inspecting its qualities must necessarily have been deferred, if, for instance, something had to be made to order, or an article had to be procured from a distant market, the situation was quite different. In such a case the precise subject-matter which should eventually fill the contract was not where both could judge of it, not always even in existence; and the buyer could only leave his

order, describing what should be supplied him, and detailing its character at pleasure; and the seller was to furnish something of corresponding description. The seller's judgment being necessarily relied upon, and the description given by the buyer being a rule of guidance, the seller was bound to supply what in truth answered that description, and was so salable in the market; the nature of the contract called for so much. But here the seller's duty terminated; for *caveat emptor* would throw upon the buyer all additional risks as to quality and the inherent fitness of such a thing for his own unexplained purposes; the doctrine further suggesting, that so soon as the buyer had an opportunity of inspecting the article, and ascertaining its fair compliance with his description, he was bound to examine and reject for cause, or be forever held to his bargain as *ad idem* with the seller in all respects. So when, at a much later stage, merchants took up the practice of dealing in specific commodities by bargaining over a representative sample, *caveat emptor* still prevailing, the bulk furnished should correspond with the sample, to be sure; but of its intrinsic qualities the buyer was to judge by testing the sample, and using all the precautions in his power. Implied warranty of quality appears to be, therefore, a doctrine by no means at variance with the policy of *caveat emptor*; it is rather the reasonable adaptation of that policy to emergencies; for still, as before, the subject-matter delivered by the seller must be essentially that bargained for; while upon the buyer is ever cast the responsibility of taking heed, to the extent of his opportunity, that the thing which he means to purchase is worth all he agrees to pay for it. It is only where the circumstances of the transaction are such that the buyer cannot be supposed capable of making an intelligent inspection of the thing at all, and discriminating as to its true qualities for himself, but must, instead, trust to the superior discretion and opportunities of the seller (the seller's vocation here importing peculiar skill or expert knowledge in supplying the thing wanted), or where the seller seeks to defraud, that the latest cases seem to depart from the old rule of *caveat emptor*; and this, after all, in order to give the particular transaction its just import, consistently with maintaining the general maxim.

2 Schouler's P. P. (2nd ed.), § 381.

ples as these spring the entire doctrine of warranties by implication of law. But from this it must not be inferred that implied warranties are mere exceptions to the rule *caveat emptor*, much less to that of *caveat venditor*. It is common to treat them as mere

It may not be possible to reconcile all the decisions upon the subject of implied warranties upon the sale of goods; but if we keep steadily in view the principle which lies at the basis of all such cases, we shall find that much of the apparent conflict will disappear. It is a universal doctrine, founded upon the plainest principles of natural justice, that, whenever the article sold has some latent defect which is known to the seller, but not to the purchaser, the former is liable for this defect, if he fails to disclose his knowledge on the subject at the time of sale. In all such cases, where the knowledge of the vendor is proved by direct evidence, his responsibility rests upon the ground of fraud. But there are cases in which the probability of knowledge on the part of the vendor is so strong that the courts will presume its existence without proof, and in these cases, the vendor is held responsible upon an implied warranty. The only difference between these two classes of cases is, that in one the *scienter* is actually proved, in the other it is presumed.

It is obvious that the vendor of goods would be very likely to know whether he has a title to the goods he sells. He knows the source from which such title was obtained, and has, therefore, means of judging of its validity, which the purchaser cannot be supposed to have. Hence it is the doctrine, both of the civil and the common law, that every vendor impliedly warrants that he has title to what he assumes to sell. *Hoe v. Sanborn*, 21 N. Y. 552; s. c., 78 Am. Dec. 163, 165.

So, in commenting upon the opinion of Baron Parke in *Morley v. Attenborough*, 3 Exch. 500, the learned editor of the Am. Decisions says:

"But admitting all that is said in the opinion to be directly and positively adjudicated, it does not militate very strongly against the doctrine of implied warranty of title. The rule of *caveat emptor*, with the exceptions stated by the learned baron, is shorn of most of its warning and menace to purchasers with respects to defects in title. If a warranty of title may be inferred, without express words of warranty,

from the vendor's conduct at the time of sale, tantamount to an affirmation of title, there is no reason why it may not be inferred from the mere fact of sale, especially where the vendor is in possession, unless the sale is made under such circumstances as to negative the idea of a warranty." Freeman's note to *Scott v. Hix*, 62 Am. Dec. 462.

And in an Illinois case, after stating *caveat emptor* to be the general rule, the court proceeds: "Yet, like most general rules, it also has its exceptions, as in the case of goods sold by sample; there the law implies a warranty that the bulk is of a quality as good as the sample; and in executory contracts for the sale of personal property, the law implies, as a part of the contract, in the absence of any express stipulation to that effect, that the property shall be of a fair, merchantable quality and condition, and fit for the uses for which it is purchased. And the rule is the same where the purchase is made without sample, or without an opportunity for inspection. In such cases it would be unjust to say, let the buyer take care, when he has no opportunity of looking at the article. If, however, there is no fraud, and he takes the article on inspection, or with an opportunity to inspect it, he has no right to complain. The maxim of *caveat emptor* is then properly applicable to him." *Kohl v. Lindley*, 39 Ill. 195; s. c., 89 Am. Dec. 294, 300.

The common law applies the maxim *caveat venditor* and not that of *caveat emptor* to merchandise sold to arrive, which the vendor has not on hand and which neither party can inspect. It would be contrary to sound morality and public policy to enforce the doctrine of *caveat emptor* and compel the purchaser to pay for goods of an unmerchantable quality in such a case. *Newberry v. Wall*, 35 N. Y. Sup. Ct. 106; 1 Parsons on Con. (5th ed.) 583.

After showing that much of the original strictness of the common law in the application of the maxim *caveat emptor* grew out of the old form of declaring in *tort* upon a warranty, and that later, after it became usual to declare in *assumpsit*, the rule of *caveat*

exceptions to the common law rule.¹ But this is an error which has led to much of the difficulty found in discriminating between cases governed by the maxim *caveat emptor* and cases of implied warranty.² It should be avoided, as the doctrines of implied warranty, although closely analogous to those of the maxim *caveat emptor*, are in reality bottomed upon legal principles wholly independent of the maxim.³

Formerly, the rule *caveat emptor* was so applied as to trench upon the domain of implied warranties. It is now the policy of the law to limit the application of the maxim to cases that fall within its terms, but to rigidly apply it within those limits.⁴ On the other hand, the doctrine of implied warranties is so extended

emptor began to be limited and trenched upon, MR. STORY says: "Gradually, from that time to the present the old common law rule of *caveat emptor* has been losing ground, and the law has been tending towards the doctrine of the Roman law, which is its antipode—*caveat venditor*—until it now occupies a middle ground between the two, by requiring the strictest good faith on the part of the seller in all that he says and does, and throwing on the buyer the responsibility of any foolish mistakes, or wrong conclusions, which may result from his trusting to his own judgment." Story on Sales (Perkins' ed.), §§ 364, 365. See also Benj. on Sales (ed. 1888), §§ 627, 639, 644, 645, 646, and Mr. Bennett's note, pp. 614, 623; 2 Schouler's P. P. (2nd ed.), §§ 322, 343, 345; 1 Parsons on Con. (5th ed.) 577.

1. 2 Schouler's P. P. (2nd ed.), §§ 322, 343; 5 Wait's Act. and Def. 564, § 21; Moses v. Mead, 1 Den. (N. Y.) 378; s. c., 43 Am. Dec. 676; Hoe v. Sanborn, 21 N. Y. 552; s. c., 78 Am. Dec. 163, 171.

2. Whenever the vendor, therefore, has himself manufactured the article sold, or procured it to be done by others if honesty and fair dealing are ever to be enforced by law, a warranty should be implied. The doubts which have been expressed in one or two cases in this State upon this subject, could, I think, never have arisen, if the courts had kept steadily in view the principles upon which implied warranties rest. This would also have prevented the confusion which pervades the early English cases on the subject of exceptions to the maxim *caveat emptor*. The rule that upon executory contracts for the delivery of some indeterminate thing at a future day, there is an im-

plied warranty that the article shall be of fair quality and merchantable; the supposed rule that upon a sale of a thing for a particular purpose, there is an implied warranty that the thing shall be fit and suitable for that purpose; and the like rule that upon the sale of goods by sample, the vendor warrants that the goods shall be equal to the sample, have all been treated as exceptions to that maxim.

The first of these rules may, perhaps, be regarded as in some sense an exception, although the case is not one to which the maxim *caveat emptor* could by possibility be supposed to apply. But the other two can hardly be considered as exceptions at all. Hoq v. Sanborn, 21 N. Y. 552; s. c., 78 Am. Dec. 163, 171.

3. The doctrine of *caveat emptor*, however, has so many limitations that it must be read in the light of what are sometimes called exceptions, but which are really independent rules and principles. Bennett's note to Benj. on Sales (ed. 1888), p. 623; Benj. on Sales (Bennett's ed. 1888), §§ 627, 639; 2 Schouler's P. P. (2nd ed.), § 381. Note to Bragg v. Morrill, 24 Am. Rep. 102, 104, where many cases illustrative of the principles that govern the doctrine of implied warranty are stated.

4. No doubt the courts have, in their later decisions, manifested a strong disposition to construe liberally, in favor of the vendee, the language used by the vendor in making any affirmation as to his goods, and have been disposed to treat such affirmations as warranties, whenever the language would reasonably authorize the inference that the vendee so understood it. Chapman v. Murch, 19 Johns. (N. Y.) 290; Osgood v. Lewis, 2 Har. & G. (Md.) 495. The case of the Bezoar stone, in Cro.

Jac. 4, has been doubted, for this reason and it was suggested by CHIEF JUSTICE PARKER, in *Bradford v. Manly*, 13 Mass. 143, that it would not be received as law in this commonwealth. So also CHANCELLOR KENT, in his Commentaries, vol. 2, p. 479 (4th ed.), questions the soundness of the decision in *Seixas v. Woods*, 2 Cai. (N. Y.) 48, that there was no warranty in the case. But no suggestion is made by either of these learned jurists, that the principles of law applicable to cases of mere false representation, without a warranty, had been erroneously stated in those cases. On the contrary, CHANCELLOR KENT reaffirms the correctness of the general principles stated in *Seixas v. Woods*, 2 Cai. (N. Y.) 48.

With the application of the prevailing liberal views of the courts, in construing the affirmation of the vendor to be a warranty in all cases where the language will bear that construction, it would seem that, without further extension of the liability of the vendor, all cases where liability should reasonably attach to the party making such representations, are sufficiently provided for. *Stone v. Denny*, 4 Met. (Mass.) 151, 155; *Story on Sales* (Perkins' ed.), § 359; *Barnard v. Kellogg*, 10 Wall. (U. S.) 383; 1 *Parsons on Con.* (5th ed.) 579-584; *Smith v. Justice*, 13 Wis. 600; *Robinson v. Harvey*, 82 Ill. 58; *Benj. on Sales* (Bennett's ed. 1888), §§ 627, 628, 639, 644, 645 and note, pp. 623-630; *Rodgers v. Niles*, 11 Ohio St. 48; s. c., 78 Am. Dec. 290.

The change that has taken place in the policy of the courts toward *caveat emptor* and implied warranty is well illustrated by two New York cases. Thus, in the case of *Seixas v. Woods*, 2 Cai. (N. Y.) 48, the maxim was applied with rigor to a state of facts to which it would now be held that it had no application. *Seixas v. Woods*, 2 Cai. (N. Y.) 48; s. c., 2 Am. Dec. 215.

But in a comparatively late New York case, *Seixas v. Woods*, 2 Cai. (N. Y.) 48, is criticised and denied and in the course of his opinion EARL, J., says:

"The case of *Seixas v. Woods*, 2 Cai. (N. Y.) 48, seems to have been decided mainly upon the authority of the case of *Chandelor v. Lopus*, 1 *Smith's Lea. Cas.* (8th Am. ed.) 295. That was an action on the case for selling *peachum wood* for *braziletto*; the former worth hardly anything, the latter of considerable value. The defendant advertised the wood as *braziletto*, showed plain-

tiffs the invoice in which it was so described, and billed it to the plaintiffs as such. The plaintiffs had a verdict subject to the opinion of the court; and the court held that there was no express warranty, and that the defendant was not, therefore, liable. There was no intimation in the opinion delivered that there was any difference between a warranty as to the character of an article sold and a warranty as to its condition and quality. The court simply held that the representations on the part of the defendant did not amount to an express warranty. They were laying down broadly the common law doctrine of *caveat emptor*, and combating the implied warranties of the civil law. Hence great stress was laid upon the requirement of an express warranty. The rule, as thus laid down, has been thoroughly overturned since the courts hold that any positive information or representation as to the character or quality of an article sold may constitute a warranty. The case has been much questioned, and can no longer be regarded as authority for the precise point decided. 2 *Kent's Com.* (Comstock's ed.) 633; *Stone v. Denny*, 4 Met. (Mass.) 151; *Henshaw v. Robins*, 9 Met. (Mass.) 83, 89; *Binnard v. Spring*, 42 Barb. (N. Y.) 470; *Hart v. Wright*, 17 Wend. (N. Y.) 267, 271; *Borrekins v. Bevan*, 3 Rawle (Pa.) 37. The case holds that a vendor is liable upon an express warranty of the character of the article sold; and the more recent cases hold that a positive affirmation, understood and relied upon as such by the vendee, is an express warranty.

The case of *Swett v. Colgate*, 20 Johns. (N. Y.) 196, is quite analogous to the case of *Seixas v. Woods*, 2 Cai. (N. Y.) 48, and was decided mainly upon the authority of that case. The defendant purchased at auction goods invoiced, advertised and sold as *barilla*, when in fact it was *kelp*, a much inferior article. It came before the supreme court upon a case containing the facts; and the court, exercising the province of a jury, drew the inference from all the facts of the case that there was no warranty, laying down, however, the rule that if there had been a warranty, the vendors would have been liable. No intimation is contained in the case that there is any difference between an affirmation by the vendor as to the character of the article sold and one as to its quality and condition. Upon the same state of facts, as the law is now settled,

as to afford a just protection to the buyer against the seller.¹ But the efficiency of the maxim as a bulwark of protection to the vendor is not destroyed. He can invoke it as a shield but cannot use it as a sword.²

6. Implied Warranties by Agents, etc.—One employed to make sales of personal property for another as a general agent may, by his conduct or the circumstances under which he makes the sale, raise an implied warranty of title, quality or quantity. The ordinary maxim of agency governs in such cases—"Qui facit per alium, facit per se,"—and the act of the agent is the act of the principal in so far as the buyer is concerned.³ But ordinarily a special agent with limited powers for the sale of personal property must have acted within the scope of this authority to raise a warranty; for he does not usually bind his principal by a warranty,

it would be a question of fact for the jury whether or not there was a warranty.

The case of *Seixas v. Woods*, 2 Cai. (N. Y.) 48, and of *Swett v. Colgate*, 20 Johns. (N. Y.) 196, have been frequently cited in our courts, and have doubtless influenced, and it may be controlled, the decisions in other cases. The propositions of law announced in them are sufficiently correct; but in view of the rules of law, as now settled in this and other States, I am of opinion that the law was not properly applied to the facts appearing in those cases. *Hawkins v. Pemberton*, 51 N. Y. 198; s. c., 10 Am. Rep. 595, 599; *Dounce v. Dow*, 64 N. Y. 411. It is worthy of note that *Chandelor v. Lopus*, 1 Smith Lea. Cas. (8th Am. ed.) 295, was the case of the *Bezoar Stone*, and *EARL, J.*, in the above opinion, confounds it with another case.

1. That is, there are now many recognized cases of implied warranty that are promptly classified by the courts and text writers as such and no attempt is made to apply in them the doctrine of *caveat emptor*. What those cases are will appear in the progress of this discussion, and may be seen in the text books and decisions of the courts.

"The law, in respect to implied warranty in cases of sales, as it now stands, seems to be, that a warranty is implied in five cases: First, that the seller has a valid title; second, that the subject-matter is merchantable; third, that it is reasonably fit for the use for which it was sold; fourth, that it does not contain latent defects known to and concealed by the vendor; fifth, that it corresponds to the sample, if a sample be shown.

Story on Sales (Perkins' ed.), § 366; *Schouler's P. P.* (2nd ed.), §§ 343, 347, 348, 349, 350, 354, 358, 359, etc.; *Benjamin on Sales* (Bennett's ed., 1888), §§ 627, 639, 644, *et seq.*, and note pp. 614-630; *Bragg v. Morrill*, 49 Vt. 45; s. c., 24 Am. Rep. 102, and note reviewing many cases; *Bradford v. Manly*, 13 Mass. 138; s. c., 7 Am. Dec. 122 and note; *Hawkins v. Pemberton*, 51 N. Y. 198; s. c., 10 Am. Rep. 595.

2. 1 *Parsons on Con.* (5th ed.) 584; 2 *Schouler's P. P.* (2nd ed.), § 381.

3. Undoubtedly there are many cases where it has been held that a general agent to sell might warrant quality. A general agent, Mr. Russell, in his treatise on Factors and Brokers, p. 75, defines to be either, first, a person who is appointed by the principal to transact all his business of a particular kind; or, secondly, an agent who is himself engaged in a particular trade or business, and who is employed by his principal to do certain acts for him in the course of that trade or business. Such agencies extend, it is said, to whatever is fairly included among the dealings of that branch of business in which the agent is employed. But their scope arises, not out of the instructions given, but out of those implied powers which the law confers, even in spite of instructions, because of which these are often called implied agencies in contradistinction from special agencies, which are express.

Thus, in *Howard v. Sheward*, L. R., 2 C. P. 148, an agent of a horse dealer bound his master to a warranty of the quality of a horse sold, although directed not to warrant. Other cases of warranty of quality by a general agent are, *Hunter v. Jameson*, 6 Ired. (N.

Car.) 252; Woodford v. McClenahan, 9 Ill. 85; Milburn v. Belloni, 34 Barb. (N. Y.) 607; Nelson v. Cowing *et al.*, 6 Hill (N. Y.) 336; DIXON, J., in Cooley v. Perrine, 41 N. J. L. 330; s. c., 32 Am. Rep. 210, 217.

The definition of the term "general agent," as above quoted, must be borne in mind in applying the doctrine of the text. It will then be easy to harmonize many apparently conflicting cases and *dicta*, and will make clear the fact that an agent with general power to sell is not necessarily a general agent.

Thus on the final hearing of the case above quoted from it was correctly held that "a naked power to sell a chattel, conferred on a person not the general agent of the vendor, does not comprise an authority to warrant the quality of the thing sold." Perrine v. Cooley, 42 N. J. L. (13 Vroom) 623.

And such is the doctrine of a very recent case. Pickert v. Marston, 68 Wis. 465; s. c., 60 Am. Rep. 876 (1887).

The distinction between general and special agents has been somewhat differently stated as follows: "And in many cases the acts of an agent, though not in conformity to his authority, may yet be binding upon his employer, who is left, in such cases, to seek his remedy against his agent. Whether an employer be or be not bound by such acts as are not conformable to the commission given by him, depends principally upon the authority being general or special. By a general agent is understood, not merely a person substituted in the place of another, for transacting all manner of business, but a person whom a man puts in his place to transact all his business of a particular kind, as to buy and sell certain kinds of wares, to negotiate certain contracts, and the like. An authority of this kind empowers the agent to bind his employer by all acts within the scope of his employment, and that power cannot be limited by any private order or restriction not known to the party dealing with the agent. A special agent is one whom is employed about one specific act, or certain specific acts only, and he does not bind his employer unless his authority be strictly pursued. Paley on Agency, 199, *et seq.*

"A general authority," said LORD ELLENBOROUGH, in Whitehead v. Tuckett, 15 East 408, "does not import an unqualified one, but that which is derived from a multitude of instances; whereas

a particular authority is confined to an individual instance." London etc. Society v. Haggerstown etc. Bank, 36 Pa. St. 498; s. c., 78 Am. Dec. 390. See also Lobdell v. Baker, 1 Met. (Mass.) 193; s. c., 35 Am. Dec. 358; Brady v. Todd, 9 C. B., N. S. 145; 29 L. J., C. P. 144; Howard v. Sheward, L. R., 2 C. P. 148.

And compare, upon the doctrines of the text, the following: 2 Schouler's P. P. (2nd ed.), § 324; 1 Parsons Con. (5th ed.) 60; Benj. on Sales (Bennett's ed. 1888), §§ 624, 625, and note p. 613; Bishop on Con. (Enlarged ed.), § 1063; 1 Am. & Eng. Ency. of Law, 348, 358, tit. Agency.

From the doctrine that a general agent has all the powers of his principal it naturally follows that persons dealing with a general agent need not inquire into his authority. Williams v. Getty, 31 Pa. St. 461; s. c., 72 Am. Dec. 757.

They may deal with him as though he were the principal and by his acts his principal is bound, notwithstanding any secret instructions the agent may have had, if they were unknown to the person with whom he dealt. Davis v. Burnett, 4 Jones L. (N. Car.) 71; s. c., 67 Am. Dec. 263; Lobdell v. Baker, 1 Met. (Mass.) 193; s. c., 35 Am. Dec. 357; Towle v. Leavitt, 23 N. H. 360; s. c., 55 Am. Dec. 195 and note; Bryant v. Moore, 26 Me. 84; s. c., 45 Am. Dec. 96 and note; 1 Am. & Eng. Ency. of Law 350.

So in sales by sample, whether made by an agent or not, the law implies, as we shall see more fully later on, a warranty that the bulk shall be similar and equal to the sample, and consequently it is clear that a principal cannot escape liability on such a warranty because the sale was made for him by an agent, whether general or special. Schuchard v. Alled, 1 Wall. (U. S.) 359; Nelson v. Cowing, 6 Hill (N. Y.) 336; Andrews v. Kneeland, 6 Cow. (N. Y.) 354; Randall v. Kehlor, 60 Me. 47.

It may also be said that lately the tendency of the courts seems to be to treat agents, such as travelling salesmen with a general power of sale, as general agents whose warranties will bind a principal without proof of express authority to make them. Thus in a late Indiana case (1885) it is said: "It is next contended that the evidence fails to show that the salesman had authority to make the guaranty which the defendants claimed was made."

express or implied, that is *ultra vires*.¹ Yet, even a special agent may bind his principal by such warranties, either express or im-

The inference to be drawn from the arguments of counsel is, that it was incumbent on the defendants to prove affirmatively, either that express authority to that end had been conferred, or that such sales are usually attended with warranties. It may be said that the position contended for has the support of authority, but the authorities supporting it are, in the main, cases which involved an agency to do a single act, as the sale of some article by an agent in whose hands the particular article was placed for sale. *Andrews v. Kneeland*, 6 Cow. (N. Y.) 336, 354; *Smith v. Tracy*, 36 N. Y. 79; *Cooley v. Perrine*, 41 N. J. L. 322; *Brady v. Todd*, 9 C. B. (N. S.) 592.

We think the rule generally prevailing is, that an agent upon whom general authority to sell is conferred will be presumed to have authority to warrant, unless the contrary appears. *Talmage v. Bierhausa*, 103 Ind. 270, 274; *Deming v. Chase*, 48 Vt. 382; *Murray v. Brookes*, 41 Iowa 45; *Boothby v. Scales*, 27 Wis. 635; *Flatt v. Osborn*, 33 Minn. 98.

1. 2 Schouler's P. P (2nd ed.), § 324; *Bishop on Con.* (Enlarged ed.), § 1063; *Benj. on Sales* (Bennett's ed. 1888), § 625 and note, p. 613; *Brady v. Todd* 9 C. B. (N. S.) 592; s. c., 30 L. J., C. P. 223; s. c. (in substance), *Benj. on Sales* as above.

The case of *Brady v. Todd*, just cited, is a leading English case that has been directly endorsed in the United States.

It is followed in the United States in similar cases.

"The plaintiff in error purchased a horse of the defendant's testator, and this action arose in consequence of a claim laid by the former, that such sale was accompanied by a warranty. It appeared in the case, that the sale in question was made, not by the testator in person, but by his servant, in his behalf. It was decided in the court below, that this servant, on the admitted facts of the case, had no power in law to enter, in the name of his employer, into this warranty, and the question now is, whether that conclusion was correct. There was no conflict as to the essential facts, and in the state of the case it is agreed that the agent who acted in this matter was not the general agent,

in this line of business, of the deceased, and that he had no special authority to make representation with respect to the thing to be sold, nor to warrant it, and that his entire delegated power was embraced in a direction to make sale of the horse for his master. In the supreme court the doctrine was maintained, and was applied to these facts, that a naked authority to sell a chattel, conferred, under ordinary circumstances, on a person who was not the general agent of such vendor, in the business to which such sale appertained, but was an agent merely *pro hac vice*, did not comprehend an authority to warrant the quality of the thing sold. This conclusion harmonized with the rule of law on this subject, as settled in the English courts, in the case of *Brady v. Todd*, 9 C. B. (N. S.) 592, and it will be perceived, upon turning to that case, that the point involved was investigated with care, and was decided upon general principles, with the concurrence of all the judges. Mr. Benjamin, in his treatise on Sales, section 625, says that 'this is the most authoritative exposition of the present state of the law on this point.' I entirely agree in the judicial view thus expressed, but I do not feel that it is necessary to explain further the grounds of this conclusion, nor to discuss the pertinent cases, as this has been done with so much clearness and force in the opinion read in the supreme court, in this case.

"I think the judgment should be affirmed." *Perrine v. Cooley*, 42 N. J. L. (13 Vroom) 623.

And upon a previous hearing of the same case, in the supreme court of New Jersey, the entire doctrine of the law upon this question was reviewed and the same conclusions reached. *Cooley v. Perrine*, 41 N. J. L. (12 Vroom) 322; s. c., 32 Am. Rep. 210. To the same effect are other cases. *Smith v. Tracy*, 36 N. Y. 79; *State v. Fredericks*, 47 N. J. 469; *Herring v. Skaggs*, 73 Ala. 446; *Dodd v. Farlow*, 11 Allen (Mass.) 426; *The Monte Allegre*, 9 Wheat. (U. S.) 647; *Schell v. Stephens*, 50 Mo. 375.

And see, too, the general proposition that the acts of a special agent must be shown to be within his authority in order to bind his principal. *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494; s. c., 24 Am. Dec. 62 and note; *Pursley v. Mor-*

plied, "as are customary in the particular business."¹ On the principle that where a custom of warranty exists, or where the law implies one generally, the buyer is justified in believing the agent of the seller to have authority to make such warranty or to be governed by the law or the custom as his principal would be if

rison, 7 Ind. 356; s. c., 63 Am. Dec. 424, and note; Carmichael v. Buck, 10 Rich. L. (S. Car.) 332; s. c., 70 Am. Dec. 226; London etc. Society v. Hagerstown etc. Bank, 36 Pa. St. 498; s. c., 78 Am. Dec. 390; Pickert v. Marston, 68 Wis. 465; s. c., 60 Am. Rep. 876; Kohn v. Washer, 64 Tex. 131; s. c., 53 Am. Rep. 745.

1. Bishop on Con. (enlarged ed.), § 1063; Story on Sales (Perkins' ed.), § 350; 2 Schouler's P. P. (2nd ed.), § 324; 1 Parsons on Con. (5th ed.) 60.

Warranties are sometimes given by agents without express authority to that effect. In such cases the question arises as to the power of an agent, who is authorized to sell, to bind his principal by a warranty. The general rule is, as to all contracts including sales, that the agent is authorized to do whatever is usual to carry out the object of his agency, and it is a question for the jury to determine what is usual. If, in the sale of the goods confided to him, it is usual in the market to give a warranty, the agent may give that warranty in order to effect a sale.

Thus, in *Alexander v. Gibson*, a servant who was sent to sell a horse at a fair, and receive the price, was held by Lord Ellenborough to be authorized to give a warranty of soundness, because "this is the common and usual manner in which the business is done."

In *Dingle v. Hare*, 7 C. B. N. S. 145; s. c., 6 Jur. N. S. 679, an agent selling guano was held authorized to warrant it to contain 30 per cent. of phosphate of best quality, the jury having found as a fact that ordinarily these manures were sold with such a warranty, all the judges agreeing, and BYLES, J., saying: "It is clear law that an agent to sell has authority to do all that is necessary and usual in the course of the business of selling, and if it was usual in the trade for the seller to warrant, Wilson (the agent) had authority to warrant." Benj. on Sales (Bennett's ed. 1888), § 624.

An agent to sell chattels has no implied authority to warrant in the absence of custom, but proof of a custom to warrant is competent. *Pickert v.*

Marston, 68 Wis. 465; s. c., 60 Am. Rep. 876.

The usage of the business in which a general agent is employed furnishes the rule by which his authority is measured. Hence, a general selling agent has authority to sell on credit, and to warrant the soundness of the article sold when such is the usage. METCALF, J., in *Upton v. Suffolk etc. Mills*, 11 Cush. (Mass.) 586; s. c., 59 Am. Dec. 163, 164.

The power in this case is to sell and convey the negro in the name of the plaintiff, and the agent must, as an incident of the power, and in the absence of any prohibition, have the right to warrant the soundness of the slave, *as that is a usual and ordinary stipulation in such contracts*, and must, therefore, be implied to effectuate the object of the power. *Skinner v. Gunn*, 9 Port. (Ala.) 305; *Gaines v. McKinley*, 1 Ala. N. S. 446; *Cocke v. Campbell*, 13 Ala. 286.

In the case of *Skinner v. Gunn*, just quoted, the decision can only be supported on the ground that a warranty of soundness in the sale of slaves was customary. This the court seems to have held as a matter of judicial knowledge.

But a later Alabama case more clearly establishes the rule on correct principles: "As a general rule, the agent has power to do whatever is usual—to enter into such express stipulations as are usual and customary—in effecting such sales. What stipulations are usual and customary in effecting such sales is not always a matter of judicial knowledge. It is declared in the sale of slaves and horses to be within the knowledge of the court that it is usual to give warranties. It cannot be affirmed that such custom exists in the sale of all chattels. Generally, and we hold in a sale like the present, 'it is a question for the jury to determine what is usual.' This, in the absence of express authority in the agent to warrant, for if the agent had such express authority, then his act is the act of his principal. And in the absence of express authority, the question

dealing in *propria persona*.¹ And, it seems, but the doctrine is open to question, that even though, in such a case, the agent be expressly forbidden to warrant, yet the principal will be bound if the buyer has no notice that the custom is not to govern.² But on the other hand, where the custom is not to warrant, no warranty can be implied from the circumstances of the sale or the con-

arises, and it is one for the jury, whether such warranty is customary in the sale of safes. If the jury, on the evidence, find there was such custom, then the principal is bound, 'in the absence of prohibition' resting on the agent, and brought to the knowledge of the purchaser, to the same extent as if the principal had himself given the warranty. On the other hand, if there was no such authority given, and no such custom found to exist, then the principal would not be bound." *Herring v. Skaggs*, 62 Ala. 180; s. c., 34 Am. Rep. 4, 6.

Bound & Co., being his agents to sell the notes without expressed restriction of their powers, had authority to do any act, or make any declaration in regard to them, found necessary to make a sale, and usually incidental thereto. *Andrews v. Kneeland*, 6 Cow. (N. Y.) 354; *Nelson v. Cowing*, 6 Hill (N. Y.) 336; *Sturgis v. N. J. St. Bt. Co.*, 62 N. Y. 625.

It is plain that Goodspeed would not have bought the notes, nor was it reasonably to be expected that they could be sold at all unless the negotiation was accompanied with an assurance that would be confided in that the notes were business paper. It is within our judicial observation from many cases before us, that such is the usual accompaniment, in that mart, of a sale of promissory notes having the guise of commercial paper. *Bound & Co.* had power, then, by their agency, to give such assurance. *Ahern v. Goodspeed*, 72 N. Y. 108, 114. Opinion by FOLGER, J. And see cases collected, 1 Am. & Eng. Ency. of Law, 358.

1. We think it the better rule, that an agent, employed to sell, without express power to warrant, cannot give a warranty which shall bind the principal, unless the sale is one which is usually attended with warranty, in which case he may. 1 Parsons on Con. (5th ed.) 60.

True, there is no direct proof that David had authority to warrant the pumps, or make any representation concerning their quality or condition.

But a warranty—and so of a representation—is one of the usual means for effecting the sale of a chattel, and, when the owner sells by an agent, it may be presumed, in the absence of all proof to the contrary, that the agent has been clothed with all the usual powers for accomplishing the proposed end. So long as the agent is acting within the general scope of his authority, persons dealing with him are considered as dealing with the principal. *Nelson v. Cowing*, 6 Hill (N. Y.) 338. And see *LeRoy v. Beard*, 8 How. (U. S.) 451, 467, 468; *Sanford v. Handy*, 23 Wend. (N. Y.) 260.

2. We think the rule generally prevailing is, that an agent upon whom general authority to sell is conferred, will be presumed to have authority to warrant, unless the contrary appears. Authority to sell generally, without any restrictions, carries with it *prima facie* authority to do any act or make any declaration in regard to the subject-matter of the sale necessary to consummate the contract and usually incident thereto, and, until the contrary is made to appear, it will be presumed that a warranty is not an unusual incident to a sale by an agent for a dealer in a commodity or article, where the thing sold is not present and subject to the inspection of the purchaser. *Ahern v. Goodspeed*, 72 N. Y. 108; *Sturgis v. N. J. Steamboat Co.*, 62 N. Y. 625; *Nelson v. Cowing*, 6 Hill (N. Y.) 336; *Schuchardt v. Allens*, 1 Wall. (U. S.) 359; *Boothby v. Scales*, 27 Wis. 626; *Howard v. Sheward*, L. R., 2 C. P. 148; *Deming v. Chase*, 48 Vt. 382.

In all such cases, even though the authority of the agent is restricted by instructions from his principal, he will be bound by a warranty attending a sale made by the agent, unless the purchaser knew of the restriction. *Talmage v. Bierhouse*, 103 Ind. 270, 274; *Murray v. Brookes*, 41 Iowa 45; *Fenn v. Harrison*, 1 T. R. 760; 1 Parsons on Con. (5th ed.) 60; 2 Schouler's P. P. (2nd ed.), § 324.

But see *Cooley v. Perrine*, 41 N. J. L. (12 Vroom) 322; s. c., 32 Am. Rep.

duct of the special agent, which will be binding on the principal.¹ And, of course, no warranty can be implied on a sale by an agent where the law would not have implied one had the sale been made by the principal in person.² And neither a special nor a general agent, even though he has power to warrant, can give, either expressly or impliedly, an unusual and extraordinary warranty without express authority so to do, for the law will not presume the existence of such power in an agent, and the buyer is presumed to know the law.³

7. Conditions Precedent—Not Implied Warranties.—A condition precedent in a contract for the sale of personalty is one that must be performed, usually by the vendor, before the contract can become executed, and in default of the performance of which the contract cannot be enforced by the party at fault in failing to comply with such condition.⁴ It is common for a condition pre-

210; *Herring v. Skaggs*, 62 Ala. 180; s. c., 34 Am. Rep. 4; which seem to imply that a selling agent expressly prohibited from warranting cannot bind his principal by a warranty even though a warranty be customary. It is submitted, however, that the doctrine of the text and the authorities cited in its support is the true one when applied to cases of agency where the agent has a general power of sale and it is customary to warrant in the sale of such property, because even if there be an express prohibition by the principal it should not invalidate the custom, in the absence of notice to the purchaser, but in such case an implied warranty, in accordance with the custom, should arise even though an express warranty by the agent be void, the principle being that the purchaser, being wholly innocent and without laches, in relying upon the custom, should not suffer, but that the loss should fall upon the vendor, who, knowing of the custom, gave no notice of his departure therefrom to the purchaser.

1. *Bishop on Con.* (enlarged ed.), § 1063; *Kohn v. Washer*, 64 Tex. 131; s. c., 53 Am. Rep. 745; *Pickert v. Marston*, 68 Wis. 465; s. c., 60 Am. Rep. 876; *Smith v. Tracy*, 36 N. Y. Y. 79.

2. Thus, an administrator is not held to a personal warranty of the condition of the goods of his intestate sold by him pursuant to law, and consequently an auctioneer selling for him is not bound. *Blood v. French*, 9 Gray (Mass.) 197.

3. *Upton v. Suffolk Co. Mills*, 11 Cush. (Mass.) 586; s. c., 59 Am. Dec. 163; *Palmer v. Hatch*, 46 Mo. 585.

4. When the vendor sells an article by a particular description, it is a condition precedent to his right of action, that the thing which he offers to deliver, or has delivered, should answer the description. LORD ABINGER protested against the confusion which arises from the prevalent habit of treating such cases as warranties, saying: "A good deal of confusion has arisen in many of the cases upon this subject, from the unfortunate use made of the word 'warranty.' Two things have been confounded together. A warranty is an express or implied statement of something which a party undertakes shall be part of a contract and, though part of the contract, collateral to the express object of it. But in many of the cases, the circumstance of a party selling a particular thing by its proper description has been called a warranty, and the breach of such a contract a breach of warranty; but it would be better to distinguish such cases as a non-compliance with a contract which a party has engaged to fill; as, if a man offers to buy peas of another and he sends him beans, he does not perform his contract; but that is not a warranty; there is no warranty that he should sell him peas; the contract is to sell peas, and if he sells him anything else in their stead, it is a non-performance of it." There can be no doubt of the correctness of the distinction here pointed out. If the sale is of a described article, the tender of an article answering the description is a condition precedent to the purchaser's liability, and if this condition be not performed, the purchaser is entitled to

cedent, performance of which is due from the vendor, to be treated as an implied warranty, but it is an essentially different thing, usually consisting of an express or implied agreement on the vendor's part that the property sold shall be of a certain

reject the article, or, if he has paid for it, to recover the price as money had and received for his use; whereas, in case of warranty, the rules are very different. Benj. on Sales (Bennett's ed. 1888), § 600; *Chanter v. Hopkins*, 4 M. & W. 399; *Shand v. Bowers*, 2 App. Cas. 480.

The old rule upon this subject was well settled, that upon a sale of goods, if there be no express warranty of the quality of the goods sold, and no actual fraud by a wilful misrepresentation, the maxim *caveat emptor* applies. Without going at large into the doctrine upon this subject, or attempting to reconcile all the cases, which would certainly be very difficult, it may be sufficient to say that, in this commonwealth, the law has undergone some modification, and it is now held that, without express warranty or actual fraud, every person who sells goods of a certain denomination or description undertakes, as part of his contract, that the thing delivered corresponds to the description, and is in fact an article of the species, kind and quality thus expressed in the contract of sale. *Hastings v. Lovering*, 2 Pick. (Mass.) 214; *Hogins v. Plympton*, 11 Pick. (Mass.) 97.

Indeed, this rule seems to be now well settled in England. In an action for a breach of warranty, a vessel was advertised and sold as a copper fastened vessel, but was sold as she lay *with all faults*. It appeared that she was only partially copper fastened, and not what is known to the trade as a copper fastened vessel. It was held that, "with all faults" must be understood all faults which a copper fastened vessel may have. *Shepherd v. Kain*, 5 Barn. & Ald. 240. *SHAW, C. J.*, in *Winsor v. Lombard*, 18 Pick. (Mass.) 57, 59, 60.

Where the vendee gave the vendors, manufacturers of safes, a written order for a "No. 4 safe, with a combination lock," and the vendors sent a safe answerable to the order, it was held that they had complied with the conditions precedent, and that there was no implied warranty as to the merits or usability of the lock. *Tilton Safe Co. v. Tisdale*, 48 Vt. 83.

The doctrine that on the sale of a chattel as being of a particular kind or description, a contract is implied that the article sold is of that kind or description, is also sustained by the following English cases: *Powell v. Horton*, 2 Bing. N. S. 668; *Barr v. Gibson*, 3 M. & W. 390; *Chanter v. Hopkins*, 4 M. & W. 399; *Nichol v. Godts*, 10 Exch. 191; *Gompertz v. Bartlett*, 2 E. & B. 849; *Azenar v. Casella*, Law Rep. 2 C. P. 431, 677. And has been approved by some decisions in the courts of this country. *Henshaw v. Robins*, 9 Met. (Mass.) 83; *Borrekens v. Bevan*, 3 Rawle (Pa.) 23; *Osgood v. Lewis*, 2 Harr. & G. (Md.) 495; *Hawkins v. Pemberton*, 51 N. Y. 198; 10 Am. Rep. 595.

The right to repudiate the purchase for the non-conformity of the article delivered to the description under which it was sold is universally conceded. That right is founded on the engagement of the vendor, by such description that the article delivered shall correspond with the description. The obligation rests upon the contract. *Wolcott v. Mount*, 36 N. J. L. (7 Vroom) 262; s. c., 13 Am. Rep. 438, 442.

So where the vendor contracted to deliver "Manila sugar" and delivered a sugar which, in commercial language passes for and is properly known as "Manila sugar," he complies with the condition precedent in his contract and there was no implied warranty of the quality or purity of the sugar which would permit a recovery, even though the sugar delivered contained more impurities than the sugar known under the name of "Manila sugar" usually does. *Gossler v. Eagle etc. Refinery*, 103 Mass. 331.

And in *Josling v. King* the vendor was held bound, as on a condition precedent, to deliver "oxalic acid," although he had exhibited the bulk of the article sold to the buyer, and written to him that he would not warrant its strength in order to "avoid any unpleasant differences," and suggested to him to make a fresh examination if he thought proper. *Josling v. King*, 13 C. B. (N. S.) 447; 32 L. J., C. P. 94.

described kind or species.¹ The confounding of conditions precedent with implied warranties has produced much apparent conflict of decisions in the courts, and only a rigid separation of the two can assure harmony in the application of the principles of implied warranty. When they are confused, confusion arises in

If the specific existing chattel, however, is sold by description and does not correspond with that description, the vendor fails to comply, not with a warranty or collateral agreement, but with the contract itself, by breach of a condition precedent. *Benj. on Sales* (Bennett's ed., 1888), § 645. The delivery of property corresponding with the contract is a condition precedent to the vesting of title in the vendee. The parties understand that the vendee is not bound to accept the property tendered, except upon this condition. *Reed v. Randall*, 29 N. Y. 358; s. c., 86 Am. Dec. 305, 308.

Where a vendee ordered "xx pipe iron" and such iron was forwarded by the vendor and accepted and partly used by the vendee before he found the quality of the iron inferior to and different from that in iron of the same description which he had before used, it was held that the vendor had complied with his contract and that, in the absence of fraud, there was no implied warranty of quality upon which the vendee could recover, the vendor being a dealer in, but not a manufacturer of such iron. *Dounce v. Dow*, 64 N. Y. 411. And see generally upon the subject of conditions precedent: 2 Schouler's P. P. (2nd ed.), §§ 344, 351, 352, 353; *Story on Sales* (Perkin's ed.), §§ 247, 251, 252; *Benj. on Sales* (Bennett's ed.), §§ 564, 565, 566, 600-609 a. And see Mr. Bennett's notes, pp. 551, 619.

1. *Swett v. Colgate*, an early New York case, well illustrates the results of confusing a condition precedent with an implied warranty and the doctrines of the rule *caveat emptor*. In that case, "the defendants purchased, at auction, the goods in question invoiced as barilla, and advertised and sold as such; but there was no warranty nor any concealment on the part of the vendors. The goods were consigned by certain merchants in England to the plaintiffs who sent them to Messrs. Goodhue & Co., at New York, to be sold; they were described as barilla in the bill of parcels, and sold to the defendants. After the purchase the defendants discovered that the article purchased was

not barilla, but kelp. Before the sale they inspected and examined it, and a sample was exhibited at the time of sale. Goodhue & Co. knew it was an article of bad quality, but did not know that it was other than barilla. Kelp is a substance greatly resembling barilla, and from which it is not easily distinguishable." There was no fraud and the vendors were probably deceived themselves.

On this state of facts it was held that there was no implied warranty and therefore that the rule *caveat emptor* should govern. *Swett v. Colgate*, 20 Johns. (N. Y.) 196; s. c., 11 Am. Dec. 266. To the same effect is another early case in New York. *Seixas v. Woods*, 2 Cal. 48; s. c., 2 Am. Dec. 215. And both rest upon *Chandelor v. Lopus*, 2 Cr. Rep. 4; s. c., 1 Sm. Lea. Cas. 238.

All of these cases are, however, wrongly decided, because in each of them the agreement constituted a condition precedent and amounted to an express warranty that the goods were of such kind or species. Hence, upon this point, the correctness of these New York decisions has been denied, and in New York they have been overruled. *Hawkins v. Pemberton*, 51 N. Y. 198; s. c., 10 Am. Rep. 595; *White v. Miller*, 71 N. Y. 118; s. c., 27 Am. Rep. 13; *Dounce v. Dow*, 64 N. Y. 411, 415. See also *Benj. on Sales* (Bennett's ed., 1888), §§ 564, 600, and note, p. 619.

Later on this doctrine will be more fully considered in treating of implied warranties of identity of kind or species. It is here sufficient to cite a few authorities to the proposition that a condition precedent is essentially different from an implied warranty of quality, usually being an express or implied agreement that an article sold is or shall be of a particular kind or species. *Borrekins v. Bevan*, 3 Rawle (Pa.) 23; s. c., 23 Am. Dec. 85; *Fraleigh v. Bispham*, 10 Pa. St. 320; s. c., 51 Am. Dec. 486; *Dounce v. Dow*, 64 N. Y. 411; *Hawkins v. Pemberton*, 51 N. Y. 198; s. c., 10 Am. Rep. 595; *White v. Miller*, 71 N. Y. 118; s. c., 27 Am. Rep. 13; *Flint v. Lyon*, 4 Cal. 17; *Webber v. Davis*, 44 Me. 147; *Wolcott v. Mount*, 38 N. J. L.

the application of the maxim *caveat emptor*.¹ The distinction between an implied warranty and a condition precedent may be seen in the fact that a condition precedent relates to the *kind* of thing sold and an implied warranty usually to the *quality* of that kind of thing. Hence an implied warranty and a condition precedent may both exist in a sale of personalty.² But when a condition precedent has been complied with and there is no implied warranty the rule is *caveat emptor*.³

8. Executory and Executed Contracts—How Affect Implied Warranty.—"A contract is executory when the thing agreed has not been done."⁴ "It is executed when the thing has been done."⁵ Consequently a sale of personalty is executory until the property in the thing sold has vested in the buyer.⁶ And it is executed where the right of property has passed to him.⁷ When the right to property has vested, and when it has not, is often a disputed question of much difficulty.⁸ And sometimes a contract remains executory after the delivery of the thing, agreed to be purchased, to the buyer because of a failure on the seller's part to comply

496; s. c., 20 Am. Rep. 428; *Josling v. King*, 13 C. B. (N. S.) 447; 32 L. J., C. P. 94.

1. Fraud, condition, representation and warranty are subjects constantly mingled in legal discourse; rules overlap; and as between implied conditions and implied warranties the courts are at decided variance. 2 *Schouler's P. P.* (2nd ed.), § 320; *Story on Sales* (Perkins' ed.), §§ 349, 364, 365; *Benjamin on Sales* (Bennett's ed., 1888), § 644. And see the preceding note for some cases showing erroneous decisions made because of a confusion of condition precedent with implied warranties.

2. It is kind or species not quality to which a condition precedent relates. 2 *Schouler's P. P.* (2nd ed.), § 344; *Gosler v. Eagle Sugar Refinery*, 103 Mass. 331, 334; *Swett v. Shumway*, 102 Mass. 365; *Tilton Safe Co. v. Tisdale*, 48 Vt. 83; *Gunther v. Atwell*, 19 Md. 157.

3. *Benj. on Sales* (Bennett's ed. 1888), §§ 646, 647; *Barr v. Gibson*, 3 Me. & W. 390.

4. *Bishop on Con.* (ed. 1887), §§ 624, 636. A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing. *Fletcher v. Peck*, 6 Cranch (U. S.) 87, 1363. See also 3 Am. & Eng. Ency. of Law, tit. Contracts, 824, 825, §§ 3, 4; *Benj. on Sales* (Bennett's ed. 1888), §§ 308-312; *Story on Sales* (Perkins' ed.), § 231, 232.

5. *Bishop on Con.* (ed. 1887), §§ 624, 636. *Benj. on Sales* (Bennett's ed. 1888), §§ 308-312. A contract executed is one in which the object of the contract is performed. *Fletcher v. Peck*, 6 Cranch (U. S.) 87, 136; *Frazer v. Robinson*, 42 Miss. 121; *Robison v. Robison*, 44 Ala. 227; *Beller v. Block*, 19 Ark. 566. See also 3 Am. & Eng. Ency. of Law, tit. Contracts, 824, 825, §§ 3 & 4; *Story on Sales* (Perkins' ed.), §§ 231, 232.

6. *Holland's El. of Jurisp.* (4th ed.) 210; *Benj. on Sales* (Bennett's ed. 1888), § 308; *Story on Sales* (Perkins' ed.), §§ 296, 299, 300, 315. It is conceived that in all cases of contracts for the sale of personal property, where it has any market value, the vendor, before he can recover of the vendee the market price, must have delivered the property to the vendee, or have done such acts as vested the title in the vendee, or would have vested the title in him, if he had consented to accept it. *Pittsburgh etc. R. Co. v. Heck*, 50 Ind. 303; s. c., 19 Am. Rep. 713.

7. That is, it is executed upon the vendor's part although it may still remain in a certain sense executory upon the part of the vendee. *Story on Sales*, §§ 231, 232.

8. Into the dispute we need not enter here, as it is not essential to this discussion. Regarding it see *Benj. on Sales* (Bennett's ed. 1888), bk. 2, ch. 1, and the subsequent chapters in the same book developing the subject fully.

with a condition precedent.¹

So it is said that the breach of a condition precedent may result in raising an implied warranty for the protection of the buyer, even after the delivery and acceptance of the thing sold.² But frequently such acceptance is regarded as a waiver and permits

1. It does not follow that because there has been a delivery by the vendor, he has passed the title to the vendee so as to change the nature of the contract from executory to executed. Delivery does not necessarily pass title. *Story on Sales*, §§ 295, 296, 313; *Benj. on Sales* (Bennett's ed. 1888), §§ 674, 675; 2 *Schouler's P. P.* (2nd ed.), §§ 254, 264, 383. Nor does mere delivery and acceptance always execute the contract so as to relieve the vendor from the performance of conditions precedent. Thus where a manufacturer of steam boilers agreed with a customer to manufacture and deliver to the latter at a future time three steam boilers to run the engines in the customer's rolling mill, it was held that it was an implied stipulation in the contract that such boilers should be free from all such defects of material and workmanship, whether latent or otherwise, as would render them unfit for the usual purposes of such boilers; and that the delivery and acceptance of boilers having defects of material and workmanship unfitting them for the use for which they were designed was not a compliance with the contract sufficient to execute it and make the maxim *caveat emptor* applicable; but that on the contrary the purchaser could maintain an action to recover back the money paid as the purchase price of such boilers. *Rodgers v. Niles*, 11 Ohio St. 48; s. c., 78 Am. Dec. 290.

The delivery of property corresponding with the contract is a condition precedent to the vesting of the title in the vendee. *Reed v. Randall*, 29 N. Y. 358; s. c., 86 Am. Dec. 305; *Howard v. Hoery*, 23 Wendall (N. Y.) 350; s. c., 35 Am. Dec. 572, and note.

The assignment of error mainly relied on by the plaintiff in error is that the court refused to instruct the jury to return a verdict for the defendants. The legal proposition upon which their counsel based this request was, that the purchaser of personal property, upon breach of warranty of quality, cannot, in the absence of fraud, rescind the contract of purchase and sale and sue for the recovery of the price. And they contended that, as the iron was deliv-

ered to defendant in error either at Coplay or Elizabethport, and the sale was completed thereby, the only remedy for the defendant in error was by a suit upon the warranty.

It did not appear that at the date of the contract the iron had been manufactured, and it was shown by the record that no particular iron was segregated and appropriated to the contract by the plaintiffs in error until a short time before its shipment, in the latter part of April and the early part of May. The defendant in error had no opportunity to inspect it until it arrived in Milwaukee, and consequently never accepted the particular iron appropriated to fill the contract. It was established by the verdict of the jury that the iron shipped was not of the quality required by the contract. Under these circumstances the contention of the plaintiffs in error is, that the defendant in error, although the iron shipped to him was not what he bought, and could not be used in his business, was bound to keep it, and could only recover the difference in value between the iron for which he contracted and the iron which was delivered to him.

We do not think that such is the law. When the subject-matter of a sale is not in existence, or not ascertained at the time of a contract, an undertaking that it shall, when existing or ascertained possess certain qualities, is not a mere warranty, but a condition, the performance of which is precedent to any obligation upon the vendee under the contract; because the existence of those qualities being part of the description of the thing sold becomes essential to its identity, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted. *Pope v. Allis*, 115 U. S. 363, 371.

2. Although a man may refuse to perform his promise until the other party has complied with a condition precedent, yet if he has received and accepted a substantial part of that which was to be performed in his favor, the condition precedent changes its character, and becomes a warranty or

the invocation of the maxim *caveat emptor*.¹ In executory contracts there is usually an implied warranty of quality or a condition pre-

independent agreement, affording no defence to an action, but giving right to a counter-claim for damages. Benj. on Sales (Bennett's ed. 1888), §5 64, *citing*, *Ellen v. Topp*, 6 Exch. 424; *Behn v. Burness*, 3 B. & S. 751; *Oppenheim v. Fraser*, 34 L. T. N. S. 524.

But see Mr. Bennett's notes to Benj. on Sales (ed. 1888), pp. 551, 619.

In a recent Iowa case (1885) the court says: "The case differs in no essential respect from one where the buyer makes an order for goods of a certain kind and quality and the seller accepts the order. The obligation of the seller is to execute the contract upon his part by a selection and delivery of the goods of the kind and quality contracted for. Such conduct is not in the outset a sale with a warranty, it is executory. It becomes an executed sale upon delivery; and if the delivery is made under circumstances which preclude inspection, we think that a warranty arises that the goods are of the quality contracted for. If in the case at bar, the plaintiffs contracted for 'choice, sugar-cured canvassed hams,' the defendant was bound to select and deliver such. And when he drew a draft against them, and caused the draft to be presented, and he accepted payment thereon at a time when the goods were in transit, we think that a warranty arose that the goods thus shipped and drawn against while in transit were of the quality contracted for." *Forcheimer v. Stewart*, 65 Iowa 594; s. c., 54 Am. Rep. 30, 35; See also *Brown v. Burhans*, 4 Hun (N. Y.) 227; *Woodle v. Whitney*, 23 Wis. 55; s. c., 99 Am. Dec. 102.

On an executory contract for the sale of corn, which the vendee had had no opportunity to inspect before delivery, the vendor delivered the corn to a warehouseman for the vendee. Upon inspection it was found that a portion of the corn was unmerchantable. The vendee kept the corn but was permitted to recoup damages, when an action was brought against him for the purchase price, to the amount of the difference between the purchase price and the real value of the corn. In the opinion of the court, SKINNER, J., says: "The contract was executory, the corn was not purchased upon inspection, and the duty of Trice was to deliver a fair article fit for

use and market as a sound commodity; and his duty, under the contract, was not performed until he had done so. The acceptance of the corn by the warehouseman was not a waiver of the implied warranty, nor would a delivery of the corn to Babcock personally at the warehouse have precluded him from setting up in defence of an action for the price a breach of warranty as to its quality. He was not bound to refuse to receive the corn because some portion of it was damaged, nor was he bound to return it on discovery of the fact. He might rely upon the warranty. Ch. Con. 401; *Mondell v. Steel*, 8 Mee. & W. 858; 2 Smith's Lead. Cas. 20-22.

It is true that the acceptance of corn under an executory contract, with opportunity of inspection at the time of delivery, without complaint, may raise a presumption that it was of the quality contemplated by the parties; but it will not preclude the party from showing and setting up the actual defect in the quality and condition. *Babcock v. Trice*, 18 Ill. 420; s. c., 68 Am. Dec. 560. And see *Brantley v. Thomas*, 22 Tex. 270; s. c., 73 Am. Dec. 264; *Fisk v. Tank*, 12 Wis. 276; s. c., 78 Am. Dec. 737.

1. In cases of executory contracts for the sale and delivery of personal property, the remedy of the vendee to recover damages on the ground that the article furnished does not correspond with the contract, does not survive the acceptance of the property by the vendee after opportunity to ascertain the defect, unless notice has been given to the vendor, or the vendee offers to return the property. The retention of the property by the vendee is an assent on his part that the contract has been performed. The delivery of property corresponding with the contract is a condition precedent to the vesting of the title in the vendee. The parties understand that the vendee is not bound to accept the property tendered, except upon this condition. This the vendee is to determine upon the receipt of the property. There is no intention that a defective article should be accepted, and that the vendee should rely upon the covenant for his indemnity. The latter is not bound to receive and pay for a thing he has not agreed to purchase; but if the thing

cedent equivalent thereto.¹ It thus appears that in both executed and executory contracts an implied warranty may exist.² And that even in executed contracts such an implied warranty may serve to protect the buyer against defects in the thing sold which it was the duty of the seller to avoid, and of which the buyer at the time the contract became executed, was excusably ignorant.³ But generally speaking, there is no implied warranty of quality in executed contracts where all conditions precedent have

purchased is found on examination to be unsound, or not to answer the order given for it, he must immediately return it to the vendor, or give him notice to take it back, and thereby rescind the contract, or he will be presumed to have acquiesced in its quality. He cannot accept the delivery of the property under the contract, retain it after an opportunity to ascertain its quality, and recover damages if it be not of the quality or description called for by such contract. It is understood of every contract for the future sale and delivery of an article of merchandise, even without express terms, that it shall be of merchantable quality; and I am not aware that it has ever been doubted that, upon the delivery of property pursuant to such a contract, the vendee, by retaining the property without notice to the vendor, waives all remedy upon the contract for any breach of an obligation implied by law. *Reed v. Randall*, 29 N. Y. 358; s. c., 86 Am. Dec. 305, 308, and note p. 312, collecting many authorities *pro* and *con*. See also *City of Memphis v. Brown*, 20 Wall. (U. S.) 289, 318; *Howard v. Hoey*, 23 Wend. (N. Y.) 350; s. c., 35 Am. Dec. 572 and note; *Brown v. Burhans*, 4 Hun (N. Y.) 227. And see the next paragraph of text and notes thereto, treating of waiver of implied warranties.

1. This appears from the foregoing notes to this section of the text, but see also to the same effect, *Benj. on Sales* (Bennett's ed. 1888), § 600, and note p. 551; *id.* p. 119, note; *Story on Sales* (Perkins' ed.), §§ 368, 371, 374, 375, 376, 377; 2 *Schouler's P. P.* (2nd ed.), §§ 343, 344, 349, 351, 354, *et seq.*; *Howard v. Hoey*, 23 Wend. (N. Y.) 350; s. c., 35 Am. Dec. 572; *Babcock v. Trice*, 18 Ill. 420; s. c., 68 Am. Dec. 560, and note; *Reed v. Randall*, 29 N. Y. 358; s. c., 86 Am. Dec. 305 and note; *Gould v. Banks*, 8 Wend. (N. Y.) 562; s. c., 24 Am. Dec. 90; *Pope v. Allis*, 115 U. S. 363.

2. This is plainly to be inferred from the doctrines already stated. That there may be an express warranty in both executory and executed contracts is, of course, clear. 2 *Schouler's P. P.* (2nd ed.), § 323; *Parks v. Morris etc. Co.*, 54 N. Y. 586; *Polhemus v. Heiman*, 45 Cal. 573.

3. *Rodgers v. Niles*, 11 Ohio St. 48; s. c., 78 Am. Dec. 290; *Byers v. Chapin*, 28 Ohio St. 306; *Dayton v. Hooglund*, 39 Ohio St. 682; *Gerst v. Jones*, 32 Gratt. (Va.) 525; *Shepherd v. Pybus*, 3 Man. & Gr. 868; *Jones v. Just*, L. R., 3 Q. B. 197; *Leopold v. Van Kirk*, 27 Wis. 152; *Brenton v. Davis*, 8 Blackf. (Ind.) 317, 318.

But when the seller is the maker or manufacturer of the thing sold, the fair presumption is that he understood the process of its manufacture, and was cognizant of any latent defect caused by such process and against which reasonable diligence might have guarded. This presumption is justified in part by the fact that the manufacturer or maker by his occupation holds himself out as competent to make articles reasonably adapted to the purposes for which such or similar articles are designed. When, therefore, the buyer has no opportunity to inspect the article, or when, from the situation, inspection is impracticable or useless, it is unreasonable to suppose that he bought on his own judgment, or that he did not rely on the judgment of the seller as to latent defects of which the latter, if he used due care, must have been informed during the process of manufacture. If the buyer relied, and, under the circumstances, had reason to rely, on the judgment of the seller, who was the manufacturer or maker of the article, the law implies a warranty that it is reasonably fit for the use for which it was designed, the seller at the time being informed of the purpose to devote it to that use. *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 116.

been complied with by the vendor.¹

9. A Waiver of Implied Warranty.—There may be an express or implied waiver of an implied warranty and such waiver frequently arises from the acts of the vendee in accepting and using chattels under such conditions that it is apparent he did not rely on the warranty.² On the other hand, there are cases where acceptance and user do not imply a waiver of an implied warranty or condition precedent.³ And fraud or deceit will avoid

1. *Moses v. Mead*, 1 Den. (N. Y.) 378; s. c., 43 Am. Dec. 676, and note; *Beirne v. Dord*, 5 N. Y. 95; s. c., 55 Am. Dec. 321 and note; *Wetherill v. Neilson*, 20 Pa. St. 448; s. c., 59 Am. Dec. 741 and note; *McClurg v. Kelley*, 21 Iowa 508; *Rodgers v. Niles*, 11 Ohio St. 48; s. c., 78 Am. Dec. 290 and note.

2. The purchaser of a machine takes the risk of its quality in the absence of fraud or warranty. And where, on his complaint, it is agreed that he shall retain it at a reduced price, he precludes himself from afterwards objecting to its quality. *James v. Bocage*, 45 Ark. 284.

Where a buyer of logs had no opportunity to inspect them and the seller made certain representations as to their character it was held that the buyer, by accepting and retaining the logs, waived his right to complain of their defective character, and that the representations of the seller raised a condition precedent rather than a warranty. *Thompson v. Libby*, 35 Minn. 443.

If a warranty that the iron was merchantable could be implied, defendant, by using a large portion of the iron after an opportunity to examine and ascertain the quality, must be deemed to have accepted it and to have waived the warranty. *Dounce v. Dow*, 64 N. Y. 411.

In case of an executory contract for the sale of goods with express or implied warranty, if there are patent defects, and the purchaser has full opportunity to examine and knows of such defects, his failure to notify the vendor within a reasonable time, that the goods are not accepted, as fulfilling the warranty, is a waiver. *Morehouse v. Comstock*, 42 Wis. 626.

If a vendee would rescind a contract of sale for breach of an implied warranty of the quality of the goods he must act promptly, so that the other party may be put *in statu quo*. *Pritchett v. McFadden*, 8 Ill. App. 197.

When goods ordered prove defective

in quality, it is, in general, incumbent on the purchaser to notify the seller of his non-acceptance on that ground, else he is deemed to waive the objection, and to consent to keep and pay for them according to the terms specified. In such case it is considered sufficient evidence of acceptance that the purchaser has not returned or offered to return the goods, or notified the seller of his non-acceptance. *Barton v. Kane*, 17 Wis. 38; s. c., 84 Am. Dec. 728.

A purchaser of goods by sample, not examining them promptly, but proceeding to sell them from the packages and continuing to do so for several weeks before giving notice of any defects waives an implied warranty against such defects. *Muller v. Eno*, 3 Duer (N. Y.) 421. But the rule is otherwise when it is a custom of trade in such sales that the warranty shall hold until the packages are opened in the course of trade. *Doane v. Dunham*, 79 Ill. 131.

The principle that when the contract of sale is executory the remedy of the purchaser to recover damages, on the ground that the article furnished does not correspond with the contract, will not survive an acceptance, and retention of the property, after an opportunity to ascertain the defect, without notifying the vendor, is well supported by authority. *Reed v. Randall*, 29 N. Y. 358; s. c., 86 Am. Dec. 305. And see, for numerous authorities on this and related questions, the opinion in the case just cited, and Mr. Freeman's note thereto. 86 Am. Dec. 305, 312.

3. A warranty may exist, in the case of an executory contract, when the defect in the property is incapable of discovery at the time of delivery. In such case the purchaser may retain the property and sue upon the warranty. *Brown v. Burhans*, 4 Hun (N. Y.) 227; *Babcock v. Trice*, 18 Ill. 420; s. c., 68 Am. Dec. 560. And see the preceding section in the text and the notes there-

a renunciation or waiver of warranty either express or implied.¹

10. When Express Warranty Excludes Implied.—An express warranty of title excludes an implied warranty of title, and an express warranty of quality excludes an implied warranty of quality.² But an express warranty of title does not exclude an implied warranty of quality, and *vice versa*.³

Written Contract—Parol Evidence.—When a contract of sale in-

to, where many cases bearing on the doctrines of this section of the text are cited.

1. "Fraud vitiates." Consequently a renunciation of warranty made by the buyer does not bind where there has been fraud on the part of the seller. *Bevans v. Farrell*, 18 La. Ann. 232; *Heilbutt v. Hickson*, L. R., 7 C. P. 438; 2 Schouler's P. P. (2nd ed.), §§ 364, 365.

2. As to the second question, we are of opinion that the law will not imply what is not expressed where there is a formal contract. *Evans' Essays*, 32; 1 Fonbl. 364; *Doug.* 654; 6 T. R. 606. The express warranty as to soundness and age, excludes any implied warranty as to other qualities. *Lanier v. Auld*, 1 Murph. (N. Car.) 138; s. c., 3 Am. Dec. 680, 681.

The language just quoted lays down the rule of law correctly, but whether the rule was correctly applied in the case from which it is quoted is more than questionable. It was there *held* that the express warranty as to the soundness and age of a negro sold as a slave excluded any implied warranty that the negro was in fact a slave, it turning out that he was in fact free. The court treated slavery as a *quality*, and therefore excluded any implied warranty as to its existence. In fact it is a *status*, and a warranty of title should have been implied at common law.

When certain qualities are expressly warranted no others can be implied. *McGraw v. Fletcher*, 35 Mich. 104; *Story on Sales*, § 358; 2 Schouler's P. P. (2nd ed.), § 367; *Benj. on Sales* (Bennett's ed. 1888), § 666.

It is only where there is no express warranty that resort to an implied warranty can be had. *Johnson v. Latimer*, 71 Ga. 470.

An express warranty of certain qualities excludes an implied warranty that the article is reasonably fit for its intended purpose. *International etc. Co. v. Smith*, 17 Mo. App. 264; *Mullain v. Thomas*, 43 Conn. 252; *Warren Glass Works v. Keystone Coal Co.*, 65 Md. 547.

Insistence upon an express warranty seems to be a waiver of an implied one. *Expressio unius est exclusio alterius*. *Jackson v. Langston*, 61 Ga. 392; *Baldwin v. VanDeusen*, 37 N. Y. 487; *Deming v. Foster*, 42 N. H. 175. And see the cases cited in the preceding paragraph of this note.

3. An implied warranty of soundness is not excluded by an express warranty of title. *Trimmer v. Thomson*, 10 S. Car. 164; *Houston v. Gilbert*, 3 Brev. (S. Car.) 63; s. c., 5 Am. Dec. 542. In his note to this case the learned editor of the Am. Decisions seems to think it in conflict with the rule in other States than South Carolina, and based upon the peculiar modification of the law in relation to implied warranties said to prevail in that State. In fact, however, the case is correctly decided on common law grounds, and in the point decided is more accurate than the North Carolina case of *Lanier v. Auld*, 1 Murph. (N. Car.) 138; s. c., 3 Am. Dec. 680.

The doctrine laid down in *Houston v. Gilbert*, 3 Brev. (S. Car.) 63, has been several times repeated in South Carolina. *Wells v. Spears*, 1 McCord (S. Car.) 421; *Hughes v. Banks*, 1 McCord (S. Car.) 537; *Wood v. Ashe*, 3 Strobb. (S. Car.) 64. It seems also to meet the approval of Mr. Bennett in his review of the American cases. *Benj. on Sales* (Bennett's ed. 1888), p. 614.

And there are cases which go farther than the doctrine stated in the text and seem to hold that the maker of a manufactured article may be held on an implied warranty of quality or fitness even where he has given an express warranty as to quality in some specified respects. *Boothby v. Scales*, 27 Wis. 626; *Bigge v. Parkinson*, 7 H. & N. 955; 2 Schouler's P. P. (2nd ed.), § 367.

While, on the other hand, it is sometimes *held* that a warranty of title in a bill of sale is an exclusion of all other warranties not expressed, and is conclusive against the existence of any other warranty. *Wren v. Wardlaw*, Minor (Ala.) 363; *Sparks v. Messick*, 65 N. Car. 440.

writing is silent upon the question of warranty one may be implied provided it arises from the subject-matter and language of the contract as a matter of law.¹ But the terms of the contract cannot be varied by parol evidence so as to create an implied warranty when from the terms and subject-matter of the written contract the law would not imply one.² Yet the

1. The rule to be deduced from all the authorities on the subject that is, where a contract for the purchase or manufacture of specific articles, or of a certain class of articles, is in writing, and contains no express warranty of fitness of the article for a certain intended use, an implied warranty does not exist unless it can be made to arise from the contract itself. It must have its source, if at all, in some language, either of description or other character, employed in the contract. *Ottawa Bottle etc. Co. v. Gunther*, 31 Fed. Rep. 208, 212; *Story on Sales*, § 358. And so in the above case it was held that what the term "export beer bottles" meant was a subject of parol expert evidence in order that it might be determined whether that term implied a warranty of kind. *Ottawa Bottle etc. Co. v. Gunther*, 31 Fed. Rep. 208.

The true doctrine and the reasons upon which it rests are thus stated in a Tennessee case: "The defendant was in possession of a negro slave, and sold the same to plaintiff, and by deed transferred the slave to the plaintiff. This deed contained no covenant whatever, but was a mere conveyance of the title. This action of *assumpsit* was brought upon the warranty of title implied by law from the mere fact of the sale; the defendant not having a good title to the slave, who was taken from the possession of the plaintiff and sold, by the paramount right of another. Upon the trial of the cause, the honorable circuit judge charged the jury "that the plaintiff could not recover, because of the deed or bill of sale; that the writing must contain the whole contract, and to permit the plaintiff to recover would be to add to or enlarge the written agreement."

In this charge we are of the opinion that the circuit court was in error. It is a well settled principle, applicable to all sales of chattels in the possession of the vendor, that the act, or fact of sale, of itself, by operation of law, implies and involves a warranty of title. This principle operates with as much force when the sale and transfer of the prop-

erty is evidenced by writing, or by deed, as if the evidence of sale were merely verbal. And this principle does not contravene the general rule of evidence alluded to by the judge; because the warranty of his title is as strongly implied from the fact of sale, which fact is proved by deed, as if it were proved otherwise. It does not enlarge the writing; it arises by operation of law, from the act or fact of sale itself. The property being a slave, makes no difference in the principle; a slave is a personal chattel. *Trigg v. Faris*, 5 Humph. (Tenn.) 343.

And, in support of this doctrine, see *Miller v. Van Tassel*, 24 Cal. 458; *Long v. Hickingbottom*, 28 Miss. 772; s. c., 64 Am. Dec. 118; *Word v. Cavin*, 1 Head (Tenn.) 506; *Shattuck v. Green*, 104 Mass. 42; *Swett v. Shumway*, 102 Mass. 365; *Story on Sales*, § 358; *Shepherd v. Pybus*, 3 Man. & Gr. 868; *Freeman's note to Scott v. Hix*, 2 Sneed (Tenn.) 192; s. c., 62 Am. Dec. 466, 467.

2. When the contract is in writing an additional warranty, not expressed or implied by its terms, that the article is fit for a particular use, cannot be added, either by implication of law or by parol evidence. *Whitmore v. South Boston etc. Co.*, 2 Allen (Mass.) 52, 58.

An examination of the authorities cited in the preceding note will show that this is as far as the principle of the law will warrant the courts in going in the exclusion of an implied warranty, where there is a written contract silent upon the subject of express warranty.

It has been held, however, that "a warranty of title to a chattel cannot be implied or proved when there is a written bill of sale, which contains no warranty, for that would be to add to the writing by parol." *Sparks v. Messick*, 65 N. Car. 440.

It is, however, correctly held that in the absence of fraud, accident or mistake, it is incompetent to show a parol, contemporaneous, express warranty of agricultural implements sold by a written contract containing no warranty. *Mast v. Pearce*, 58 Iowa 579; s. c., 43

mere fact that the terms of the contract exclude an express or implied warranty of title will not prevent an implied warranty of quality, and *vice versa*.¹

11. Official and Judicial Sales—No Implied Warranty in.—In official and judicial sales there is no implied warranty of title, and the rule *caveat emptor* applies. And such is the general rule as to sales in a representative capacity as by trustees, guardians, executors, administrators, etc.²

12. Fraud and Deceit—When Raise Implied Warranties.—Where a person offers personalty for sale as though it were his own but knowing that it does not belong to him, and at the same time keeps the purchaser in ignorance, he is guilty of a fraud for which the sale may be rescinded.³ And in cases involving the quality

Am. Rep. 125 and note; Nicholas v. Wayman, 71 Iowa 160. But this does not exclude evidence of a mistake in reducing a contract to writing, and that a warranty was omitted by mistake, or that the *entire* contract was not put in written form. Chapin v. Dobson, 78 N. Y. 74; s. c., 34 Am. Rep. 512. And, conversely, although a bill of sale silent on the subject of warranty implies a warranty of title, yet parol evidence may be introduced to overturn the implication and show that there was no warranty. Miller v. Van Tassel, 24 Cal. 458.

1. This follows from the doctrines and authorities that have gone before. It is clear that the express exclusion of a warranty of title might still leave a warranty of quality to be implied from the language and subject-matter of the contract.

2. It is clear that sheriff's and officers of the law generally, also executors and other trustees, who sell property, real or personal, in such capacity, are presumably held to no implied warranty of title; a sufficient reason being, that the character of the office precludes the supposition that such a party is the true and absolute owner of that which he offers for sale. 2 Schouler's P. P. (2nd ed.), § 372. The rule of *caveat emptor* applies in all its rigor to purchasers at judicial sales. Corwin v. Benham, 2 Ohio St. 36. In a sheriff's sale the rule is *caveat emptor*. Jones v. Burr, 5 Strobb. (S. Car.) 147; s. c., 53 Am. Dec. 699, and note; Danley v. Rector, 10 Ark. 211; s. c., 50 Am. Dec. 242, and note; The Monte Allegre, 9 Wheat. (U. S.) 616; Bashore v. Whisler, 3 Watts (Pa.) 490; Stone v. Pointer, 5 Munf. (Va.) 287; Worthy v. John-

son, 8 Ga. 236; Salmond v. Price, 13 Ohio 383; Freeman on Executions, § 338, 352; Neal v. Gillaspay, 56 Ind. 451; s. c., 26 Am. Rep. 37, and note collecting many cases; McGhee v. Ellis, 4 Lit. (Ky.) 244; s. c., 14 Am. Dec. 124, and note.

And this is true both at law and in equity. Lang's Heirs v. Waring, 25 Ala. 625; s. c., 60 Am. Dec. 533 and note; but see titles: EQUITY and SUBROGATION, in this work.

It has been held, however, but the case has been denied, that a sheriff may be guilty of concealment regarding defects in a title that will prevent the application of the maxim *caveat emptor*. Com. v. Dickinson, 5 B. Mon. (Ky.) 506; s. c., 43 Am. Dec. 139. But see note to this case denying its correctness and authority, 43 Am. Dec. 143. *Caveat emptor* is the rule of executors and administrators' sales. Robb v. Mann, 11 Pa. St. 300; s. c., 51 Am. Dec. 551 and note; Sackett v. Twining, 18 Pa. St. 199; s. c., 57 Am. Dec. 599 and note; Lynch v. Baxter, 4 Tex. 431; s. c., 51 Am. Dec. 735; Walton v. Reager, 20 Tex. 109; Doxey's Admr. v. Burns, 37 Tex. 719.

As between a purchaser and a trustee at a trustee's sale of personalty, the rule *caveat emptor* applies. Brewer v. Christian, 9 Ill. App. 57.

The rule *caveat emptor* applies to a sale by a guardian. A *suppressio veri* will not invalidate the sale and entitle the vendee to rescind it; otherwise of a *suggestio falsi*. Mason v. Wait, 5 Ill. 127.

3. 2 Schouler's P. P. (2nd ed.), §§ 370, 595, 604; Story on Sales, § 383; Sherman v. Johnson, 56 Barb. (N. Y.) 59; Sweetman v. Prince, 62 Barb. (N. Y.) 256.

of personalty sold which would otherwise fall within the rule *caveat emptor*, an implied warranty may arise from the fraud or deceit of the vendor that will prevent him from invoking the maxim and force him to abide by and make good the expectations of quality or condition that his fraudulent conduct or representations raised in the mind of the vendee.¹ But a mere suppression of the truth, under circumstances where there is no obligation on the vendor to speak, will not raise such a warranty.² There must be a *suggestio falsi* as well as a *suppressio veri*, for the law does not inhibit a seller from silently allowing a buyer to cheat himself, but it forbids him from actively assisting in the self-swindle

1. Defects visible and easily discovered will not prevent the vendee's recovery therefor, if the seller has disguised them and by his false statements has induced the vendee to buy. *Hanks v. McKee*, 2 Litt. (Ky.) 227; s. c., 13 Am. Dec. 265, and note.

In such a case asthma in a slave is not such a disease that by its visible character a vendee is bound to know the stage it has reached. *Hanks v. McKee*, 2 Litt. (Ky.) 227; s. c., 13 Am. Dec. 265.

The reason for the rule that a general warranty does not extend to visible defects ceases when the vendor uses art to conceal, and succeeds in concealing such defects from the purchaser. *Chadsey v. Greene*, 24 Conn. 562.

Implied warranties arise by implied operation of law; they exist without any intention of the seller to create them, and may properly be divided into two kinds. The one untintured by actual fraud or deceit, as the warranty of title, warranty that provisions purchased for domestic use are wholesome; and the warranty in executory contracts, or where the purchaser had no opportunity of inspection, that the article contracted for shall be salable as such in the market. The other kind of implied warranties are those where fraud and deceit are of their very essence, without which they do not exist, as in cases where the seller of any article, knowing of its unsoundness, uses any disguise or artifice to conceal it, or represents it (whether in the way of expressing opinion or belief, or otherwise) to be exempt from such defect. *Osgood v. Lewis*, 2 Har. & G. (Md.) 495; s. c., 18 Am. Dec. 317.

In Georgia, by § 2651 of the Code, said to be declaratory of the common law, it is provided that the vendor of chattels is held to warrant that he knows of no latent defect undisclosed.

Held, to charge a vendor selling a mare and saying her shortness of breath was caused by epizootic, when in fact it was caused by another disease which soon made her worth less. *Perdue v. Harwell* (Ga.), 4 S. E. Rep. 877.

And in a similar case at common law the same rule was enforced. *Hull v. Kirkpatrick*, 4 Ind. 637. The rule of *caveat emptor* does not apply where the vendor has used any device to put the purchaser off his guard. *Biggs v. Perkins*, 75 N. Car. 397; *Armstrong v. Bufford*, 51 Ala. 410; *Roseman v. Canovan*, 43 Cal. 110, 117; *Phipps v. Buckman*, 30 Pa. St. 401; *Smith v. Richards*, 13 Pet. (U. S.) 26; *Lord v. Goddard*, 13 How. (U. S.) 198; *King v. Eagle Mills*, 10 Allen (Mass.) 548; *Thayer v. Turner*, 8 Met. (Mass.) 550; *Hazard v. Irwin*, 18 Pick. (Mass.) 95; *Gatling v. Newell*, 12 Ind. 118; *Kennedy v. Panama Mail Co.*, L. R., 2 Q. B. 580, 587. And see generally on this subject, *Benjamin on Sales* (Bennett's ed. 1888), § 430 and note, p. 448; *Story on Sales*, §§ 378-381; 2 *Schouler's P. P.* (2nd ed.), §§ 604, 605; 1 *Story's Eq. Juris.*, § 191 *et seq.*

2. It is only where a party is under some pledge or obligation to reveal facts to another that mere silence will be considered as a means of deception. *Benjamin on Sales* (Bennett's ed. 1888), § 430, and see note p. 450; *Story on Sales*, §§ 381, 382; 1 *Story's Eq. Juris.*, § 197; 1 *Parsons on Con.* (5th ed.) 578. And even false representations by the vendor do not imply a warranty and will not release a vendee when by ordinary care he might have ascertained the true condition of the thing purchased. *Moore v. Turbeville*, 2 Bibb (Ky.) 602; s. c., 5 Am. Dec. 642; *Williams v. Hicks*, 2 Vt. 36; s. c., 19 Am. Dec. 693; *Armstrong v. Bufford*, 51 Ala. 410; *Briggs v. Perkins*, 75 N. Car. 397; *Oneida Manf. Co. v. Lawrence*, 4 Cow. (N.Y.)

by word or deed.¹ And in some cases a duty to speak is raised

440; *Ellis v. Andrews*, 56 N. Y. 83; *Chrysler v. Canaday*, 90 N. Y. 272; *Parker v. Moulton*, 114 Mass. 99; *Poland v. Brownell*, 131 Mass. 138; *Holbrook v. Connor*, 60 Me. 578; *Watts v. Cummins*, 59 Pa. St. 84; *Gordon v. Butler*, 105 U. S. 553; *Mason v. Wait*, 5 Ill. 127. This rule, however, does not apply when the property is not present at the sale and the vendee is forced to rely on the representations of the vendor. *Hanks v. McKee*, 2 Litt. (Ky.) 227; s. c., 13 Am. Dec. 265.

The rule that the vendor's silence as to defects where the vendee trusts to his own observation and judgment was correctly applied in a case where a second hand engine, with defects known to the seller, was examined by the buyer and an expert chosen by him, without discovery of the defect. The failure of the seller to disclose the defects—he not being asked—did not charge him with an implied warranty. *Cogel v. Kniseley*, 89 Ill. 598; 1 *Parsons on Con.* (5th ed.) 578.

So far, the rule is clear, but there is a tendency to restrict rather than to extend the doctrine that the vendor may remain silent and see the vendee swindle himself. *Story on Sales*, §§ 382, 384; 1 *Story on Con.*, § 648; 2 *Schouler's P. P.* (2nd ed.), § 604; *Benj. on Sales* (Bennett's ed. 1888), § 430; note to *Emerson v. Brigham*, 6 Am. Dec. 117.

6. The defendants insist that it is, in all cases where both parties have not an equal access to the means of information, citing 2 *Kent's Com.* 482; and further, he insists that the concealment of any latent defect that could not have been discovered by the vendee through the exercise of proper diligence, will avoid the contract, citing numerous cases.

How far a person is bound, when dealing with another, to communicate facts wholly within his own knowledge, is a question about which the ablest jurists differ. Testing it by the code of moral ethics, there can be no doubt about it, nor is there any doubt when tested by the rules of the civil law; both codes would require a communication by the vendor of every material fact within his knowledge, and unknown to the purchaser, which might have an influence in making the contract. Otherwise, the parties would not stand

on equal ground, the vendor having a decided advantage over the purchaser. But this rigid principle has not been adopted into the common law. The doctrine in 2 *Kent's Com.* 490, is said to be, where one party possesses a knowledge of facts which, from the situation of the property, the other cannot know, a suppression of such facts would render a contract invalid.

To make the mere suppression of a fact such a fraud as will justify a court in declaring the contract void, we believe the more modern and more correct doctrine to be, there must be something more than a failure to communicate facts within the knowledge of the party selling—there must be concealment, and that may consist in withholding the information when it is asked for, or by making use of some device to mislead, thus involving act and intention. Thus *Parsons*, in his able treatise on the law of contracts, the most modern work on that subject to which we have access, says: If the seller knows of a defect in his goods which the buyer does not know, and if he had known would not have bought the goods, and the seller is silent, and only silent, his silence is, nevertheless, a moral fraud, and ought, perhaps, on moral grounds, to avoid the contract. But this moral fraud has not yet grown into a legal fraud. In cases of this kind, there may be circumstances which cause this moral fraud to be legal fraud, and give the buyer his action on the implied warranty, or on the deceit.

And if the seller be not silent, but produce the sale by means of false representations, then the rule of *caveat emptor* does not apply, and the seller is answerable for his fraud. But the weight of authority requires that this should be active fraud. The common law does not oblige a seller to disclose all that he knows which lessens the value of the property he would sell. He may be silent, leaving the purchaser to inquire and examine for himself, or to require a warranty. He may be silent and be safe; but if he be more than silent, if by acts, and certainly if by words, he leads the buyer astray, inducing him to suppose that he buys with warranty, or otherwise preventing his examination or inquiry, this becomes a fraud, of which the law will

by the circumstances so that silence upon the vendor's part works a fraud and raises a warranty.¹

take cognizance. The distinction seems to be, and it is, grounded upon the apparent necessity of leaving men to take some care of themselves in their business transactions. The seller may let the buyer cheat himself *ad libitum*, but must not actively assist him in cheating himself. 1 Parsons on Con. 461.

Here the seller was silent; he made no representations of any kind as to the quality of the hay, and used no artifice to induce the defendant's agent to buy. The hay was there in ricks, and it was quite easy for the purchaser to satisfy himself as to its quality by pulling a few handfuls from the ricks. Damaged hay, as everyone knows, can be very readily detected by the color and smell. It was in the power of the purchaser to test in this way every one of the ricks. It was his own folly that he did not do so. It was lawful for the seller to suffer the buyer to cheat himself *ad libitum*, so that the seller does not actively assist him therein. Proper diligence would have enabled the buyer to detect the unsound condition of the hay. The charge of fraud is in nowise established.

Kohl v. Lindley, 39 Ill. 195; s. c., 89 Am. Dec. 294; Armstrong v. Bufford, 51 Ala. 410; Biggs v. Perkins, 75 N. Car. 397; Mason v. Wait, 5 Ill. 127; Roseman v. Camoran, 43 Cal. 110, 117; Benj. on Sales (Bennett's ed. 1888), § 430 and note, pp. 448, 449; Schouler's P. P. (2nd ed.), § 604; Story on Sales, § 382, 384.

1. Where a vendor sold a quantity of beef for domestic consumption and knew at the time of the sale that the cow from which it came was diseased when she was slaughtered, it was held that there was an implied warranty that the meat was sound and wholesome, and the court added: "In the present case the concealment of the fact that the animal was diseased is equivalent to the suggestion of a falsehood that she was sound." VanBracklin v. Fonda, 12 Johns. (N. Y.) 468; s. c., 7 Am. Dec. 339.

There is a strong and decided tendency evinced of late to hold a party liable for a *suppressio veri* as for a *suggestio falsi*, and in this respect we are approaching the rule of the civil law. It is sometimes as fraudulent to conceal facts as to misstate them. 1

Story on Con., § 648; 2 Schouler's P. P. (2nd ed.), § 604; Story on Sales, §§ 381, 382, 384; Benj. on Sales (Bennett's ed. 1888), § 430; Peek v. Gurney, L. R., 6 H. L. 403; Ankuright v. Newbold, 17 Ch. D. C. A. 317; Smith v. Chadwick, 20 Ch. D. C. A. 58; Lee v. Jones, 17 C. B. N. S. 506; Hill v. Gray, 1 Starkie 434; Laidlaw v. Organ, 2 Wheat. 178; Perebee v. Gordon, 13 Ired. (N. Car.) 350; Bean v. Herrick, 12 Me. 262; Prentiss v. Russ, 16 Me. 30; Miliken v. Chapman, 75 Me. 322; s. c., 46 Am. Rep. 386, 395, 396; Downing v. Dearborn, 77 Me. 457; Barnard v. Duncan, 38 Mo. 170; Dean v. Morey, 33 Iowa 120; Brown v. Gray, 6 Jones (N. Car.) 103; Turner v. Huggins, 14 Ark. 21; Singleton v. Kennedy, 9 B. Mon. (Ky.) 222; Dixon v. McClutchee, Add. (Pa.) 322 (1797); Stevens v. Fuller, 8 N. H. 463; Paddock v. Strobridge, 29 Vt. 471; Cardwell v. McClellan, 3 Sneed (Tenn.) 150; Hough v. Evans, 4 McCord (S. Car.) 169; Duvall v. Medtart, 4 Har. & J. (Md.) 14; Cornelius v. Mollay, 7 Pa. St. 293; Kintzing v. McElrath, 5 Pa. St. 467; VanArsdale v. Howard, 5 Ala. 596; Truebody v. Jacobson, 2 Cal. 269; Merritt v. Robinson, 35 Ark. 483; Brown v. Montgomery, 20 N. Y. 287.

Of course, in cases where the concealment of the truth is held to be fraudulent, it must appear that there was an intention to deceive. In the absence of the *scienter* there is no fraud. Hanson v. Edgerly, 29 N. H. 343; Binnard v. Spring, 42 Barb. (N. Y.) 470; Hadley v. Clinton, 13 Ohio St. 502; Bigler v. Flickinger, 55 Pa. St. 279; Cooper v. Lovering, 106 Mass. 79; Beach v. Bemis, 107 Mass. 499.

But the *scienter* is sometimes presumed without proof of the actual intent, and in such cases an implied warranty is said to arise. Hoe v. Sanborn, 21 N. Y. 552; s. c., 78 Am. Dec. 163, 165.

It should be borne in mind, however, that "a transaction cannot be characterized as a warranty and a fraud at the same time. A warranty rests upon contract; while fraud or fraudulent representations have no element of contract in them, but are essentially a tort." Rose v. Hurley, 39 Ind. 77; Shordan v. Kyler, 87 Ind. 38, 41; Graham v. Nowlin, 54 Ind. 389; Pierce v. Carey, 37 Wis.

13. Some General Principles of Implied Warranty.—A warranty of title is never implied in the sale of realty, but only in sales of personalty.¹ The doctrine of implied warranty applies only to articles susceptible of a standard quality or which are sold by sample.² But it applies to property exchanged as well as to property sold.³ What facts will constitute an implied warranty is a question of law for the court, but the existence of the facts is for the jury.⁴ Where there is a refusal to warrant, no warranty can be implied.⁵ A mere contract of sale or agreement to sell does not imply a warranty.⁶ But, subject to certain limitations, a warranty of title, although not of quality, is implied in every sale of chattels.⁷ The tendency in the development of the law is to regard implied warranties with greater, and the doctrines of *caveat emptor* with less, favor than formerly.⁸

232. But representations or concealments in a sale which would amount to a warranty, express or implied, "will not be deprived of that character by the fact that they were falsely and fraudulently made." 2 Schouler's P. P. (2nd ed.), § 606; *Carter v. Abbott*, 33 Iowa 180; *Rose v. Hurley*, 39 Ind. 77. And may work an estoppel, equivalent to a warranty, for the protection of the buyer. *Rose v. Teeple*, 16 Ind. 37; *Vaughn v. Ferrall*, 57 Ind. 182; *Anderson v. Hubble*, 93 Ind. 570, 577. But if fraud is alleged no recovery can be had on proof of a breach of warranty only. *Ross v. Mather*, 51 N. Y. 108; *Ward v. Hobbs*, 3 Q. B. 150. But see *Williamson v. Allison*, 2 East 446.

Yet the purchaser may elect to sue in tort or contract where the facts will justify a resort to either remedy. 2 Schouler's P. P. (2nd ed.), § 606; *Lasiter v. Ward*, 11 Ired. (N. Car.) 443. From this it will be seen that it is scarcely correct to speak of a fraud as raising a warranty, but it is common so to do, and the legal results are practically the same as though there had been a warranty.

1. *Dorsey v. Jackman*, 1 S. & R. (Pa.) 42; s. c., 7 Am. Dec. 611.

2. *Pollard v. Lyman*, 1 Day (Conn.) 156; s. c., 2 Am. Dec. 63.

3. *Rivers v. Grugett*, 1 McCord (S. Car.) 100.

4. Implied warranties arise by operation of law. They exist without any intention of the seller to create them. They are conclusions or inferences of law pronounced by the court upon facts admitted or proved before the jury. If the facts be controverted, the court can hypothetically instruct the jury that if they find such and such facts, then there

is an implied warranty, and their verdict must be given accordingly; but if they do not find those facts, then there is no implied warranty. *Osgood v. Lewis*, 2 Har. & G. (Md.) 495; s. c., 18 Am. Dec. 317.

It has been said that the element of intention is necessary to constitute an implied warranty. *Figge v. Hill*, 61 Iowa 430; *Seixas v. Woods*, 2 Cai. (N. Y.) 48; s. c., 2 Am. Dec. 215.

But this has been denied and the intention has been implied, as a part of the conclusion of law, from the facts necessary to constitute an implied warranty. A vendor cannot escape liability by claiming that he did not intend what his language declared. *Hawkins v. Pemberton*, 51 N. Y. 108; s. c., 10 Am. Rep. 595; *Stroud v. Pierce*, 6 Allen (Mass.) 413; *Stone v. Denny*, 4 Met. (Mass.) 151; *Smith v. Justice*, 13 Wis. 600; *Robinson v. Harvey*, 82 Ill. 58; *Hoe v. Sanborn*, 21 N. Y. 552; s. c., 78 Am. Dec. 163, 165.

5. *Habersham v. Rodrigues*, 1 Spears (S. Car.) 314; *Smith v. Bank*, *Riley* (S. Car.) Ch. 113.

6. *Harley v. Golden State Works*, 66 Cal. 238.

7. *Perley v. Balch*, 23 Pick. (Mass.) 283; s. c., 34 Am. Dec. 56; *Scott v. Hix*, 2 Sneed (Tenn.) 192; s. c., 62 Am. Dec. 458, and note collecting and reviewing many cases. And see the discussion of implied warranties of title *post*.

8. Story on Sales, §§ 359, 364, 365; 2 Schouler's P. P. (2nd ed.), §§ 320, 381; *Benj. on Sales* (Bennett's ed. 1888), §§ 627, 639, 644, *et seq.* and note, p. 623; note to *Emerson v. Brigham*, 6 Am. Dec. 113, *et seq.*; note to *Bragg v. Morrill*, 24 Am. Rep. 104, *et seq.*

14. Custom or Usage—Effect on Implied Warranty, etc.—A custom or usage, if well established, may affect the application of the maxim *caveat emptor*, or the doctrines of implied warranty by modifying, enlarging or restricting them.¹ But the common law is jealous of such interference with its established rules, and customs or usages are not permitted to so alter the law as to interfere with its policy and work manifest injustice.²

15. Subject-matter of Sale—Existence of.—It is said that there is an implied warranty that the subject-matter of a sale does or shall exist, in every sale of chattels.³ But in realty the existence

1. In *Jones v. Bowden*, 4 Taunt. 487, it was shown that in an auction sale of certain drugs, as pimento, it was usual to state in the catalogue whether they were sea damaged or not, and in the absence of a statement that they were sea damaged, they would be assumed to be free from that defect. *Held*, that the freedom from sea damage was an implied warranty in the sale when it was not stated that the drugs were sea damaged.

So in *Fatman v. Thompson*, 2 Disney (Ohio) 482, it was *held* that a usage among tobacco dealers to warrant that the article should remain sound and merchantable for four months after the sale was valid, and if established would govern the sale. And while in a sale by sample it is the duty of the buyer, when the goods are delivered, to examine them in a reasonable time, and notify the seller if they do not conform to the sample, yet if the goods are in packages, and to be sold again from the packages, a usage not to examine such goods until they are opened for sale to customers will be valid, provided the goods are so opened in the ordinary course of trade, and without unusual delays. *Doane v. Dunham*, 79 Ill. 131. Evidence is admissible to prove a custom that, upon the sale of berries in bags by sample, the sample represents the average quality of the entire lot, and not the average quality of the amount contained in each bag taken separately. *Schnitzer v. Oriental Print Works*, 114 Mass. 123.

And evidence may be heard to show that the term "horn chains" in a contract was the customary name for chains made of "hoof and horn." *Swett v. Shumway*, 102 Mass. 365.

2. Usages will not be permitted to conflict with settled rules of law, or the legal interpretation or effect of a contract. Nor will they be received to imply a warranty from the terms of a con-

tract whence the law implies none, or to prevent the implication of a warranty where the law implies one. *Dickinson v. Gay*, 7 Allen (Mass.) 29; s. c., 83 Am. Dec. 656.

A usage that in sales by sample there is an implied warranty against latent defects existing in both the sample and bulk, is illegal. *Boardman v. Spooner*, 13 Allen (Mass.) 359; *Dickinson v. Gay*, 7 Allen (Mass.) 29; s. c., 83 Am. Dec. 656.

Where one sells goods under circumstances to justify a buyer in believing them to be of the vendor's manufacture, a rule of a board of trade will have no application to prevent a warranty of their merchantable quality as implied by law. *Chicago Packing etc. Co. v. Tilton*, 87 Ill. 547.

No custom in the sale of any particular description of goods can be admitted to control the general rules of law. *Beirne v. Dord*, 5 N. Y. 95; s. c., 55 Am. Dec. 321, 325; *Thompson v. Ashton*, 14 Johns. (N. Y.) 317.

A custom cannot affect the right to return goods that do not conform to the sample by which they were sold. *Webster v. Granger*, 78 Ill. 230. And see on the subject of customs and usages and their relationship to the doctrine of implied warranty generally: 2 Schouler's P. P. (2nd ed.), § 326; *Boorman v. Jenkins*, 12 Wend. (N. Y.) 566; 27 Am. Dec. 158, and note; *Bradford v. Manly*, 13 Mass. 139; s. c., 7 Am. Dec. 122, and note; *Dickinson v. Gay*, 7 Allen (Mass.) 29; s. c., 83 Am. Dec. 656, and note; *Beirne v. Dord*, 5 N. Y. 95; s. c., 55 Am. Dec. 321, and note; *Cox v. Heisley*, 19 Pa. St. 243; *Dodd v. Farlow*, 11 Allen (Mass.) 426; *Wetherill v. Neilson*, 20 Pa. St. 448; *Whitmore v. South Boston I. Co.*, 2 Allen (Mass.) 52.

3. *Lile v. Hopkins*, 12 Smed. & M. (Miss.) 299; s. c., 51 Am. Dec. 115; *Benj. on Sales* (Bennett's ed. 1888), § 669.

of the subject-matter of a sale is not impliedly warranted, but its existence is a condition precedent to the execution of the sale.¹

16. Kinds of Implied Warranties.—The elementary principles relating to the law of implied warranties in general having been reviewed and established, it is now in order to treat of their application to the different kinds and classes of implied warranties.

Implied warranties may be divided into—

1. *Implied Warranties of Title.*

2. *Implied Warranties of Quality.*²

Subordinate to implied warranties of quality, but in a certain sense distinct from them, we may class:

3. *Implied Warranties in Sales by Sample*; especially by the warranty that the bulk shall conform to the sample.³

These three branches of the law of implied warranty will now be considered in the order named.

17. Implied Warranty of Title—The Rule in General.—By the civil law in every sale there was an implied warranty of peaceable possession and against eviction practically equivalent to warranty of title.⁴ At common law it has been said that no warranty of title in the sale of personalty is implied.⁵ But such is not now

1. Benj. on Sales (Bennett's ed. 1888), §§ 76, 77, 78, 669; 2 Schouler's P. P. (2nd ed.), §§ 317, 344; *ante*, § 7 of this title.

2. 2 Schouler's P. P. (2nd ed.), § 342; Benj. on Sales (Bennett's ed. 1888), §§ 627, 644; Story on Sales, § 366; 1 Parsons on Con. (5th ed.) 573.

3. Story on Sales, § 366; 2 Schouler's P. P. (2nd ed.), § 359; Benj. on Sales (Bennett's ed. 1888), note, p. 624, *et seq.*; 1 Parsons on Con. (5th ed.), § 585.

4. Story on Sales (Perkins' ed.), § 367 *c*; 2 Schouler's P. P. (2nd ed.), § 379; Benj. on Sales (Bennett's ed. 1888), §§ 405, 406, 642; 2 Bl. Com. 451; 2 Kent's Com. 478; Dig. 21, 2, 1.

5. In Noy's Maxims, ch. 42, it is said: "If I take the horse of another man and sell him, and the owner take him again, I may have an action of debt for the money; for the bargain was perfect by the delivery of the horse, and *caveat emptor*." And so the law is stated in Coke's Institutes, thus: "Note, that by the civil law every man is bound to warrant the thing he selleth or conveyeth, albeit there be no express warranty; but the common law bindeth him not unless there be a warranty, either in deed or in law, for *caveat emptor*." Co. Lit. 102 *a*.

In Morley v. Attenborough, 3 Exch. 500, these old statements of the law

were seemingly endorsed, for the court in the course of the opinion although the remarks were *obiter dicta* said: "The bargain and sale of a specific chattel by our law (which differs in that respect from the civil law) undoubtedly transfers all the property the vendor has, where nothing further remains to be done according to the intent of the parties to pass it. But it is made a question whether there is annexed by law to such a contract, which operates as a conveyance of the property, an implied agreement on the part of the vendor that he has the ability to convey. With respect to *executory contracts* of purchase and sale, where the subject is unascertained and is afterwards to be conveyed, it would probably be implied that both parties meant that a good title to that subject should be transferred, in the same manner as it would be implied, under similar circumstances, that a merchantable article was to be supplied. Unless goods, which the party could enjoy as his own and make full use of, were delivered, the contract would not be performed. The purchaser could not be bound to accept if he discovered the defect of title before delivery, and if he did, and the goods were recovered from him, he would not be bound to pay, or, having paid, he

would be entitled to recover back the price, as on a *consideration which had failed*. But where there is a bargain and sale of a specific ascertained chattel, which operates to transmit the property, and nothing is said about title, what is the legal effect of that contract? Does the contract necessarily import, unless the contrary be expressed, that the vendor has a good title? or has it merely the effect of transferring such title as the vendor has? . . . The result of the older authorities is, that there is, by the law of England, no *warranty of title in the actual contract of sale any more than there is of quality*. The rule of *caveat emptor* applies to both; but if the vendor knew that he had no title, and concealed that fact, he was always *held* responsible to the purchaser as for a fraud, in the same way that he is if he knew of the defective quality. This rule will be found in Co. Lit. 102 a; 3 Rep. 22 a; Noy Max. 42; Fitz. Nat. Brev. 94 c; in *Springwell v. Allen*, Aleyn 91, cited by LITTLEDALE, J., in *Early v. Garrett*, 9 B. & C. 932; and in *Williamson v. Allison*, 2 East 449, referred to in the argument. . . . It may be that, as in the earlier times, the chief transactions of purchase and sale were in markets and fairs, where the *bona fide* purchaser without notice obtained a good title as against all except the crown (and afterwards a prosecutor, to whom restitution is ordered by the 21 Hen. 8, ch. 11), the common law did not annex a warranty to any contract of sale. Be that as it may, the older authorities are strong to show that there is no such warranty implied by law from the mere sale. *In recent times a different notion appears to have been gaining ground* (see note of the learned editor to 3 Rep. 22 a); and MR. JUSTICE BLACKSTONE says, 'In contracts for sale it is constantly understood that the seller undertakes that the commodity he sells is his own,' and MR. WOODSON, in his Lectures, goes so far as to assert that the rule of *caveat emptor* is exploded altogether, which no authority warrants. 'At all times, however, the vendor was liable, if there was a warranty *in fact*; and at an early period, the affirming the goods to be his own by a vendor in possession, appears to have been deemed equivalent to a warranty.' LORD HOLT, in *Medina v. Stoughton* (1 Salk. 210; Ld. Raymond, 593), says that: 'Where one

in possession of a personal chattel sells it, the bare affirming it to be his own amounts to a warranty.' And MR. JUSTICE BULLER, in *Pasley v. Freeman* (3 T. R. 57), disclaims any distinction between the effect of an affirmation when the vendor is in possession or not, treating it as equivalent to a warranty in both cases. . . . From these authorities in our law, to which may be added the opinion of the late LORD CHIEF JUSTICE TINDAL in *Omerod v. Huth* (14 M. & W. 664), it would seem that there is no implied warranty of title on the sale of goods, and that, if there be no fraud, a vendor is not liable for a bad title, unless there is an express warranty, or an equivalent to it, by *declarations or conduct; and the question in each case where there is no warranty in express terms, will be, whether there are such circumstances as will be equivalent to such a warranty*. Usage of trade, if proved as a matter of fact, would, of course, be sufficient to raise an inference of such an engagement; and without proof of such usage, the very nature of the trade may be enough to lead to the conclusion that the person carrying it on must be understood to engage that the purchaser shall enjoy that which he buys, as against all persons. It is, perhaps, with reference to such sales that Blackstone makes the statement above referred to. . . . We do not suppose that there would be any doubt, if the articles were bought in a shop professedly carried on for the sale of goods, that *the shop keeper must be considered as warranting that those who purchase will have a good title to keep the goods purchased*. In such a case the vendor sells 'as his own,' and that is what is equivalent to a warranty of title.

"But in the case now under consideration, the defendant can be made responsible only *as on a sale of a forfeited pledge eo nomine*, . . . and the question is, whether on such a sale, accompanied with possession, there is *any assertion of absolute title to sell*, or only an assertion that the article has been pledged with him, and the time allowed for redemption has passed." *Held*, that the latter was the true meaning of the contract. The learned judge continued as follows: "It may be that, though there is no implied warranty of title, so that the vendor would not be liable for a breach of it to unliqu-

the rule either in England or America, and in both countries the rule is settled, that in a sale of personalty there is an implied warranty of title when the vendor sells as owner, or under circumstances implying an affirmation of ownership, personalty of which he is in possession.¹

undated damages, yet the purchaser may recover back the purchase money as on a consideration that failed, if it could be shown that it was the understanding of both parties that the bargain should be put an end to if the purchaser should not have a good title. But if there is no implied warranty of title *some circumstances must be shown* to enable the plaintiff to recover for money had and received. This case was not made at the trial, and the only question is whether there was an implied warranty."

It will be noticed that on the facts of the case *Morley v. Attenborough*, 3 Exchange 500; s. c., 13 Jur. 282, was rightly decided, as it was the case of a sale by a pawnbroker *as such* of an unredeemed pledge, and the court properly decided that in such a case the pledgee did not pretend to sell as owner, but avowedly sold as a mere pledgee, and, therefore, that no warranty of title could be implied, and the rule was *caveat emptor*.

In this case it was stated, as we have seen, that by the older authorities there was no implied warranty of title in the sale of chattels, and Blackstone's statement to the contrary was criticised. But it seems that the learned judge who delivered the opinion was himself in error as to the weight of the older authorities upon this question. *Benj. on Sales* (Bennett's ed. 1888), §§ 627-640; 2 *Schouler's P. P.* (2nd ed.) §§ 376, 377; note to *Scott v. Hix*, 62 Am. Dec. 460.

1. Mr. Benjamin elaborately reviews all the cases and states the existing rule in conformity with the text, and in even broader terms, as we shall see shortly. *Benj. on Sales* (Bennett's ed. 1888), §§ 627-640; note to *Scott v. Hix*, 62 Am. Dec. 460. And that such is the result of the American cases, see 2 *Schouler's P. P.* (2nd ed.), §§ 376-378.

In England the leading case upon the general rule, as stated in the text, is *Eichholz v. Banister*, 17 C. B., N. S. 708; 34 L. J., C. P. 105, and with it may be usefully compared the early case of *L'Apostole v. L'Plastrier*, as stated in *Ryall v. Rowles*, 1 Vesey, Sen. 351;

s. c., 2 Wh. & Tud. L. C. Eq. (5th ed.) 733.

In the United States, there are many cases that support the text, which, indeed, is but a general statement of the American rule that will shortly be discussed more fully. From the mass of cases it is sufficient to cite *Ricks v. Dillahunt*, 8 Port. (Ala.) 133; *Cozzins v. Whitaker*, 3 Stew. & P. (Ala.) 322; *Williamson v. Sammons*, 34 Ala. 691; *Boyd v. Whitfield*, 19 Ark. 447; *Lindsay v. Lamb*, 24 Ark. 222; *Gross v. Kierski*, 41 Cal. 111; *Starr v. Andersen*, 19 Conn. 341; *Lines v. Smith*, 4 Fla. 47; *Morris v. Thompson*, 85 Ill. 16; *Fawcett v. Osborn*, 32 Ill. 411; *Marshall v. Duke*, 51 Ind. 62.

Chism v. Woods, Hard. (Ky.) 540; s. c., 3 Am. Dec. 740; *Payne v. Rodden*, 4 Bibb (Ky.) 304; s. c., 7 Am. Dec. 739; *Scott v. Scott*, 2 A. K. Marsh. (Ky.) 215; *Chancellor v. Wiggins*, 4 B. Mon. (Ky.) 201; s. c., 30 Am. Dec. 499; *Richardson v. Tipton*, 2 Bush (Ky.) 202; *Hale v. Smith*, 6 Greenl. (Me.) 420; *Eldridge v. Wadleigh*, 3 Fairt. (Me.) 372; *Butler v. Tufts*, 13 Me. 302; *Huntingdon v. Hall*, 36 Me. 501; s. c., 58 Am. Dec. 765; *Thurston v. Spratt*, 52 Me. 202; *Mockbee v. Gardner*, 2 Harr. & G. (Md.) 176; *Rice v. Forsythe*, 41 Md. 389; *Matheny v. Mason*, 73 Mo. 677; s. c., 39 Am. Rep. 541; *Dryden v. Kellogg*, 2 Mo. App. 87; *Donaldson v. Newman*, 9 Mo. App. 235; *Robinson v. Rice*, 20 Mo. 229; *Emerson v. Brigham*, 10 Mass. 202; s. c., 6 Am. Dec. 109; *Bucknam v. Goddard*, 21 Pick. (Mass.) 71; *Coolidge v. Brigham*, 1 Met. (Mass.) 551; *Dorr v. Fisher*, 1 Cush. (Mass.) 273; *Bennett v. Bartlett*, 6 Cush. (Mass.) 225; *Whiney v. Hytewood*, 6 Cush. (Mass.) 86; *Brown v. Pierce*, 97 Mass. 46; s. c., 93 Am. Dec. 57; *Shattuck v. Green*, 104 Mass. 42; *Hunt v. Sackett*, 31 Mich. 18; *Davis v. Smith*, 7 Minn. 414; *Long v. Hickingbottom*, 28 Miss. 772; s. c., 64 Am. Dec. 118; *Storm v. Smith*, 43 Miss. 497; *Sargeant v. Currier*, 49 N. H. 310; s. c., 6 Am. Rep. 524; *Wanser v. Messler*, 29 N. J. L. 256; *Wood v. Sheldon*, 42 N. J. L. 421; s. c., 36 Am. Rep. 523;

18. The English Rule.—In England, the rule is even broader than this, and is thus stated: "A sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold."¹ Under this rule, in England, no distinction is drawn between cases where the vendor is in possession and those where he is not, and such a distinction has been expressly repudiated as unsound in principle.²

19. The American Rule.—But in the United States an attempt has been made to distinguish between cases where the vendor was in possession and those where he was not, and there are many *dicta* and a few direct decisions to the effect that, in the former case, there is an implied warranty of title and in the latter none.³ It has been thought that this distinction is too firmly imbedded in

Inge v. Bond, 3 Hawks. (N. Car.) 101; Heirmance v. Vernoy, 6 Johns. (N. Y.) 5; Vibbard v. Johnson, 19 Johns. (N. Y.) 78; Swett v. Colgate, 20 Johns. (N. Y.) 196; s. c., 11 Am. Dec. 266; Case v. Hall, 24 Wend. (N. Y.) 102; s. c., 35 Am. Dec. 605; Rew v. Barber, 3 Cow. (N. Y.) 272; Hoe v. Sanborn, 21 N. Y. 556; s. c., 78 Am. Dec. 163; Burt v. Dewey, 40 N. Y. 283; s. c., 100 Am. Dec. 482; McKnight v. Devlin, 52 N. Y. 401; s. c., 11 Am. Rep. 715; McCoy v. Artcher, 3 Barb. (N. Y.) 323; McGiffen v. Baird, 62 N. Y. 329; Darst v. Brockway, 11 Ohio 462; McCabe v. Morehead, 1 W. & S. (Pa.) 513; Swanzy v. Parker, 50 Pa. St. 441; Flynn v. Allen, 57 Pa. St. 482; Whitaker v. Eastwick, 75 Pa. St. 229; Krumhaar v. Birch, 83 Pa. St. 426; Dorsey v. Jackman, 1 S. & R. (Pa.) 42; s. c., 7 Am. Dec. 611; Colcock v. Goode, 3 McCord (S. Car.) 513; Wood v. Caven, 1 Head (Tenn.) 507; Trigg v. Faris, 5 Humph. (Tenn.) 343; Gookin v. Graham, 5 Humph. (Tenn.) 480; Charlton v. Lay, 5 Humph. (Tenn.) 496; Bank of St. Albans v. Farmers' etc. Bank, 10 Vt. 145; Thrall v. Newell, 19 Vt. 202; s. c., 47 Am. Dec. 682; Patee v. Pelton, 48 Vt. 182; Gilchrist v. Hilliard, 53 Vt. 592; s. c., 38 Am. Rep. 706; Sherman v. Champlain etc. Co., 31 Vt. 162; Byrnside v. Burdette, 15 W. Va. 702; Lane v. Romer, 2 Chand. (Wis.) 61; Costigan v. Hawkins, 22 Wis. 74; s. c., 94 Am. Dec. 583; Croninger v. Paige, 48 Wis. 229; Edgerton v. Michels, 66 Wis. 124.

1. Benj. on Sales (Bennett's ed. 1888), § 639.

2. The case of Medina v. Stoughton Salk. 210, in the point of decision is the same as Crosse v. Gardner; but there is an *obiter dictum* of Holt, C. J., that, where the seller of a personal thing is out of possession, it is otherwise, for there may be room to question the seller's title, and *caveat emptor* in such case to have an express warranty or a good title. This distinction by Holt is not mentioned by Lord Raym., 593, who reports the same case; and if an affirmation at the time of sale be a warranty, I cannot feel a distinction between the vendor's being in or out of possession. The thing is bought of him, and in consequence of his assertion; and if there be any difference, it seems to me that the case is strongest against the vendor when he is out of possession, because then the vendee has nothing but the warranty to rely on. Butler, J., in Pasley v. Freeman, 3 T. R. 51; s. c., 2 Sm. Lea. Cas. *55, 62. The doctrine thus enunciated by Butler, J., was distinctly reaffirmed in Morley v. Attenborough, 3 Exch. 500, and in Eichholz v. Banister, 17 C. B. (N. S.) 708; s. c., in substance, Benj. on Sales (Bennett's ed. 1888), §§ 635, 636.

3. See the long list of cases cited in note 1, p. 119.

In many of the cases cited in the note referred to *dicta* will be found assuming that in the United States there is no implied warranty of title in the sale of personalty by a vendor out of possession. Kent so states the rule, 2 Com. 478, and in Huntingdon v. Hall, 36 Me. 501; s. c., 58 Am. Dec. 765,

our law of sales to be eradicated.¹ But of late there is a tendency to question its correctness in principle, and upon examination it will be found that most of the cases relied upon as establishing it really turn upon facts from which no warranty would have been implied under the English rule, and therefore that the question of possession or the want of it was not controlling in such cases.²

KENT's statement of the doctrine is quoted with approval, and the court said that, "the doctrine of implied warranty would seem to be limited to the case where the vendor has possession

. . . The cases where it is asserted in general terms that in the sales of personal chattels the law will imply a warranty, will be found to be those in which the vendor was in possession, and where the distinction here considered did not arise, and was not necessarily involved in their determination." In general it may be said that the tendency of the American courts is to hold that if the vendor has not the possession, there is no implied warranty, and the rule is *caveat emptor*. *Huntingdon v. Hall*, 36 Me. 501; s. c., 58 Am. Dec. 765; *Lackey v. Stouder*, 2 Ind. 376; *Johnson v. Houghton*, 19 Ind. 359, 362; *Long v. Hickingbottom*, 28 Miss. 772; s. c., 64 Am. Dec. 118; *Storm v. Smith*, 43 Miss. 497; *Scranton v. Clark*, 39 N. Y. 220, 224; s. c., 100 Am. Dec. 430.

It should be noted, however, that any affirmation of title by a vendor not in possession is construed to be a warranty. *Huntingdon v. Hall*, 36 Me. 501; s. c., 58 Am. Dec. 765; *Byrnside v. Burdette*, 15 W. Va. 702.

That in the absence of evidence the presumption is that the vendor was in possession. *Long v. Hickingbottom*, 28 Miss. 772; s. c., 64 Am. Dec. 118.

And the constructive possession is sufficient to raise a warranty. *Huntingdon v. Hall*, 36 Me. 501; s. c., 58 Am. Dec. 765; *Shattuck v. Green*, 104 Mass. 42.

1. *Benj. on Sales* (Bennett's ed. 1888), § 641; *Story on Sales* (Perkins' ed.), § 367, note; 2 *Schouler's P. P.* (2nd ed.), § 378.

2. Thus, speaking upon this subject, Mr. Schouler says: "But when we reflect how little, after all, the precedents have established, how recently *Eichholz v. Banister*, 17 C. B. N. S., 708, was decided, and what a considerable part of the law in England upon this subject rested previously on mere *dicta*, we shall be slow to conclude that the

American courts have found a safe harbor. There are recent cases in our State courts which tend to establish this preferable doctrine: that the sale of personal property implies a warranty of ownership in the seller, unless the circumstances are such as to justify a contrary presumption; but that where the goods are absolutely in a third person's possession, and neither actually nor constructively in the seller's, this is a strong circumstance against implying so full a warranty. In other words, the question is one of evidence, without any clear-cutting distinction in respect of possession by this or that party." 2 *Schouler's P. P.* (2nd ed.), § 378.

So, Mr. Freeman, in a note to *Scott v. Hix*, 62 Am. Dec. 464, 465, doubts the correctness of the American doctrine that there is no implied warranty, except where the vendor is in possession. And in this connection the case of *Scott v. Hix*, *supra*, is itself worthy of attention as illustrative of the general doctrine. In that case the court correctly said: "The law does not imply a warranty of title to personal property not in possession of the vendor at the time of sale, but which is out of his possession and claimed by another, as in the case before us. In such cases the warranty must be express; it cannot be implied." In this case it was also clear that no warranty was intended or expected. "It was an adventure for speculation with a risk of title and all other consequences." *Scott v. Hix*, 2 Sneed (Tenn.) 192; s. c., 62 Am. Dec. 458.

For a review and comparison of the leading cases cited in support of the American rule, see Mr. Bennett's note to *Benj. on Sales* (ed. 1888), pp. 616, 618. As the result of his examination of the cases Mr. Bennett says: "If this is a correct analysis of the cases on this subject, it will be seen that in very few of them was the exact point decided, or necessary to the decision; and, considering that all the cases and *dicta* rest on the older cases, which have been shaken in the later English decisions, it may still be open

It would, therefore, seem that the distinction between a vendor in and out of possession as affecting the doctrine of implied warranty of title may yet be abandoned in the United States and the English rule, with its well recognized limitations, be adopted as the correct enunciation of the common law doctrine.¹

20. The Rule in Canada.—In Canada, the rule as to an implied warranty of title has been somewhat uncertain and there has been a tendency towards the United States rule on the subject of possession, but probably when squarely presented for decision the English rule as stated above will be followed.²

21. The Civil Law Rule.—There was an implied warranty against eviction in the Roman law which in effect amounted to an implied warranty of title.³

22. Implied Warranty of Title—Illustrative Cases.—In preceding paragraphs the general principles and peculiar distinctions of the doctrine of implied warranties of title have been stated.⁴ In connection therewith leading cases have been cited and reviewed. Bearing in mind these principles and distinctions it is proper to here consider some cases in which they have been applied. Thus it is held that the sale and delivery of goods in possession of the seller, where nothing is said about the title, is equivalent to an express warranty of title and the rights and liabilities of the parties are the same.⁵ Possession, it is said, implied a warranty

to doubt whether the distinction between a vendor in and out of possession ought to be or will be generally sustained." The cases reviewed by Mr. Bennett upon this question are the following: *Andres v. Lee*, 1 Dev. & B. (N. Car.) Eq. 318; *McCoy v. Artcher*, 3 Barb. (N. Y.) 323; *Dresser v. Ainsworth*, 9 Barb. (N. Y.) 620; *Edick v. Crim*, 10 Barb. (N. Y.) 445; *Huntingdon v. Hall*, 36 Me. 501; s. c., 58 Am. Dec. 765; *Scott v. Hix*, 2 Sneed (Tenn.) 192; s. c., 62 Am. Dec. 458; *Long v. Hickingbottom*, 28 Miss. 773; s. c., 64 Am. Dec. 118; *Hopkins v. Grinnell*, 28 Barb. (N. Y.) 537; *Scranton v. Clark*, 39 N. Y. 220; s. c., 100 Am. Dec. 430; *Storm v. Smith*, 43 Miss. 497; *Sheppard v. Earles*, 13 Hun (N. Y.) 651; *Byrnside v. Burdette*, 15 W. Va. 702. In only one of these cases, namely, *Huntingdon v. Hall*, 36 Me. 501, does Mr. Bennett find that the so-called American doctrine was necessary to the decision and directly applied; and a careful examination of the cases in question leads the present writer to the same conclusion.

1. This is hardly stating the probabilities of the adoption of the English rule in sufficiently strong terms, but it is not desirable in the text of a work

like this to undertake to state what the law should be, but only what it is. In this particular instance, however, the rule is so unsettled that a discussion of the question in the light of fundamental principles has seemed necessary. It is believed in so doing a conclusion has been reached in harmony with well considered authorities of recent date. See *Sherman v. Champlain Trans. Co.*, 31 Vt. 162; *Shattuck v. Green*, 104 Mass. 42, 45; *Gross v. Kierski*, 41 Cal. 111; 2 *Schouler's P. P.* (2nd ed.), § 378.

2. See upon the Canadian doctrine, *Somers v. O'Donohue*, 9 U. C. C. P. 208; *Johnston v. Barker*, 20 U. C. C. P. 231; *Brown v. Cockburn*, 37 U. C. Q. B. 592.

In the last named case it was strongly intimated that the true rule was that in a case of sales of personalty there was an implied warranty of title, except in cases where from the facts a mere intent to pass the vendor's interest appeared.

3. 2 *Schouler's P. P.* (2nd ed.), § 379; *Story on Sales* (Perkins' ed.), § 367 c; *Benj. on Sales* (Bennett's ed. 1888), §§ 405, 406, 642.

4. See the preceding paragraphs of the text numbered 17, 18, 19, 20.

5. *Gross v. Kierski*, 41 Cal. 111.

of title to the goods sold.¹ But this rule does not apply when the person in possession sells in a capacity other than that of owner as in the discharge of a public function; nor does it bind an agent who sells as such but only his principal.² Where property is exchanged or given in payment there is an implied warranty of title.³ Possession is *prima facie* evidence of the ownership of personalty and therefore a sale by one in possession is said to imply a warranty of title; but a sale in market overt does not, in the United States, make good the title of a vendee when the vendor in possession had no title.⁴ Where a tenant in common of personal property, in possession of a bailee for all the owners, sells his interest, the possession of the bailee is constructively the possession of each tenant in common, and an implied warranty of title exists in such sale. The vendor in such case cannot escape liability on an implied warranty by delivery to his vendee of the bill of sale under which he acquired title.⁵ Implied warranties exist without any intention of the seller to create them,⁶ and it is said that in every sale of chattels there is an implied warranty of title but not of quality,⁷ while a sale of chattels in the seller's possession carries with it an implied warranty of title, yet if the buyer, after the sale, discovers that there are incumbrances on the property he is not forced to rely upon the warranty, but may rescind the contract and return the property if it is still in his power to do so.⁸ Where the vendor is not in possession at the time of sale it has been held that his subsequent acquisition of a good title to the chattel sold did not enure to the benefit of the buyer.⁹ Where the subject of a sale is merely the vendor's title and not the chattel itself there is no implied warranty of title, even though the vendor be in possession.¹⁰ But in every sale of personalty a quit claim of the seller's title is implied, whether he be in possession or not.¹¹ A warranty of title is implied in the sale of an unnegotiable chose in action by a vendor in possession.¹² But the transfer of shares of stock in a corporation without any representations as to the particular property

1. *Chism v. Wood*, Hard. (Ky.) 540; s. c., 3 Am. Dec. 740, and note, a leading case on the subject; *Edgerton v. Michels*, 66 Wis. 124; *Barton v. Flaherty*, 3 G. Greene (Iowa) 327; s. c., 54 Am. Dec. 503; *Long v. Hickingbottom*, 28 Miss. 772; s. c., 64 Am. Dec. 118; *Coolidge v. Brigham*, 1 Met. (Mass.) 547, 551.

2. *Forsythe v. Ellis*, 4 J. J. Marsh. (Ky.) 298.

3. *Caylor v. Copes*, 16 Fed. Rep. 49.

4. *Fawcett v. Osborn*, 32 Ill. 411; s. c., 83 Am. Dec. 278.

5. *Shattuck v. Green*, 104 Mass. 42.

6. *Osgood v. Lewis*, 2 Har. & G. (Md.) 495; s. c., 18 Am. Dec. 317.

7. *Perley v. Balch*, 23 Pick. (Mass.) 283; s. c., 34 Am. Dec. 56; *DeFreeze v.*

Trumper, 1 Johns. (N. Y.) 274; s. c., 3 Am. Dec. 329; *Erwin v. Maxwell*, 3 Murph. (N. Car.) 241; s. c., 9 Am. Dec. 602; *Lile v. Hopkins*, 12 Smed. & M. (Miss.) 299; s. c., 51 Am. Dec. 115; *Morris v. Thompson*, 85 Ill. 16; *Whitaker v. Eastwick*, 75 Pa. St. 229.

8. *Baker v. McAllister*, 2 Wash. Ty. 48; *Story on Sales*, §§ 367 b, 423, 424.

9. *Scranton v. Clark*, 39 N. Y. 220; s. c., 100 Am. Dec. 430.

10. *Sherman v. Champlain Trans. Co.*, 31 Vt. 162; *Morley v. Attenborough*, 3 Ex. 500.

11. 2 Schouler's P. P. (2nd ed.), § 374; *Morley v. Attenborough*, 3 Ex. 500.

12. *Boyd v. Anderson*, 1 Overt. (Tenn.) 438; s. c., 3 Am. Dec. 762.

owned by the corporation implies a warranty only of title to the stock sold and not of the title of the corporation to property held by it.¹ An implied warranty of title to personal property extends to a prior lien or encumbrance as well as to the absolute right of property.² A bill of sale implies a warranty of the vendor's title without any covenant to that effect; but the implication may be rebutted.³ Possession being *prima facie* evidence of ownership it devolves on the plaintiff, in an action for breach of an implied warranty in a sale by a vendor in possession, to show that title was not in the vendor.⁴ Upon the assignment of a chattel mortgage there is no implied warranty of title to the mortgaged goods.⁵ Sale of personalty, as an engine, with a patent attachment represented by the vendor to be of great value to the vendee, creates an implied warranty that the vendor has a right to attach the patented article and that the vendee shall have the right to use it.⁶ So where a sale is made of an exclusive right to manufacture an article there is an implied warranty of title to such exclusive right.⁷ Where buildings on leasehold property, subject by the conditions of the lease to be removed at the expiration of the lease, are sold, there is an implied warranty of title when the buildings are sold and transferred as personalty.⁸ So when land was sold together with personal property accompanying it a warranty of title to the personalty was held to be implied.⁹ Such are some of the diverse applications of the doctrines relating to implied warranty of title, but it should not be forgotten that, in the United States at least, *caveat emptor* is the rule as to title in money, if not in all cases where the vendor is not in possession at the time of sale.¹⁰ Many other illustrations might be given but these suffice to show the application of the general rules already laid down regarding implied warranty of title.

23. Affirmations About Title as Warranties.—On the border line between implied and express warranties are affirmations, language, acts or conduct on the part of a vendor in regard to title or quality, which are of such a character as to throw the vendee off his guard. In general, the courts are very ready to construe these into express warranties of title or quality.¹¹ But a mere expres-

1. *State v. North* La. etc. R. Co., 34 La. Ann. 947.

2. *Dresser v. Ainsworth*, 9 Barb. (N. Y.) 619.

3. *Miller v. Van Tassel*, 24 Cal. 458.

4. *Bergen v. Riggs*, 34 Ill. 170; s. c., 85 Am. Dec. 304.

5. *Jones v. Huggesford*, 3 Met. (Mass.) 515.

6. *Pacific etc. Works v. Newhall*, 34 Conn. 67.

7. *Costigan v. Hawkins*, 22 Wis. 74.

8. *Dryden v. Kellogg*, 2 Mo. App. 87.

9. *Bechet v. Smithers*, 50 N. Y. Sup. Ct. (1884) 381.

10. *Long v. Hickingbottom*, 28 Miss. 772; s. c., 64 Am. Dec. 118, and note; *Lackey v. Stonder*, 2 Ind. 376; *Huntingdon v. Hall*, 36 Me. 501; s. c., 58 Am. Dec. 765; *Scranton v. Clark*, 39 N. Y. 220; s. c., 100 Am. Dec. 430.

11. 2 *Schouler's P. P.* (2nd. ed.), § 371; *Newmark on Sales*, §§ 317, 318; *Whitehead v. Atherton Machine Co.*, 139 Mass. 366; *McLennan v. Ohmen*, 75 Cal. 558; *Lamme v. Gregg*, 1 Metc. (Ky.) 444; *Dickens v. Williams*, 2 B.

sion of opinion cannot be so construed.¹ When any affirmation or statement by the vendor is in writing its construction is for the court.² And such would also be the rule if the language used was not in dispute.³ But where the facts are in dispute the court should instruct the jury what would be a warranty and what a mere expression of opinion, and the jury must then determine the facts and apply the law.⁴

24. Breach of Implied Warranty of Title.—It is sometimes a mooted question when a breach of an implied warranty of title has occurred so that a right of action for the breach springs into existence.

In some cases it is held that the implied warranty is broken immediately on the completion of the sale if the vendor has no title.⁵ And whether the buyer has or has not surrendered the chattel to the real owner will make no difference.⁶ Thus it has been held that the statute of limitations begins to run at the moment of sale.⁷ On the other hand, it has been held that in the absence of fraud on the seller's part there is no breach of warranty, such as will defeat an action for the purchase money unless the vendee has been ousted and the true owner recovered the property.⁸ Where this is the rule it is held that the statute of limitations does not begin to run until the vendee is disturbed in his possession of the chattels.⁹ In Kentucky the rule in relation to implied warranty is that first above stated, while the rule last stated ap-

Mon. (Ky.) 374; Note to Chandelor v. Lopus, 1 Sm. Lea. Cas. (8th ed.), p. 535 *et. seq.*

1. Newmark on Sales, § 318, and authorities cited. Reed v. Hastings, 61 Ill. 266; Tenney v. Cowles, 67 Wis. 594; Lamme v. Gregg, 1 Metc. (Ky.) 444; Dickens v. Williams, 2 B. Mon. (Ky.) 374.

2. This rests upon the elementary principle that the construction of written instruments is for the court and needs no authority to support it.

3. Newmark on Sales, § 318; Biddle on Chattel Warranties, §§ 83, 84; Halliday v. Briggs, 15 Neb. 219, 223.

4. Whitney v. Sutton, 10 Wend. (N. Y.) 412; Tuttle v. Brown, 4 Gray (Mass.) 457; s. c., 64 Am. Dec. 80; Morrill v. Wallace, 9 N. H. 111; Wolcott v. Mount, 36 N. J. L. 262; s. c., 13 Am. Rep. 447.

5. Perkins v. Whelan, 116 Mass. 542; Grose v. Hennessey, 13 Allen. (Mass.) 389; Matheny v. Mason, 73 Mo. 677; s. c., 39 Am. Rep. 541, 545; Dryden v. Kellogg, 2 Mo. App. 87; McGiffen v. Baird, 62 N. Y. 329; Payne v. Rodden, 4 Bibb (Ky.) 304; Chandelor v. Wiggins, 4 B. Mon. (Ky.) 201; s. c., 39 Am. Dec. 499, and note; Word v.

Caven, 1 Head (Tenn.) 506; Brown v. Pierce, 97 Mass. 46; s. c., 93 Am. Dec. 57; Fawcett v. Osborn, 32 Ill. 411; s. c., 83 Am. Dec. 278.

6. Perkins v. Whelan, 116 Mass. 542; Chancellor v. Wiggins, 4 B. Mon. (Ky.) 201; s. c., 39 Am. Dec. 499, and note. And see Matheny v. Mason, 73 Mo. 677; s. c., 39 Am. Rep. 541.

7. Chancellor v. Wiggins, 4 B. Mon. (Ky.) 201; s. c., 39 Am. Dec. 499; Gross v. Kierski, 41 Cal. 115.

8. Sweetman v. Prince, 62 Barb. (N. Y.) 256; Case v. Hall, 24 Wend. (N. Y.) 102; s. c., 35 Am. Dec. 605; Vibbard v. Johnson, 19 Johns. (N. Y.) 77; Krumbhaar v. Birch, 83 Pa. St. 426; Flynn v. Allen, 57 Pa. St. 485; Wanser v. Messler, 29 N. J. L. 256; Gross v. Kierski, 41 Cal. 111; Randon v. Toby, 11 How. (U. S.) 493; Linton v. Porter, 31 Ill. 107. These cases should be carefully compared together and with the cases cited to the doctrine on this subject first stated in the text. See also Salle v. Light's Executors, 4 Ala. 700; s. c., 39 Am. Dec. 317, and note.

9. Gross v. Kierski, 41 Cal. 111. And see Linton v. Porter, 31 Ill. 107. Also Newmark on Sales, § 329.

plies in cases of express warranties.¹ The soundness of this distinction has been questioned.² In Missouri the rule prevails that the vendee may surrender the property to the true owner and then recover for a breach of the implied warranty by his vendor, but in order to do so he must prove conclusively that the person to whom he surrendered the property was its true owner.³ And in Tennessee it has been held that the mere fact of the recovery by a third person against the vendee in a suit of which the vendor had no notice was not *prima facie* evidence of the vendor's want of title so as to throw on him the burden of proof as to his title.⁴

25. Sale Under Mortgage—No Implied Warranty in.—On a sale of chattels announced as made by virtue of a mortgage there is no implied warranty of title.⁵ And such is the rule in the case of chattels pledged to a pawnbroker and sold by him as unredeemed pledges.⁶ On similar principles it is held that an assignment of personal property, held under execution at the time of the assignment, does not imply a warranty of title.⁷ In all such cases the rule is *caveat emptor*.

26. Incorporeal Chattels—No Implied Warranty in Sales of.—In the sale of an incorporeal chattel there is generally no implied warranty of title.⁸ But implications of a right of user, as in the case of a patent, sometimes arise that are equivalent to an implied warranty.⁹

27. Implied Warranty of Title in Executory Contracts.—It has already appeared in what class of cases, where the contract of sale is executed, the law implies a warranty of title.¹⁰ But in executory contracts of sale the vendee is under no obligation to accept the chattel bargained for if the vendor's title is defective, and may recover back the purchase money, if he has paid it, when he discovers the defect.¹¹ In such cases there is an implied warranty

1. *Payne v. Rodden*, 4 Bibb (Ky.) 304; s. c., 7 Am. Dec. 739; *Scott v. Scott*, 2 A. K. Marsh. (Ky.) 217; *Tipton v. Triplett*, 1 Metc. (Ky.) 570; *Plummer v. Newdigate*, 2 Duv. (Ky.) 1; s. c., 87 Am. Dec. 479; *Newmark on Sales*, § 329.

2. *Benj. on Sales* (Bennett's ed. 1888), p. 619, note.

3. *Dryden v. Kellogg*, 2 Mo. App. 92; *Matheny v. Mason*, 73 Mo. 677, 683; s. c., 39 Am. Rep. 541, 545. And see *McGiffen v. Baird*, 62 N. Y. 229; *Newmark on Sales*, § 329.

4. *Roper v. Rowlett*, 7 Lea (Tenn.) 320. See *Richardson v. Tipton*, 2 Bush (Ky.) 202.

5. *Harris v. Lynn*, 25 Kan. 281; s. c., 37 Am. Rep. 253.

6. 1 *Parson's on Con.* (5th ed.) 575, 576; *Morley v. Attenborough* 3 Exch. 500; *Harris v. Lynn*, 25 Kan. 281; s. c.,

37 Am. Rep. 253; *Sheppard v. Earles*, 13 Hun (N. Y.) 651, 653; *Brown v. Cockburn*, 37 Up. Can. 591, 604.

7. *Hopkins v. Grinnell*, 28 Barb. (N. Y.) 533.

8. 2 *Schouler's P. P.* (2nd ed.), § 373. See also *Smith v. Neale*, 2 C. B. (N. S.) 67; *Hall v. Conder*, 2 C. B. (N. S.) 22.

9. See and compare 2 *Schouler's P. P.* (2nd ed.), §§ 373, 318; *Pacific Iron Works v. Newhall*, 34 Conn. 67; *Crominger v. Paige*, 48 Wis. 229.

10. See the full statement of these cases in the preceding portions of the text, also the question mooted. 2 *Schouler's P. P.* (2nd ed.), § 368.

11. 2 *Schouler's P. P.* (2nd ed.), § 369; *Story on Sales*, § 367, b; *Newmark on Sales*, § 324; *Benj. on Sales* (Bennett's ed. 1888), § 627; *Morley v. Attenborough*, 3 Exch. 500; *Brown v. Cockburn*, 37 Up. Can. Q. B. 592.

of title on the vendor's part, or, more accurately, title in him is a condition precedent.¹

28. Implied Warranty of Quality in General.—"The maxim of the common law, *caveat emptor*, is the general rule applicable to sales, so far as *quality* is concerned. The buyer (in the absence of fraud) purchases at his own risk, unless the seller has given an express warranty or unless a warranty be implied from the nature and circumstances of the sale."² No warranty of quality is implied by the mere sale of goods and chattels.³ In a sale of goods there is generally an implied warranty of title and that the goods are of a certain kind or species, but there is no implied warranty of the quality of the goods arising from the mere fact of sale.⁴ And such is the rule even when the sale is in open market,⁵ for the seller of personal property is not liable for defects in quality or condition as a general rule, unless there has been fraud or an express warranty.⁶ Nor does the mere fact of sale imply the soundness of the thing sold.⁷ Where the thing sold is in compliance with all conditions precedent and conforms to the description given there is no implied warranty and the rule is *caveat emptor*.⁸ The rule *caveat*

1. 2 Schouler's P. P. (2nd ed.), § 369; Benj. on Sales (Bennett's ed. 1888), § 627; *ante*, paragraph 7 of text.

2. Benj. on Sales (Bennett's ed. 1888), § 644.

3. It is a principle of the common law that no warranty of quality is implied in the sale of goods. *Caveat emptor*. In the absence of fraud, if the article proves to be of bad quality, the purchaser has no redress, unless he has taken the precaution to require a warranty. This rule is founded in wisdom; and its practical good sense is so well fitted to the habits of our trading people that we are disposed to adhere to it. We believe it is adopted in almost all of the States of the Union where the common law prevails.

The law protects against fraud, and the vendor is held liable if he knows of the defect. If he is innocent, the purchaser must protect himself by a warranty, and it is supposed that, in general, trade is sufficiently protected, in the absence of fraud, by the inducement which is held out to all dealers to take proper care in the selection of their merchandise arising from the fact that by selling articles of good quality they secure customers, and by selling those of bad quality their customers desert them. Merchants buy upon their own judgment; they sell upon the judgment of their customers, and only

undertake for good faith and fair dealing. If a warranty was implied of the good quality of every article sold, there would be but few merchants, or prices would be exorbitantly high. *Dickson v. Jordan*, 11 Ired. L. (N. Car.) 166; s. c., 53 Am. Dec. 403, 404.

4. *Whitaker v. Eastwick*, 75 Pa. St. 229.

5. *Morris v. Thompson*, 85 Ill. 16.

6. *Hyatt v. Boyle*, 5 Gill & J. (Md.) 110; s. c., 25 Am. Dec. 276; *Weimer v. Clement*, 37 Pa. St. 147; s. c., 78 Am. Dec. 411.

7. *West v. Cunningham*, 9 Port. (Ala.) 104; s. c., 33 Am. Dec. 300.

8. On the other hand, a severe application of the rule of *caveat emptor*, where the thing sold answers the description, together with a lucid statement of the law, and the distinction between warranty of quality and the description of the thing may be found in the decision of the exchequer of pleas delivered by PARKE, B., in *Barr v. Gibson*, 3 M. & W. 390. The defendant sold to the plaintiff, on the 21st of October, 1836, "all that ship or vessel called the Sarah, of Newcastle, etc.," covenanting in the deedpoll by which the conveyance was made, that "he had good right, full power, and lawful authority," to sell. It turned out that the ship, which was on a distant voyage, had got ashore on the coast of Prince

emtor applies as well to a sale of stocks as of chattels, and a vendor thereof can be held liable only for fraud or misrepresentation.¹ So a banker or broker who deals in depreciated bills must take the risk of a bank bill purchased by him being worth the price he pays for it.² That the purchaser of personal property must attend to qualities within his own observation is well settled. It is upon this idea that the doctrine of *caveat emtor* is founded.³ And where the vendee has equal knowledge or equal means of knowledge with the vendor there is no implied warranty of quality.⁴ So where goods sold are present and in view of the

of Wales' Island, on the 13th of October, eight days *before* the sale; on a survey, on the 14th, it was recommended that she be sold as she lay, because, under the circumstances of the winter coming on, and the want of facilities and assistance, the ship could not be got off so as to be repaired there; but if in England she could have easily been got off. At the sale, on the 24th of October, the hull produced only £10. PATTERSON, J., left it to the jury to say whether, at the time of sale to the plaintiff, the vessel *was* or *was not* a ship, or a mere bundle of timber; and the jury found she *was not* a ship. On a rule to set aside the verdict, which was thereupon given for the plaintiff, PARKE, B., said (at p. 399): "The question is not what passed by the deed, but what is the meaning of the covenant contained in it.

"In the bargain and sale of an existing chattel, by which the property passes, the law does not (in the absence of fraud) imply any warranty of the good quality or condition of the chattel so sold. The simple bargain and sale, therefore, of the ship *does not imply a contract that it is then seaworthy, or in a serviceable condition*, and the express covenant that the defendant has full power to bargain and sell does not create any further obligation in this respect. But the bargain and sale of a chattel, as being of a particular description, *does not imply a contract that the article sold is of that description*; for which the cases of *Bridge v. Wain*, 1 Stark. 504, and *Shepherd v. Kain*, 5 B. & Ald. 240, and other cases, are authorities; and therefore the sale in this case of a ship, *implies a contract* that the subject of the transfer did exist in the character of a ship; and the *express covenant* that the defendant had power to make the bargain and sale of the subject before mentioned must operate

as an *express covenant to the same effect*. That covenant, therefore, was broken if the subject of the transfer had been, at the time of the covenant, physically destroyed, or had ceased to answer the designation of a ship; but if it still bore that character, there was no breach of the covenant in question, *although the ship was damaged, unseaworthy, or incapable of being beneficially employed*. The contract is for the sale of the subject *absolutely*, and not with reference to collateral circumstances. If it were not so it might happen that the same identical thing in the same state of structure might be a ship in one place and not in another, according to the local circumstances and conveniences of the place where she might happen to be. If the contracting parties intend to provide for any particular state or condition of the vessel, they should introduce an express stipulation to that effect. . . . We are of opinion, upon the evidence given on the trial, the ship did continue to be capable of being transferred as such at the time of the conveyance, though she might be totally lost within the meaning of a contract of insurance. . . . Here the subject of the transfer had the form and structure of a ship, although on shore, with the possibility though not the probability of being got off. She was still a ship, though at the time incapable of being, from the want of local conveniences and facilities, beneficially employed as such." New trial ordered. *Benj. on Sales* (Bennett's ed. 1888), §§ 646, 647; *Barr v. Gibson*, 3 M. & W. 390.

1. *Renton v. Maryatt*, 21 N. J. Eq. 123.

2. *Hinckley v. Kersting*, 21 Ill. 247.

3. *Brantley v. Thomas*, 22 Tex. 270; s. c., 73 Am. Dec. 264.

4. *Bartlett v. Hoppock*, 31 N. Y. 118; s. c., 88 Am. Dec. 428.

parties a warranty of quality will not in general be implied.¹ There is no warranty if the sale is on inspection and the vendee's knowledge is equal to that of the vendor.² Nor is there an implied warranty of the quality of goods that have been, and at

1. The law has been long well settled, both in this country and in England, that on a sale and transfer of goods or chattels which are present and in view of the parties, no warranty of quality will be implied where none is expressly made. *Snell v. Moses*, 1 Johns. (N. Y.) 96; *Holden v. Dakin*, 4 Johns. (N. Y.) 421; *Sands v. Taylor*, 5 Johns. (N. Y.) 395; 4 Am. Dec. 374; *Oneida Manf. Soc. v. Lawrence*, 4 Cow. (N. Y.) 440; *Bradford v. Manly*, 13 Mass. 139; s. c., 7 Am. Dec. 122; *Hart v. Wright*, 17 Wend. (N. Y.) 267; *Howard v. Hoey*, 23 Wend. (N. Y.) 350; s. c., 35 Am. Dec. 572; *Moses v. Mead*, 1 Den. (N. Y.) 378; s. c., 43 Am. Dec. 676; *Chit. Con.* (3rd Am. ed.) 449; 2 Bla. Com. 451; *Laing v. Fidgeon*, 6 Taunt. 108; *Fisher v. Samuda*, 1 Camp. 190; *Chandelor v. Lopus*, Cro. Jac. 4. This is the general rule of the common law upon an executed sale of specific chattels, and rests upon the old adage of *caveat emptor*. *Getty v. Rountree*, 2 Pin. (Wis.) 379; s. c., 2 Chand. (Wis.) 28; s. c., 54 Am. Dec. 138.

2. "*Assumpsit* on an implied warranty that wheat sold by the defendants to the plaintiff was spring wheat. The plaintiff went to the defendants, who were grain dealers, for the purpose of purchasing some seed spring wheat. The wheat was at the mill of one of the defendants, and an order was given to the plaintiff for the quantity desired, but without any description. The plaintiff took the order to the mill, and was there shown some wheat, which the miller stated was spring wheat. The plaintiff took the wheat, which he and the miller supposed to be spring wheat, and sowed it, but it proved to be winter wheat, and the plaintiff consequently lost his crop. It was admitted to be impossible for anyone, upon inspection, to tell the difference between spring and winter wheat. The plaintiff requested the court to charge that if the defendants sold the wheat to the plaintiff as seed spring wheat, there was an implied warranty that it was spring wheat, and if it was not, the defendants were liable, but the court instructed the jury to find a verdict for the defendants. A verdict for the defendants was accordingly

given, upon which judgment was entered, and the plaintiff thereupon sued out a writ of error."

By court, *STRONG, J.*: "We have here the bald question whether, in sales of personal property on inspection, without express warranty, the law presumes an engagement on the part of the vendor that the article sold is of the species contemplated by the parties. No doubt there is such an undertaking where sales are made by sample. In such cases the vendor warrants that the bulk of the article shall correspond in kind with the sample. The tendency of the modern cases has also been to the doctrine that in sales of articles in regard to which the seller is presumed to have superior knowledge, there is a warranty, that the thing sold shall be in kind what it is represented to be. Illustrations of this are found in sales of wine by wine merchants, of jewels by a jeweler, and of medicines by a druggist. In this class of cases, the buyer and the seller do not deal on equal terms. The vendor is professedly an expert. His trade invites confidence in his representations, and confidence is usually reposed. So far, in modern decisions, there has been a departure from the rule laid down in *Chandelor v. Lopus*, Cro. Jac. 4 [s. c., 1 Sm. Lea. Cas.] The case before us is not one of this character. The wheat was not sold by sample, and neither the contract of sale nor the identity of the article was defined by a bill of parcels. Nor was the subject of the contract a manufactured article, ordered and supplied for a particular purpose. True, the difference between spring wheat and other wheat is not ascertainable by inspection, and it may be assumed that they are not the same in species. Still, the case is one of a purchase on inspection of an article of which the vendor's means of knowledge were no greater than those of the vendee. To the purchaser of goods on inspection, the language of the law is *caveat emptor*. There may be a few exceptions, such as we have referred to, but a sale of such an article as wheat is not one of them. When the purchaser has seen it, and gets what he saw, no warranty is implied that is

the time of sale are, in the custody of the vendee.¹ Where the chattel purchased is unsound to the knowledge of the vendee at the time of the purchase, *caveat emptor* is the rule in the absence of an express warranty.² So where it is understood at the time of sale that an article is unsound and consequently it is sold for a less price than it would otherwise have brought, no implication of warranty can arise.³ And such is the rule where it is expressly understood that the vendee buys at his own risk,⁴ or when he relies upon his own knowledge, or information received from his agents, and does not depend on the representations of the vendor.⁵ So when the subject of sale is of a dubious quality in regard to which common judgment might be deceived, the rule in the absence of fraud or express warranty is *caveat emptor*,⁶ and there is no implied warranty of the merchantable character of an article of which the vendor is not the manufacturer and concerning which the vendee has the same means of knowledge as the vendor.⁷ An implied warranty of soundness or fitness relates to the condition at the time of sale and does not extend to unforeseen contingencies that cause unsoundness afterwards.⁸ Nor does it generally extend to defects that are visible.⁹ So where the seller knew the purpose for which goods were intended and they were not susceptible of examination, and if they had been their unfitness could not have been determined by examination, it was held that there was no implied warranty of fitness, the goods delivered being of the kind ordered.¹⁰ It is only where there is no express warranty that resort to an implied warranty can be had.¹¹ And an express warranty of quality excludes an implied one.¹² But an implied warranty of soundness is not excluded by a written contract of sale containing a warranty of title.¹³ An implied warranty of quality or condition may result from the usage of a particular trade.¹⁴ But no custom or usage in

properly described by the name which the vendor gives to it. The charge of the court below was therefore right. Judgment affirmed." *Lord v. Grow*, 39 Pa. St. 88; s. c., 80 Am. Dec. 504 and note.

1. *Dooley v. Gallagher*, 3 Hughes (U. S.) 214.

2. *Dooley v. Jennings*, 6 Mo. 61; *Wood v. Ashe*, 1 Strobb. (S. Car.) 407; *Carnochran v. Gould*, 1 Bailey (S. Car.) 179.

3. *Watson v. Boatwright*, 1 Rich. (S. Car.) 402.

4. *Thompson v. Lindsey*, Mills (S. Car.) 236.

5. *Nester v. Michigan etc. Co.*, (Mich. 1888) 37 N. W. Rep. 278.

6. *Erwin v. Maxwell*, 3 Murph. (N. Car.) 241; s. c., 9 Am. Dec. 602; *Hart v. Wright*, 17 Wend. (N. Y.) 267.

7. *Bartlett v. Hoppock*, 34 N. Y. 118; s. c., 88 Am. Dec. 428.

8. *Mann v. Everston*, 32 Ind. 355.

9. *Schuyler v. Russ*, 2 Cai. (N. Y.) 202; *Jordan v. Foster*, 11 Ark. 139; *Birdseye v. Frost*, 34 Barb. (N. Y.) 367; *Hudgins v. Perry*, 7 Ired. (N. Car.) L. 102; *Long v. Hicks*, 2 Humph. (Tenn.) 305; *Williams v. Ingram*, 21 Tex. 300; *Hill v. North*, 34 Vt. 604.

10. *Dickson v. Jordon*, 11 Ired. L. (N. Car.) 166; s. c., 53 Am. Dec. 403. See also *Dounce v. Dow*, 64 N. Y. 411.

11. *Johnson v. Latimer*, 71 Ga. 470.

12. *Story on Sales*, § 358.

13. *Wood v. Ashe*, 3 Strobb. (S. Car.) 64.

14. In *Jones v. Bowden*, 4 Taunt. 487, it was shown that in auction sales of certain drugs, as pimento, it was usual to state in the catalogue whether they

the sale of any particular description of goods can be admitted to control the general rules of law.¹ In the sale of a business and its good will within certain specified limits, there is an implied covenant that the vendor will not interfere with the enjoyment of the rights he has sold, and equity will prevent him from so doing.² In the sale of goods by weight or measure, when the vendor's scales or measures are used, there is an implied warranty of the correctness of the scales or measures and the competency of the person using them to weigh or measure correctly, and that he will honestly do so.³ A buyer, having a right to assume a warranty of kind and quality to be true, may sell with like warranty, defend suits for the breach and recover of his vendor.⁴ Where goods cannot be inspected at the time of sale and the seller's statements about them are of such a character as to create a condition precedent rather than an implied warranty, the buyer, by accepting and retaining them, may waive his right to complain of their defective quality.⁵ Words of description in a bill of parcels or sale do not necessarily imply a warranty that the property is of the kind, quality and description specified.⁶ And where, by a written agreement one man contracted to purchase of another all the wheat the latter might raise upon his farm, there was no implied warranty that the wheat should be merchantable.⁷ These illustrations sufficiently exemplify the doctrine that "ordinarily upon sale of a chattel, the law implies no warranty of quality." But there are cases to which the rule does not apply as well established as the rule itself.⁸ Thus, if property sold is in the hands of a third party and cannot be inspected, there is an implied undertaking on the part of the vendor that the property is of the kind and in the condition represented by him.⁹ But where the vendor, while highly praising the goods, refuses to warrant and says the vendee must go and examine for himself, the representations are treated as mere expressions of opinion or puffing of wares, and no warranty can be implied.¹⁰ And such is the rule when a vendor expresses the opinion that the cost of the goods sold

were sea damaged or not, and in the absence of a statement that they were sea damaged they would be assumed to be free from that defect. *Held*, that freedom from sea damage was an implied warranty in the sale.

1. *Thompson v. Ashton*, 14 Johns. (N. Y.) 316. See also *ante*, section 14 of text, where custom and usage as affecting the doctrines of implied warranty are fully treated.

2. Thus where a physician sold his real estate, good-will and practice in a certain town to another physician, and soon afterwards returned to the town and began to practice there, it was *held* that equity would restrain him from so doing. *Dwight v. Hamilton*, 113 Mass. 175.

3. *Ortman v. Green*, 26 Mich. 209.

4. *Bagley v. Cleveland etc. Mill Co.*, 21 Fed. Rep. 159. Such is clearly the rule in cases of express warranty and in many cases where an implied warranty is created by the circumstances and conditions under which the sale is made it seems equally applicable.

5. *Thompson v. Libby*, 35 Minn. 443.

6. *Hotchkiss v. Gage*, 26 Barb. (N. Y.) 141.

7. *Davis v. Murphy*, 14 Ind. 158.

8. *Curtis & Co. Manfg. Co. v. Williams*, 48 Ark. 325.

9. *Phelps v. Quinn*, 1 Bush (Ky.) 375.

10. *Fauntleroy v. Wilcox*, 80 Ill. 477.

would amount to a certain sum really larger than their cost.¹ While mere words of praise or commendation cannot be construed into an implied warranty;² yet, if the vendor at the time of sale makes representations or assertions as to the quality of the goods sold on which he intends the vendee to rely, or by which he seeks to mislead him, and if the vendee does rely on such representations or assertions in making the purchase, then the law will treat such representations or assertions as a warranty and not as a mere expression of opinion.³ But whether the representation amounts to a warranty or is a mere expression of opinion is usually a question of fact for a jury.⁴ In a leading English case certain of the general doctrines in relation to implied warranties of quality are admirably summed up and classified,⁵ but in so far

1. Tenney v. Cowles, 67 Wis. 594.

2. The statement by a vendor that hogs sold are "suitable and proper for the New York city market," does not constitute a warranty, but is a mere expression of opinion. Bartlett v. Hop-pock, 34 N. Y. 118; s. c., 88 Am. Dec. 428.

Mere praise of personal property, such as wood, indulged in by the owner when offering it for sale does not amount to an implied warranty of its quality or condition, if the buyer has an opportunity to examine it, and fails to do so, provided no artifice is used to prevent such an examination. Byrne v. Jansen, 50 Cal. 624.

An implied warranty of quality or condition does not arise from a mere affirmation of the soundness of the thing sold.

Though to constitute a warranty requires no particular form of words, the naked averment of a fact is neither a warranty itself, nor evidence of it. In connection with other circumstances, it certainly may be taken into consideration; but the jury must be satisfied from the whole, that the vendor actually, and not constructively, consented to be bound for the truth of his representations.

Should he have used expressions fairly importing a willingness to be thus bound, it would furnish a reason to infer that he had intentionally induced the vendee to treat on that basis; but a naked affirmation is not to be dealt with as a warranty merely because the vendee had gratuitously relied on it; for not to have exacted a direct engagement, had he desired to buy on the vendor's judgment, must be accounted an instance of folly. Testing the vendor's responsibility by these

principles, justice will be done without driving him into the toils of an imaginary contract. McFarland v. Newman, 9 Watts (Pa.) 55; s. c., 34 Am. Dec. 497. See also Tenney v. Cowles, 67 Wis. 594; Duffany v. Ferguson, 66 N. Y. 482; Lamme v. Gregg, 1 Metc. (Ky.) 444; Dickens v. Williams, 2 B. Mon. (Ky.) 374; Williams v. Cannon, 9 Ala. 348.

3. Hahn v. Doolittle, 18 Wis. 196; Hanks v. McKee, 2 Litt. (Ky.) 227; s. c., 13 Am. Dec. 267 and note; Lamme v. Gregg, 1 Metc. (Ky.) 444; Dickens v. Williams, 2 B. Mon. (Ky.) 374; Richardson v. Grandy, 49 Vt. 22; Beals v. Olmstead, 24 Vt. 114; s. c., 58 Am. Dec. 150 and note; McLennan v. Ohmen, 75 Cal. 558; Polhemus v. Heiman, 45 Cal. 573; Horton v. Green, 66 N. Car. 596; Whitehead etc. Machine Co. v. Ryder, 139 Mass. 366.

4. Wolcott v. Mount, 36 N. J. L. 262; s. c., 13 Am. Rep. 447; Bradford v. Bush, 10 Ala. 386; Terhune v. Dever, 36 Ga. 648; Wheeler v. Reed, 36 Ill. 81; McFarland v. Newman, 9 Watts (Pa.) 55; s. c., 34 Am. Dec. 497; Kinley v. Fitzpatrick, 5 Miss. 59; Morrill v. Wallace, 9 N. H. 111; Foggart v. Blackweller, 4 Ired. (N. Car.) 238; Beals v. Olmstead, 24 Vt. 114; s. c., 58 Am. Dec. 150.

5. The cases which bear on the subject do not appear to be in conflict when the circumstances of each are considered. They may, we think, be classified as follows: *First*—Where goods are *in esse*, and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim *caveat emptor* applies, even though the defect which exists in them is latent, and not discoverable on examination, at least where the seller is neither the grower

as the doctrine of *Jones v.* Just implies that there is no distinction between articles sold for food directly to the consumer and other articles of merchandise, that case cannot be considered law in the United States generally, for the rule in this country, as we shall presently see more fully, is, that on the sale of provisions, meat or food for domestic use, when the buyer depends on the judgment of the seller there is an implied warranty that they are fit and wholesome.¹ The special applications of such general doctrines as have been stated may now be considered in detail thus:

29. Does a Sound Price Imply a Sound Quality?—It was a doctrine of the civil law that the sale of goods for a sound or full price raised

nor manufacturer. *Parkinson v. Lee*, 2 East 314. The buyer in such a case has the opportunity of exercising his judgment upon the matter; and if the result of the inspection be unsatisfactory, or if he distrusts his own judgment, he may, if he chooses, require a warranty. In such a case it is not an implied term of the contract of sale that the goods are of any particular quality or are merchantable. So in the case of a sale in a market of meat, which the buyer had inspected, but which was in fact diseased, and unfit for food, although that fact was not apparent on examination, and the seller was not aware of it, it was *held* that there was no implied warranty that it was fit for food, and that the maxim *caveat emptor* applied. *Emmerton v. Mathews*, 7 H. & N. 586; 31 L. J. Ex. 139. *Secondly*—Where there is a sale of a definite existing chattel specifically described, the actual condition of which is capable of being ascertained by either party, there is no implied warranty. *Barr v. Gibson*, 3 M. & W. 390. *Thirdly*—Where a known, described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, defined and described thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer. *Chanter v. Hopkins*, 4 M. & W. 399; *Ollivant v. Bayley*, 5 Q. B. 288. *Fourthly*—Where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term of warranty that it shall be reasonably fit for the purpose to which it is to be applied. *Brown v.*

Edgington, 2 M. & G. 279; *Jones v. Bright*, 5 Bing. 533. In such a case the buyer trusts to the manufacturer or dealer, and relies upon his judgment, and not upon his own. *Fifthly*—Where a manufacturer undertakes to supply goods manufactured by himself, or in which he deals, but which the vendee has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article. *Laing v. Fidgeon*, 4 Camp. 169; 6 Taunt. 108. And this doctrine has been *held* to apply to the sale by the builder of an existing barge, which was afloat, but not completely rigged and furnished; there, inasmuch as the buyer had only seen it when built, and not during the course of the building, he was considered as having relied on the judgment and skill of the builder that the barge was reasonably fit for use. *Shepherd v. Pybus*, 3 M. & G. 868; *Mellor, J.*, in *Jones v. Just*, L. R., 3 Q. B. 197; 37 L. R., Q. B. 89.

It is not deemed that the classification made in *Jones v.* Just is complete and final, but it is a most suggestive case and, generally speaking, correctly states the law both in England and the United States. In the paragraphs of the text that follow will be found an attempt at a more complete analysis and classification of the cases in which there are and are not implied warranties of quality, and in this connection both the English and American cases will be more fully collected.

1. *Benj. on Sales* (Bennett's ed. 1888), note pp. 629, 630; *id.*, §§ 672, 172a; 2 *Schouler's P. P.* (2nd ed.), § 348; *Newmark on Sales*, § 348; *Hunter v. State*, 1 Head (Tenn.) 160; s. c., 73 Am. Dec. 164, and note reviewing many cases; *Giroux v. Stedman*, 145 Mass. 439; s. c., 1 Am. St. Rep. 472 and note; 2 *Sutherland on Dam.* 410, note

a warranty that the goods were sound.¹ The maxim was "*caveat venditor*."² To this the common law opposed the maxim "*caveat emptor*,"³ and consequently where the common law prevails and is strictly applied, as in England and most of the United States, no warranty of quality, condition or soundness arises from the payment of a sound price in the absence of fraud on the part of the vendor,⁴ and the mere fact that a sound price was paid for a defective or unsound article is not sufficient to show fraud, but there must be other and stronger evidence,⁵ and the burden of

2; Story on Sales, § 373. See also *post*, section 37, of text.

1. This statement of the rule of the civil law is the one generally made and commonly accepted as correct, but it has been pointed out that it is not strictly accurate. *Hoe v. Sanborn*, 21 N. Y. 552; s. c., 78 Am. Dec. 163, 168. It is, however, sufficiently correct as used in the text, because it is upon this statement of it that the anomalous departures from the rule of *caveat emptor* in some of the United States have been founded. See note to *Emerson v. Brigham*, 6 Am. Dec. 113.

2. See *ante*, section 4 of text: *Caveat Venditor*.

3. See *ante*, section 2 of text: *Caveat Emptor*. "The rule of the civil law that a sound price implies a warranty that the article sold is sound, is not a rule of the civil law. . . . The civil law doctrine would produce endless embarrassments if applied to the extended operations of modern trade." *Eagan v. Call*, 34 Pa. St. 236; s. c., 75 Am. Dec. 653.

The maxim of the common law, *caveat emptor*, is the general rule applicable to sales so far as quality is concerned. *Benj. on Sales* (Bennett's ed. 1888), § 644.

4. The civil law maxim, that a sound article is warranted by a sound price, was not the maxim of the common law, and has not been adopted by this court. If the buyer, instead of requiring an explicit warranty, chooses to rely on his own inspection, or the opinion of the vendor, if mistaken as to quality, he has only himself to blame. If overreached by wilful misrepresentation or deceit, he has his remedy. No implied warranty arises from an unfounded affirmation of soundness in the sale of a chattel; but for a deceitful representation of it the remedy is by an action *ex delicto*. *McFarland v. Newman*, 9 Watts (Pa.) 55; *Weimer v. Clement*, 37 Pa. St. 147; s. c., 78 Am. Dec. 411;

Eagan v. Call, 34 Pa. St. 236; s. c., 75 Am. Dec. 653.

No warranty can be inferred from the price paid. *Swett v. Shumway*, 102 Mass. 365, 369; *Mixer v. Coburn*, 11 Met. (Mass.) 559; s. c., 45 Am. Dec. 230.

"When there is neither fraud nor express warranty on the sale of a chattel, the buyer takes the risk of its quality and condition. No warranty of any kind can be implied from the fact that a sound price was paid. *Caveat emptor*, and not *caveat venditor*, is the rule of the common law, and that is our law. I speak of an executed, and not of an executory contract for the sale of goods." *Moses v. Mead*, 1 Den. (N. Y.) 378; s. c., 43 Am. Dec. 676 and note; *Seixas v. Woods*, 2 Cai. (N. Y.) 48; s. c., 2 Am. Dec. 215 and note; *Dean v. Mason*, 4 Conn. 428; s. c., 10 Am. Dec. 162 and note.

The rule that a sound price warrants sound property, unless there be a special agreement to take the property, sound or unsound, is not the law in Alabama. *West v. Cunningham*, 9 Port. (Ala.) 104.

In Rhode Island, a warranty is not inferrible from the price paid. *King v. Quidnick Co.*, 14 R. I. 131.

On the sale of a cow it was held that there was no implied warranty of her fitness for breeding purposes, although the price paid indicated it was for such purposes she was bought. *Scott v. Renick*, 1 B. Mon. (Ky.) 63; s. c., 35 Am. Dec. 177 and note.

In line with the foregoing are many other cases. *Joslin v. Caughlin*, 26 Miss. 134; *Caldwell v. Smith*, 4 Dev. & B. (N. Car.) 64; *Hadley v. Clinton etc. Co.*, 13 Ohio St. 502; *Wilson v. Shackleford*, 4 Rand. (Va.) 5; *Mason v. Chappell*, 15 Gratt. (Va.) 572; *Beninger v. Corwin*, 24 N. J. L. 257; *Johnston v. Cope*, 3 Har. & J. (Md.) 89; s. c., 5 Am. Dec. 423.

5. *Fleming v. Slocum*, 18 Johns. (N.

proving fraud in such a case is upon the vendee.¹ In South Carolina and Louisiana the rule of the civil law is said to prevail, and a sound price implies a sound article.² But the tendency of the recent cases in South Carolina is to limit the doctrine that a sound price implies a sound article to cases of secret defects which the buyer could not discover on inspection, by the use of ordinary skill and diligence,³ and where by ordinary care the buyer might have discovered the defects, the maxim *caveat emptor* is applied in South Carolina as rigidly as elsewhere.⁴ In Georgia the Code provides that anything sold at the market value of its kind is presumed to be warranted to be merchantable and reasonably suited for the use for which it is purchased.⁵

30. Second Hand Chattels.—In the sale of second hand chattels there is ordinarily no implied warranty of quality or condition,⁶ and so in the sale of refuse or waste from manufactories there is no implied warranty of its quality or fitness for a particular purpose.⁷

Y.) 403; s. c., 9 Am. Dec. 224; Johnston v. Cope, 3 Har. & J. (Md.) 89; s. c., 5 Am. Dec. 423; Kimmel v. Lichty, 3 Yeates (Pa.) 262. But it has been held that a vendor is liable for selling a blind horse at a sound price without disclosing his blindness, if it was such as not to be discovered at first view. Hughes v. Robertson, 1 T. B. Mon. (Ky.) 215; s. c., 15 Am. Dec. 104.

This and other like decisions rest upon the principle so well stated by CHIEF JUSTICE REDFIELD thus: "There is no positive duty on the vendor to disclose secret defects in the article, but if he conceal them even by silence, when he knows the other party has fallen into a delusion, in regard to them, and is making a purchase which he would not otherwise make, or at a price materially beyond what he otherwise would, in consequence of such delusion, this is equivalent to a false representation, or the use of art to disguise the defects of the article." Paddock v. Strowbridge, 29 Vt. 470.

1. Beninger v. Corwin, 24 N. J. L. 257.

2. Barnard v. Yates, 1 Nott & M. (S. Car.) 142; Timrod v. Shoolbred, 1 Bay (S. Car.) 324; s. c., 1 Am. Dec. 620; Whitefield v. McLeod, 2 Bay (S. Car.) 380; s. c., 1 Am. Dec. 650; Crawford v. Wilson, 2 Mills (S. Car.) 353; Rose v. Beattie, 2 Nott & M. (S. Car.) 538; 1 Parsons on Con. (5th ed.) 584; La. Civil Code, arts. 1764, 2541.

3. The doctrine of implied warranty from the soundness of the price relates only to secret defects, which cannot by ordinary skill and diligence

be discovered. Rose v. Beattie, 2 Nott & M. (S. Car.) 538.

4. A vendor sold rice in South Carolina. After its arrival abroad a defect was discovered that might have been detected by examination at the time of sale. A sound price was paid for the rice. Held, that there was no implied warranty of quality. Venderhorst v. McTaggart, 1 Brev. (S. Car.) 269; s. c., 2 Am. Dec. 667 and note.

A vendee's knowledge of all the surrounding circumstances, coupled with opportunities to know the condition of the thing he purchases, bind him under the maxim *caveat emptor*, even in South Carolina. Whitefield v. McLeod, 2 Bay (S. Car.) 380; s. c., 1 Am. Dec. 650 and note. And see Bevans v. Farrell, 18 La. Ann. 232.

5. In Georgia, under sections 2609, 2610, of the Georgia Code, which relate to express and implied warranties, the rule is that anything sold at the market value of its kind is presumed to be warranted to be a merchantable article and reasonably suited to the use for which it is purchased. Radcliff v. Gunby, 46 Ga. 464.

6. 2 Schouler's P. P. (2nd ed.), § 366. Thus, where a second hand engine, with defects known to the seller, was examined by the buyer and an expert chosen by him without discovery of the defects, it was held that the failure of the seller to disclose the defects under the circumstances did not charge him with an implied warranty. Cogel v. Knisely, 89 Ill. 598.

7. The residuum or refuse of various kinds of manufactories is more or less

31. Sales Upon Inspection.—In sales upon inspection, with an opportunity to examine the goods purchased, there is no implied warranty of quality or condition in the absence of fraud.¹ In the sale of specific, ascertained, existing chattels there is no implied warranty of quality; but where the chattels are not ascertained and are insusceptible of examination, the rule is different, and implied warranties frequently arise.²

valuable for certain purposes and is often the subject of sale, but the quality of such refuse material is entirely subordinate to the process which is the main object of the manufacturer; and on such a sale there is no implied warranty that the article when delivered should be of a merchantable quality as a manufactured article. *Holden v. Clancy*, 58 Barb. (N. Y.) 590.

1. The rule as stated in the text must be taken subject to the exceptions which arise in cases where a manufacturer sells goods of his own manufacture to a consumer. This question will be fully treated in a later paragraph. As applied to other sales upon inspection the rule in the text is fully sustained, thus: In the absence of express warranty, when the buyer had an opportunity to inspect and the seller is guilty of no fraud, and is not the manufacturer of the article he sells, the maxim *caveat emptor* applies. *Lindley v. Hunt*, 22 Fed. Rep. 52 (1885); *Kohl v. Lindley*, 39 Ill. 195; s. c., 89 Am. Dec. 294.

In the sale of baled hemp open to inspection or which can readily be examined there is no implied warranty that the interior of the bales conforms to the exterior. *Salisbury v. Stainer*, 19 Wend. (N. Y.) 159; s. c., 32 Am. Dec. 437 and note.

There is no implied warranty of the quality of hay in ricks, which the purchaser examined, as much as he desired, before completing the contract. *Becker v. Brawner*, 18 Ill. App. 39 (1886).

In the sale of standing trees examined by the purchaser there is no implied warranty of the quality of the logs which the trees will make. *Hege v. Newson*, 96 Ind. 426.

A market gardener who had purchased certain cabbage seeds the year before of a dealer, inquired for the same kind, and was shown certain seeds which he bought, and they proved a different kind from those sold him the year before and of little value. The two kinds of seeds were not distinguishable by appearance. There was

neither fraud nor express warranty. *Held*, that there was no implied warranty, and an action on the case could not be maintained. *Shisler v. Baxter*, 109 Pa. St. 443; s. c., 58 Am. Rep. 738.

In respect to the merchantable quality of goods sold on inspection or with an opportunity therefor, the rule of law seems to be that the seller may let the buyer cheat himself *ad libitum*, but must not actively assist him in doing so. In the absence of a warranty the purchaser, in such cases, buys on his own responsibility. *Armstrong v. Bufford*, 51 Ala. 410; *Biggs v. Perkins*, 75 N. Car. 397.

A seller is not liable on an implied warranty of quality where an article has been inspected and received by the buyer, provided it be *in specie* the thing as which it has been sold. *Jennings v. Gratz*, 3 Rawle (Pa.) 168; s. c., 23 Am. Dec. 111.

There is no implied warranty that meat sold to a dealer, without representations as to the quality, is sound. If buyer and seller have equal means of knowledge of its condition, and it appears sound, and the buyer makes what examination he deems necessary before buying, the rule *caveat emptor* applies. *Rinschler v. Jelfife*, 9 Daly (N. Y.) 469, 1882.

No fraud arises upon the sale of unsound personal property, where the unsoundness was of a nature to be perceived by the eye, and no attempt at its concealment has been made. *Stewart v. Dugin*, 4 Mo. 245; s. c., 28 Am. Dec. 348.

2. So far as an ascertained specific chattel, *already existing*, and *which the buyer has inspected*, is concerned, the rule of *caveat emptor* admits of no exception by *implied* warranty of quality. *Benj. on Sales* (Bennett's ed. 1888), § 645, p. 584; *Parkinson v. Lee*, 2 East 314; *Chanter v. Hopkins*, 4 M. & W. 64; 2 Schouler's P.P. (2nd ed.), §§ 346, 347, 348; 2 Sutherland on Dam. 408; *Story on Sales*, §§ 369, 372. *Bowman v. Clemmer*, 50 Ind. 10. On the sale of a particular steer

32. Executed and Executory Contracts as Affecting Implied Warranty of Quality.—In executed or completed contracts for the sale of specific ascertained goods there is no implied warranty of quality, and the rule is *caveat emptor*.¹ Fraud will of course pre-

there is no implied warranty of his character, and the vendor is not bound to disclose it unasked. *McCurdy v. McFarland*, 10 Mo. 377.

Where one selects a specific article the law does not imply a warranty that it will answer the purposes for which it is bought. So held in reference to a fertilizer the ingredients and properties of which were known to the buyer. *Walker v. Pue*, 57 Md. 155; *Rasin v. Conley*, 58 Md. 59.

If a purchaser inspects for himself the specific article sold, and there is no express warranty, and the seller is guilty of no fraud, and is not himself the manufacturer, and the particular use to which it is to be put is not communicated to him by the purchaser at the time of the sale, there is no implied warranty that the article is reasonably fit for the purpose intended by the buyer, even though the seller supposes the buyer to intend it for such purpose. *Hight v. Bacon*, 126 Mass. 10.

Unascertained chattels: In the case of unascertained chattels, not susceptible of examination at the time of sale, there is usually an implied warranty of quality and fitness for any particular purpose for which they may be purchased to the knowledge of the vendor. *Benj. on Sales* (Bennett's ed. 1888.), § 645; 2 *Schouler's P. P.* (2nd ed.), §§ 345-350; *Newmark on Sales*, §§ 332, 333; 2 *Sutherland Dam.* 407, 408; *Story on Sales*, §§ 368, 371.

Merchandise not seen, and sold to be delivered at a future day, is impliedly warranted to be of medium quality or goodness, and merchantable. *Howard v. Hoey*, 23 Wend. (N. Y.) 350; s. c., 35 Am. Dec. 572.

There is an implied engagement in the contract of sale of articles to arrive, and which at the time of sale are not subject to inspection, that they shall be merchantable. In such cases the rule of the civil law, *caveat venditor*, should be applied. *Newberry v. Wall*, 35 N. Y. Sup. Ct. 106.

Personal property sold at a public auction, but remote from the place of sale, is impliedly warranted of the quality represented by the seller when the bidder has had no opportunity to inspect the property, and was unaware

of its absence up to the moment when he was called on to bid. *Overbay v. Lighty*, 27 Ind. 27.

When property sold is not present at the time of sale, and the vendee is forced to rely on the representations of the vendor as to its quality and condition, the rule that there is no implied warranty against defects in property open to observation does not apply. *Hanks v. McKee*, 2 Litt. (Ky.) 227; s. c., 13 Am. Dec. 265.

Where lumber is sold without an opportunity for examination by the vendee there is an implied warranty that it is merchantable. *Merriam v. Field*, 39 Wis. 578.

On a sale of "choice sugar cured, canvassed hams," where the vendee had no opportunity to examine the hams because of their distance from him, and no particular hams were selected by him, it was held that there was an implied warranty [condition precedent?] that the hams should conform to the description and be of the quality stated. *Forcheimer v. Stewart*, 65 Iowa 594; s. c. 54 Am. Rep. 30.

Where there is no opportunity for inspection, there is an implied warranty of quality. But the inspection must not only be inconvenient, it must be practically impossible, or the failure to inspect will not protect. *Hyatt v. Boyle*, 5 Gill & J. (Md.) 110; s. c., 25 Am. Dec. 276.

In England, the rule is substantially as already stated. *Jones v. Just*, L. R., 3 Q. B. 197; 37 L. J., Q. B. And see, for the substance of this case, *Benj. on Sales* (Bennett's ed. 1888.), § 655, *et seq.*

The English rule implying a warranty in the case of unascertained goods only extends to the condition of the goods when they leave the vendor's possession. *Benj. on Sales* (Bennett's ed. 1888), § 659; *Ball v. Robinson*, 10 Exch. 342; 24 L. J. Ex. 165.

And does not ordinarily cover packages or vessels containing the thing sold. *Benj. on Sales* (Bennett's ed. 1888), 597, § 660.

1. *McClurg v. Keiley*, 21 Iowa 508; *Beirne v. Dord*, 5 N. Y. 95; s. c., 55 Am. Dec. 321, and note; *Hamilton v. Ganyard*, 34 Barb. (N. Y.) 204;

vent the application of the maxim in such a case.¹ Where a contract is still incomplete and executory, however, there is generally an implied warranty of quality, or a condition precedent equivalent thereto, which will justify the buyer in refusing to receive goods which in kind, quality or condition are not in accordance with the terms of the contract; and if the contract is silent upon these points it will be presumed, in an executory contract, to be completed by the delivery of the unascertained chattels, that the chattels were to be of a fair merchantable quality and reasonably fitted for the use to which the seller may have had notice that they were to be put.²

33. Sales by Description—Implied Warranty in.—Properly speaking, a sale by description is not the sale of a specific described article, but the sale of a certain described kind or species of article.³ And consequently, if the goods delivered do not conform to the description, the buyer may reject them as not in accordance with a condition precedent.⁴ This class of conditions precedent is continually treated as an implied warranty of

Rodgers v. Niles, 11 Ohio St. 48; s. c., 78 Am. Dec. 290, and note. *Compare ante*, section 8 of text.

1. See *ante*, section 12 of text. Also note to Barnard v. Duncan, 90 Am. Dec. 426.

2. One who agrees to sell merchandise not then in existence thereby warrants that it shall be sound and merchantable at the place of production contemplated by the parties. Blackwood v. Cutting Packing Co. (Cal.), 18 Pac. Rep. 248 (1888). And in this case future crops of fruit were held merchandise, under Civil Code of Cal., § 1768.

In case of an executory contract for the manufacture of articles to be delivered at a future day, there is always an implied warranty that the articles delivered shall answer the purpose for which they were designed. Woodle v. Whitney, 23 Wis. 55; s. c., 99 Am. Dec. 102, and note.

There is an implied warranty of merchantability in an executory contract to deliver corn. Babcock v. Trice, 18 Ill. 420; s. c., 68 Am. Dec. 560 and note.

Where goods not in existence are sold the buyer may reject them if they are not of the quality specified. Pope v. Allis, 115 U. S. 363.

In executory contracts for the sale of personal property, the law implies that the article, when furnished, shall be of merchantable quality, and this without express words between the parties.

Reed v. Randall, 29 N. Y. 358; s. c., 86 Am. Dec. 305 and note; Howard v. Hoey, 23 Wend. (N. Y.) 350; s. c., 35 Am. Dec. 572 and note; Forcheimer v. Stewart, 65 Iowa 593; s. c., 54 Am. Rep. 30; Ketchum v. Wells, 19 Wis. 25; Brantley v. Thomas, 22 Tex. 270; s. c., 73 Am. Dec. 264 and note; Field v. Kinnear, 4 Kan. 476.

In an executory contract to print books, the law implies that the books are to be printed in a skilful and workmanlike manner, where the agreement is to print and deliver a specified number of copies. Gould v. Banks, 8 Wend. (N. Y.) 562; s. c., 24 Am. Dec. 90.

3. 2 Schouler's P. P. (2nd ed.), § 351; Benj. on Sales (Bennett's ed. 1888), § 600; Newmark on Sales, §§ 341, 342; Chanter v. Hopkins, 4 M. & W. 399; Opinion of Lord Blackburn in Shand v. Bowes, 2 App. Cas. 455, 480; note to Chandelor v. Lopus, 1 Smith's Leading Cases (8 Am. ed.), 302, *196; Swett v. Shumway, 102 Mass. 365; s. c., 3 Am. Rep. 471.

4. Newmark on Sales, § 342; Benj. on Sales (Bennett's ed. 1888), § 588, a, p. 527, 528, § 300; 2 Sutherland Dam. 410, 411, and cases cited in note 1; 1 Smith's Lea. Cas. (8th Am. ed.), p. 302, *196; also, same, pp. 326, 327; 2 Schouler's P. P. (2nd ed.), § 352; Pollock on Con. 465; Jones v. George, 61 Tex. 345; s. c., 48 Am. Rep. 280; Wolcott v. Mount, 36 N. J. L. 266; s. c., 13 Am. Rep. 438; Phelps v. Quinn, 1 Bush (Ky.) 375. *Compare ante*, section 7 of text

quality.¹ And when so treated it is said that, on a sale by description of an article not ascertained and which there has been no opportunity to inspect, there is an implied warranty that it is of the kind and quality described.² Perhaps it would be correct to treat a failure to deliver an article of the *kind or species* described as the breach of a condition precedent, and a failure to deliver an article of the *quality* specified and described as the breach of an implied warranty.³

34. Special Implied Warranties of Quality.—There are certain implied warranties, and conditions precedent, of quality, kind or character that deserve special consideration, apart from the general principles of the subject as heretofore treated. Some of them arise only in certain limited classes of cases; some of them depend on the relationship or status of buyer and seller towards each other; and some of them are created by the law solely as a measure of public policy. First, then, of—

35. The Implied Warranty of Merchantability.—In the sale of chattels or merchandise of a particular kind or species, where the specific articles have not been ascertained and examined by the buyer, but where, on the contrary, he trusts to the seller to furnish him with merchandise or chattels of the kind agreed upon, the same not being subject to inspection, there is not only a condition precedent that the things delivered shall be of the kind or species bargained for, but also an implied warranty of quality,

ON CONDITIONS PRECEDENT.

1. There is no doubt that in a contract of sale words of description are held to constitute a warranty that the articles sold are of the species and quality so described. *Hogins v. Plympton*, 11 Pick. (Mass.) 97, 99; *Borrekins v. Bevan*, 3 Rawle (Pa.) 23; s. c., 23 Am. Dec. 85; *Van Wyck v. Allen*, 69 N. Y. 61; s. c., 25 Am. Rep. 136. And see 1 Smith's Lea. Cas. (8 Am. ed.), pp. 326, 327. Similar language is used in many other cases, but it can scarcely be considered strictly accurate, as the following authorities will show: *Pollock on Con.* 465; *Benj. on Sales* (Bennet's ed. 1888), § 600; 2 *Schouler's P. P.* (2nd ed.), §§ 349, 351; *Newmark on Sales*, §§ 341, 342; *Jones v. George*, 61 Tex. 345; s. c., 48 Am. Rep. 280; *Wolcott v. Mount*, 36 N. J. L. 266; s. c., 13 Am. Rep. 438; *Josling v. Kingsford*, 13 C. B. N. S. 447; *Azemar v. Cassella*, L. R., 2 C. P. 431, 677; 36 L. J., C. P. 124, 263.

In some cases such conditions precedent created by a description of goods as of a certain kind or species are treated as a guaranty that they shall be of such kind or species. *Whitaker v. McCormick*, 6 Mo. App. 114;

Catchings v. Hacke, 15 Mo. App. 51.

2. *Phelps v. Quinn*, 1 Bush (Ky.) 375; *Van Wyck v. Allen*, 69 N. Y. 61; s. c., 25 Am. Rep. 136; *Swett v. Shumway*, 102 Mass. 365; s. c., 3 Am. Rep. 471; *Gardner v. Gray*, 4 Camp. 144; *Boorman v. Jenkins*, 12 Wend. (N. Y.) 566; *Hawkins v. Pemberton*, 51 N. Y. 198; s. c., 10 Am. Rep. 595; *White v. Miller*, 71 N. Y. 118; s. c., 27 Am. Rep. 13; *Jones v. Just*, L. R., 3 Q. B. 197; 37 L. J., Q. B. 89; 2 *Sutherland Dam.* 410, 411; *Newmark on Sales*, §§ 341, 342; 2 *Schouler's P. P.* (2nd ed.), §§ 349, 350, 351, 353.

3. 2 *Schouler's P. P.* (2nd ed.), § 349, where the distinction taken in the text is suggested. Also *id.*, § 316; *Newmark on Sales*, §§ 341, 342, 343.

Two recent cases will illustrate the principle that a failure to deliver the kind or species of goods sold by description is a breach of a condition precedent, rather than of an implied warranty, and this is none the less true, because one, if not both, of the cases confuses an implied warranty with a condition precedent. *Forcheimer v. Stewart*, 65 Iowa 594; s. c., 54 Am. Rep. 30; *White v. Miller*, 71 N. Y. 118; s. c., 27 Am. Rep. 13. And see *Borrekins v. Bevan*,

namely, that they shall be merchantable goods of such kind.¹ "Under such circumstances the purchaser has a right to expect a salable article answering the description in the contract."²

3 Rawle (Pa.) 23; s. c., 23 Am. Dec. 85; Gerst v. Jones, 32 Gratt. (Va.) 518; s. c., 34 Am. Rep. 773.

On the other hand, a late case correctly holds that even though an article be described by the seller to the buyer, or shown to him as an article which the buyer has described and called for, yet there is no condition precedent that it is such article if both parties at the time of inspection and purchase have equal means and opportunities of knowledge as to its kind and species and deal about it in good faith. In such case there is no breach of a condition precedent, even though the article is other than that it was supposed to be, and on such a state of facts no implied warranty can arise. Shisler v. Baxter, 109 Pa. St. 443; s. c., 58 Am. Rep. 738.

But where there is a sale by description, and such description relates both to quality and kind or species, and there is no opportunity or ability to examine and know the goods, there is a condition precedent as to the kind or species, and an implied warranty as to the quality. White v. Miller, 71 N. Y. 118; s. c., 27 Am. Rep. 13; Best v. Flint, 58 Vt. 543; s. c., 56 Am. Rep. 570; Jones v. George, 56 Tex. 149; s. c., 42 Am. Rep. 689; Jones v. George, 61 Tex. 345; s. c., 48 Am. Rep. 280; Brantley v. Thomas, 22 Tex. 270; s. c., 73 Am. Dec. 264.

1. Benj. on Sales (Bennett's ed. 1888), §§ 656-660, and note, p. 626; Newmark on Sales, § 333; 2 Schouler's P. P. (2nd ed.) §§ 354-356; Story on Sales, §§ 368, 371; 1 Smith's Lea. Cas. (8th Am. ed.), p. 332; Gardiner v. Gray, 4 Camp. 144; Jones v. Just, L. R., 3 Q. B. 197; Merriam v. Field, 24 Wis. 640; 29 Wis. 593; 39 Wis. 578.

In an executory contract for the sale of personal property, the law implies that the article when furnished shall be of merchantable quality. Reed v. Randall, 29 N. Y. 358; s. c., 86 Am. Dec. 305; Howard v. Hoey, 23 Wend. (N. Y.) 350; s. c., 35 Am. Dec. 572.

The rule of *caveat emptor* is founded in the idea that the purchaser sees what he buys and exercises his own judgment, and the strong tendency of the modern decisions is to imply a warranty of quality in all cases where the purchaser has no opportunity to exercise his own judgment, but relies on the

judgment of the party with whom he deals. If goods are sent, upon order, by a New York merchant to a Texas merchant, the law will imply a warranty that the goods sent are such as were ordered; or if goods are sent from a New York merchant to a Texas merchant without a special order, but upon a general engagement to forward goods the law will imply a warranty that all goods sent are valuable and merchantable. Brantley v. Thomas, 22 Tex. 270; s. c., 73 Am. Dec. 264.

A contract called for the future delivery of ice. *Held*, that this implied ice of a fairly merchantable quality. Warner v. Arctic Ice Co., 74 Me. 475.

Caveat emptor does not apply when goods not the subject of inspection are sold to arrive. It would be contrary to sound morality and public policy to apply the maxim in such a case. On the contrary, the rule in such a case should be *caveat venditor*, and there is an implied warranty of merchantability. Newberry v. Wall, 35 N. Y. Sup. Ct. 106.

A merchant selling guano or "super-phosphate" to a farmer as a fertilizer, impliedly warrants it to be merchantable and reasonably suited to the use designated. Gammell v. Gunby, 52 Ga. 504.

When wheat or corn is sold for future delivery, there is an implied warranty that it shall be merchantable when delivered. Fish v. Roseberry, 22 Ill. 288; Babcock v. Trice, 18 Ill. 420; s. c., 68 Am. Dec. 560; S. P. Doane v. Dunham, 65 Ill. 516.

2. LORD ELLENBOROUGH thus puts the rule in a case relating to the sale of twelve bags of "waste silk." "Under such circumstances the purchaser has a right to expect a salable article, answering the description in the contract. Without any particular warranty, this is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply. He cannot, without a warranty, insist that it shall be of any particular quality or fineness; but the intention of both parties must be taken to be that it shall be salable in the market under the denomination mentioned in the contract

And while, in the absence of an express warranty, it seems that the vendee cannot insist that the goods shall be of any particular quality or fineness, so long as they are fairly merchantable as goods of the described kind,¹ yet if they are purchased and sold as fitted for a particular use or salable in a particular market, there is an implied warranty that they shall be fit for such use or of the quality merchantable in such market.² But it is otherwise where the buyer clearly shows that he does not intend to rely upon the seller's judgment to furnish him a merchantable article of the kind ordered. Thus, if he specifies the article that he is to have and fixes its character and quality, and the seller delivers him an article fairly conforming to the order, there is no implied warranty of merchantability, or fitness for a particular use, or for a certain market for which the buyer may design it.³ In such case the buyer, having received the specific thing ordered by him, must take the risk of its quality and merchantability.⁴ So, where the thing purchased, although not susceptible of examination at the time, is yet specific, as a cargo of corn on a certain vessel, it has been held that there was no implied warranty of

between them." *Gardiner v. Gray*, 4 Camp. 144. And see *Jones v. Just*, L. R., 3 Q. B. 197; *Brown v. Edgington*, 2 M. & G. 279; *Warren Glass Works v. Keystone Coal Co.*, 65 Md. 547; *Reed v. Randall*, 29 N. Y. 358; s. c., 86 Am. Dec. 305; *Kohl v. Lindley*, 39 Ill. 195; s. c., 89 Am. Dec. 294.

But in a recent Pennsylvania case it was held that a contract to sell "fully cured sweet pickled shoulders" of pork, does not imply a warranty of quality, even though the buyer had no opportunity to examine the shoulders. It is a compliance with the contract if the shoulders are salable, and it is not necessary that they should be sweet and sound. Two judges dissent. *Ryan v. Ulmer*, 108 Pa. St. 332; s. c., 56 Am. Dec. 210. And see *Hyatt v. Boyle*, 5 Gill & J. (Md.) 110; s. c., 25 Am. Dec. 276.

Compare with these cases a late Iowa case where it was held that a contract to deliver "choice sugar-cured canvased hams" implied a warranty that the goods should fully conform to the contract in quality, as the buyer had no opportunity of inspection. *Forcheimer v. Stewart*, 65 Iowa 594; s. c., 54 Am. Rep. 30. And see note to *Chandelor v. Lopus*, 1 Smith's Lea. Cas. (8th Am. ed.), pp. 232, 233.

1. Under the English decisions, as they now stand, where the vendee has had no opportunity of inspecting the commodity, he has a right to require a

salable article, but nothing more, and he cannot insist that it shall be of any particular quality or fineness. *Ryan v. Ulmer*, 108 Pa. St. 332; s. c., 56 Am. Rep. 210; 1 Wharton Con., § 223.

2. 2 Schouler's P. P. (2nd ed.), § 354; *Newmark on Sales*, § 333; *Story on Sales*, § 371; *Brown v. Edgington*, 3 M. & G. 371; *Keates v. Cadogan*, 10 C. B. 591, per MAULE, J.; *Benj. on Sales* (Bennett's ed. 1888), § 645; *Jones v. Just*, L. R., 3 Q. B. 197; *Mann v. Everston*, 32 Ind. 355; *Leopold v. Van Kirk*, 27 Wis. 157; *Pease v. Sabin*, 38 Vt. 432; *Pacific Iron Works v. Newhall*, 34 Conn. 67; *Brown v. Murphee*, 31 Miss. 91; *Rodgers v. Niles*, 11 Ohio St. 48; s. c., 78 Am. Dec. 290; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108.

3. *Story on Sales*, § 372; 2 Schouler's P. P. (2nd ed.), § 356; *Newmark on Sales*, § 333; *Benj. on Sales* (Bennett's ed. 1888), § 661; *Jones v. Bright*, 5 Bing. 533; *Chanter v. Hopkins*, 4 M. & W. 399; *Ollivant v. Bayley*, 5 Q. B. 288; *Brown v. Edgington*, 2 M. & G. 279; *Hyatt v. Boyle*, 5 Gill & J. (Md.) 110; s. c., 25 Am. Dec. 276; *Rasin v. Conley*, 58 Md. 65; *Port Carbon Iron Co. v. Groves*, 68 Pa. St. 149; *Mason v. Chapell*, 15 Gratt. (Va.) 572; *Deming v. Foster*, 42 N. H. 165; *Tilton Safe Co. v. Tisdale*, 48 Vt. 83.

4. *Jones v. Just*, L. R., 3 Q. B. 197; 37 L. J., Q. B. 89; *Stated, Benj. on Sales* (Bennett's ed. 1888), § 657;

merchantability.¹ And it has been held that where there is an express warranty of another quality no warranty of merchantability can be implied.² This latter doctrine is, however, the subject of serious question.³ And an express warranty by a manufacturer of certain qualities in his product will not exclude an implied warranty of merchantability if silent upon that subject.⁴ An implied warranty of merchantability is limited in time to the period at which the thing sold is actually or constructively delivered to the buyer.⁵ But the seller may be liable for a deterioration in the value or merchantability of the thing during its carriage to the buyer, even by the agent of the latter, if such, deterioration results from defects in the manner in which the thing was packed and shipped by the seller.⁶ In sales by sample there is usually no implied warranty of merchantability;⁷ but there are cases where the facts and circumstances of the sale imply such a warranty.⁸ And in Pennsylvania the anomalous rule prevails that on a sale by sample there is no implied warranty that the bulk of the thing sold shall equal the sample in quality or merchantability, but only a guaranty that the article to be delivered shall follow its kind and be simply merchantable as goods of such kind.⁹ Mere receipt of the goods, even where the defect is patent and the unmerchantability subject to discovery upon examination, is not necessarily a waiver of the implied warranty of merchantability.¹⁰ But there must be notice to the

Chanter v. Hopkins, 4 M. & W. 399; *Ollivant v. Bayley*, 5 Q. B. 288.

The vendee gave the vendors, manufacturers of safes, a written order for a "No. 4 safe with combination lock," and the vendors sent a safe answerable to the order. Held, that there was no implied warranty as to the merits or usability of the lock, but only that it should be such as the order called for. *Tilton Safe Co. v. Tisdale*, 48 Vt. 83. This case correctly states the rule, but perhaps it goes too far in applying it to such a state of facts.

1. *Owens v. Dunbar*, 12 Irish L. R. 304 (1848). And see *Gossler v. Eagle Sugar Refinery*, 103 Mass. 331; *Whitney v. Broadman*, 118 Mass. 242, 248.

2. *Rowe v. Farren*, 8 Irish C. L. R., 46, 1858.

3. See *Clew v. McPherson*, 1 Bosw. (N. Y. Sup.) 480; *Newberry v. Wall*, 3 Jones & Sp. (N. Y.) 106; *Fitch v. Ardribald*, 29 N. J. L. 160; *Merriam v. Field*, 24 Wis. 640; *Wilcox v. Owens*, 64 Ga. 601.

4. *Wilcox v. Owen*, 64 Ga. 601. And see *Merriam v. Field*, 24 Wis. 640.

5. 2 Schouler's P. P. (2nd ed.), § 355;

Bull v. Robinson, 10 Exch. 342; 24 L. J. Exch. 165; *Legat v. Sand's Ale etc. Co.*, 60 Ill. 158; *Mann v. Everston*, 32 Ind. 355; *Gower v. Van Dedalzen*, 3 Bing. (N. C.) 717.

6. 2 Schouler's P. P. (2nd ed.), § 355; *Jones v. Just*, L. R., 3 Q. B. 197.

7. *Benj. on Sales* (Bennett's ed. 1888), § 667; *Story on Sales*, § 376; *Parkinson v. Lee*, 2 East 314; *Gachet v. Warren*, 72 Ala. 288. But see *Randall v. Newson*, 2 Q. B. D. 102.

8. *Benj. on Sales* (Bennett's ed. 1888), § 667; *Moody v. Gregson*, L. R., 4 Exch. 49; *Newmark on Sales*, § 336; *Nichols v. Godts*, 10 Exch. 191; *Josling v. Kingsford*, 13 C. B. 447; note to *Bradford v. Manly*, 7 Am. Dec. 128, 129; note to *Reynolds v. Palmer*, 21 Fed. Rep. 454; *Heilbutt v. Hickson*, L. R., 7 C. P. 438; *Remarks of GROVE, J.*, on the state of the sample, in *Smith v. Barker*, 40 L. T., N. S. 262.

9. *Newmark on Sales*, § 336; *Boyd v. Wilson*, 83 Pa. St. 319; s. c., 24 Am. Rep. 176; 2 Schouler's P. P. (2nd ed.), § 360, note 3. But see *West Republic Co. v. Jones*, 108 Pa. St. 55.

10. *Babcock v. Trice*, 18 Ill. 420; s. c., 68 Am. Dec. 560; *Morehouse v. Com-*

vendor, within a reasonable time, under the circumstances, that the vendee does not accept the goods as filling the contract, or a waiver of the warranty will be presumed.¹

36. Fitness for Particular Purpose—Implied Warranty of.—In considering implied warranties of the fitness for particular purposes or uses of things sold, a distinction has been taken between cases wherein the vendor is the manufacturer of the thing sold and those wherein he is a mere middleman or dealer.² Thus, in an executory contract for the manufacture of articles to be delivered at a future day, there is always, in the absence of any other agreement between the parties, an implied warranty or condition that the manufactured article shall answer the purpose for which it was designed by the manufacturer, pursuant to the orders of the vendee.³ This rule is also generally applicable, even where the

stock, 42 Wis. 626. And see *ante*, section 9. WAIVER OF IMPLIED WARRANTY.

1. *Morehouse v. Comstock*, 42 Wis. 626; and see preceding note.

2. Note to *Emerson v. Brigham*, 6 Am. Dec. 114, 115; 1 *Parsons on Con.* (5th ed.) 586; *Benj. on Sales* (Bennett's ed. 1888), pp. 626, 627, note; 2 *Schouler's P. P.* (2nd ed.), § 365; *Dounce v. Dow*, 6 *Thomp. & C. (N. Y.)* 653; s. c., on appeal, affirmed, 64 N. Y. 411; *Biddle on Chattel Warranties*, §§ 183, 185. "The plaintiff is not a manufacturer, and, therefore, no implied warranty of a manufacturer exists in the case. The sale was between merchants who are bound by the legal usages of merchants." *Dickinson v. Gay*, 7 *Allen (Mass.)* 29, 31.

All the preceding questions which we have noticed, and the exceptions thereto, seem to be based upon the theory that a warranty of fitness of an article for a specific purpose may be implied from the knowledge on the part of the seller that the article is intended for such specific purpose. This is a doctrine of the civil law which has been attempted, but unsuccessfully, to be made a part of our common law. The authorities we have already cited clearly hold that where the vendor of the article is not the manufacturer of the article sold, and in cases where the vendee, as in this case, has equal knowledge and equal opportunities of knowledge of the character or quality of the article sold, with the vendor, the vendor is only liable upon an express warranty. *Bartlett v. Hoppock*, 34 N. Y. 118; s. c., 88 Am. Dec. 428. In the absence of an express warranty when the buyer has an opportunity to inspect,

and the seller is guilty of no fraud, and is not the manufacturer of the article he sells, the maxim *caveat emptor* applies. *Lindley v. Hunt*, 22 Fed. Rep. 52.

Where the contract of sale is executed, it seems that a vendor who did not manufacture the thing sold, and was guilty of no fraud, is not chargeable on an implied warranty of the fitness of the thing for a particular purpose, even though he knew it was purchased for such purpose. *Bartlett v. Hoppock*, 34 N. Y. 118; s. c., 88 Am. Dec. 428; *Deming v. Foster*, 42 N. H. 165; *Mason v. Chappell*, 15 *Gratt. (Va.)* 572; *Dickson v. Jordon*, 11 *Ired. (N. Car.)* 166; s. c., 53 Am. Dec. 403; *Kohl v. Lindley*, 39 *Ill.* 195; s. c., 89 Am. Dec. 294; *Humphreys v. Comline*, 8 *Blackf. (Ind.)* 516; *Rocchi v. Schwabacher*, 33 *La. Ann.* 1364.

Where the contract is executory, however, the distinction between the liability of a manufacturer and a mere dealer is not recognized by the later and better cases, and either may be charged, on an implied warranty, for a failure to deliver a thing fit for a specific purpose for which it was ordered of the vendor. *Biddle Chattel Warranties*, § 167; *Randall v. Newson*, L. R., 2 Q. B. 102; s. c. (in substance), 24 *Am. Rep.* (note to *Bragg v. Morrill*), p. 106, *et seq.*; note to *Chandelor v. Lopus*, 1 *Smith's Lea. Cas.* (8th Am. ed.), 312, 313, 314, 315, 332, 333, 334; 2 *Sutherland on Dam.* 409, 410 and notes; *Story on Sales*, § 371; *Newmark on Sales*, § 346; *Benj. on Sales* (Bennett's ed. 1888), §§ 661, 661a; note to *Bragg v. Morrill*, 24 *Am. Rep.* 104, *et seq.*

3. *Story on Sales*, § 371; 2 *Schou-*

contract is executed, the principle being that in sales by a manufacturer of his product he impliedly warrants it fit for the use for which it was intended, knowledge of such intended use having been given him.¹ And where a manufacturer contracts to sell to a dealer or middleman who buys, as the manufacturer knows, to sell again, there is an implied warranty on the part of the manufacturer that the thing to be made shall be reasonably fit for the purpose for which it is made and for which the dealer

ler's P. P., § 354; Biddle on Chat. War., § 167; Newmark on Sales, § 346; Pomeroy's Smith's Mer. Law, § 603; Benj. on Sales (Bennett's ed. 1888), § 661.

Jones v. Bright, 5 Bing. 533; Brown v. Edgington, 2 M. & G. 279; Randall v. Newson, 2 Q. B. Div. 102; Jones v. Just, L. R., 3 Q. B. 197; 37 L. J., Q. B. 89.

Where goods are ordered from a manufacturer for a particular purpose, there is an implied warranty that they shall be fit for the purpose for which they are ordered; but he is only required to furnish goods of the kind and quality usually manufactured and used, and such as are reasonably fit and proper for the purpose. Harris v. White, 51 Vt. 480; s. c., 31 Am. Rep. 694.

In a sale of whiskey barrels by the manufacturer, there is an implied warranty that they will hold whiskey without leaking. Poland v. Miller, 95 Ind. 387; s. c., 48 Am. Rep. 730.

An agreement to manufacture and furnish steam boilers of specified dimensions does not charge the manufacturers with any warranty that the dimensions of the boilers shall be sufficient to enable them to do the work of the vendees, but in such case the manufacturers "must be regarded as having agreed to procure such materials, and apply such workmanship as would furnish to the plaintiffs steam boilers free from all such defects, latent or otherwise, as would render them unfit for the ordinary uses contemplated by the contract." Rodgers v. Niles, 11 Ohio St. 48, 56; s. c., 78 Am. Dec. 290.

When a manufacturer undertakes with a purchaser to manufacture an article at a fair price, for a special purpose, there is an implied warranty that the article is reasonably fit for the purpose designed. Robinson Machine Works v. Chandler, 56 Ind. 575, 579; McClamrock v. Flint, 101 Ind. 278; Street v. Chapman, 29 Ind. 142.

But the implied warranty will not go beyond the thing warranted, and the purpose to which it is applicable, and for which it is designed. Robinson Machine Works v. Chandler, 56 Ind. 575, 579, 580.

Where a manufacturer undertakes to supply goods manufactured by himself to be used for a particular purpose, and the vendee has not had the opportunity to inspect the goods and trusts, as he necessarily must do, in such a case, to the judgment and skill of the manufacturer, it is an implied term in the contract of sale that he shall furnish a merchantable article, reasonably fit for the purpose for which it was intended. Curtis & Co. Mfg. Co. v. Williams, 48 Ark. 325; Woodle v. Whitney, 23 Wis. 55; s. c., 99 Am. Dec. 102.

Upon the sale of an article by the manufacturer there is an implied warranty that it will answer the purpose for which it was made. Brown v. Murphee, 31 Miss. 91; Beers v. Williams, 16 Ill. 69; Overton v. Phelan, 2 Head (Tenn.) 445; Walton v. Cody, 1 Wis. 420; Fisk v. Tank, 12 Wis. 276; s. c., 78 Am. Dec. 737; Field v. Kinnear, 4 Kan. 476.

In California, the Code, sections 1769, 1770, provides that on a sale of manufactured article made to order for a particular purpose there is an implied warranty of the fitness of such article for such purpose. Correio v. Lynch, 65 Cal. 273; Hoult v. Baldwin, 67 Cal. 610.

1. It is immaterial whether the manufacture of the article precedes or follows the sale, provided the vendor is the manufacturer. Bragg v. Morrill, 49 Vt. 45; s. c., 24 Am. Rep. 102; Beals v. Olmstead, 24 Vt. 114; s. c., 58 Am. Dec. 150; Pease v. Sabin, 38 Vt. 432. Thus, in Randall v. Newson, 2 Q. B. D. 102 C. A., the defendant, a carriage builder, supplied a pole for the plaintiff's carriage, which broke when the plaintiff was driving, in consequence

intends to sell it.¹ But a manufacturer does not impliedly warrant the fitness of an article which he makes in accordance with the directions, plans and specifications of the vendee, and for which the manufacturer is in no way responsible, except that he is required to conform to the requirements of the vendee, which

of which his horses were injured. The jury found that the pole was not reasonably fit and proper for the carriage, at the same time absolving the defendant from any negligence, but acting under a misapprehension, they assessed the damages at the value of the pole only. *Held*, by the court of appeal, that the defendant must be taken to have warranted the pole to be reasonably fit for the particular purpose, and that it was immaterial that the fracture was caused by a latent defect in the wood which he could not, by the exercise of any reasonable care or skill, have discovered. The case was, therefore, sent to be retried, in order that a jury might determine whether the damage caused to the horses was the natural consequences of the fracture, in which event the defendant would be liable for such damage. *Randall v. Newson*, 2 Q. B. D. 102.

So, one who manufactures articles for the use of another, to be applied to a particular purpose, warrants their adaptability to that purpose, and in the defence of an action for the price of such articles, the purchaser is not stopped from setting up a breach of the warranty because the goods have been received and partially paid for in ignorance of their unfitness. *Thomas v. Simpson*, 80 N. Car. 4.

"We consider the law to be settled, that if a manufacturer of an article sells it at a fair market price, knowing the purchaser designs to apply it to a particular purpose, he impliedly warrants it to be fit for that purpose, and that if, owing to some defect in the article not visible to the purchaser, it is unfit for the purpose for which it was sold and bought the seller is liable on his implied warranty. . . . If the defendant was the manufacturer of the boat in question, and sold it to the plaintiff at a fair price, for the purpose of transporting freight on White river and the other rivers to a market, he impliedly warranted it to be fit and suitable for that purpose, at least against all defects not open and visible to the plaintiff on inspection; and the jury should have been so instructed." *Bren-*

ton v. Davis, 8 Blackf. (Ind.) 317; s. c., 44 Am. Dec. 769.

Where one sells an article of his own manufacture which has a defect produced by the manufacturing process itself, the seller must be presumed to have had knowledge of such defect, and must be helden, therefore, upon the most obvious principles of equity and justice—unless he informs the purchaser of the defect—to indemnify him against it. *Hoe v. Sanborn*, 21 N. Y. 552; s. c., 78 Am. Dec. 163; *S. P. Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108. And in support of the general rule laid down in the text, see: *Gerst v. Jones*, 32 Gratt. (Va.) 518; s. c., 34 Am. Rep. 773; *Dearborn v. Downing*, 77 Me. 457; *Hight v. Bacon*, 126 Mass. 10; *Jones v. Just*, L. R., 3 Q. B. 197; *Jones v. Bright*, 5 Bing. 533; *Getty v. Rountree*, 2 Pin. (Wis.) 379; 2 Chand. (Wis.) 28; s. c., 54 Am. Dec. 138; *Shatto v. Abernethy*, 35 Minn. 538; *Ulrich v. Stohrer*, 12 Phila. (Pa.) 199; *Benj. on Sales* (Bennett's ed. 1888), § 661, *et seq.*; also Am. note, p. 626, *et seq.*; *Newmark on Sales*, §§ 346, 347, 349, 350; *Biddle on Chat. War.*, § 167, *et seq.*; *Story on Sales*, §§ 371, 374, 375.

1. The present suit was brought to recover the agreed price of two pianos, sold and delivered in Pennsylvania in 1877. The plaintiff proved the sale and delivery and the agreed price, and then closed. The articles sold were manufactured by the plaintiff, and were sold to the defendant with a knowledge on the part of the plaintiff, that defendant was a dealer in pianos and was purchasing to resell or let to rent. As their name imports, they were manufactured and sold as musical instruments. When a manufacturer contracts to sell an article of his own make or manufacture, and there is no express agreement as to warranty, the law implies a warranty on the part of the seller that it shall be reasonably fit for the purpose to which it is to be applied. *Benj. on Sales* (3rd Am. ed.), § 657; 2 Ross. Lead. Cases, m. p. 358; *Jones v. Bright*, 3 M. & P. 155; *Pacific Guano Co. v. Mullen*, 66 Ala. 582. This implies that the material and workmanship shall be good and

done, the risk of fitness rests on the vendee.¹ But where a manufacturer sells his product to another manufacturer, who buys it to use in another manufactured product, of which it is a raw material, there is an implied warranty of its reasonable fitness as such raw material.² And a manufacturer of an article delivered

that the instrument shall be reasonably adapted to the uses for which it is made and sold. If by reason of deficient material, workmanship or structure, it fall below this standard there is a breach of this implied warranty. *Snow v. Schomacher Manf. Co.*, 69 Ala. 111; s. c., 44 Am. Rep. 509. See also *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108.

But *compare* with this case *Wilson v. Lawrence*, 139 Mass. 318.

1. A paper drying cylinder was made under a contract which specified its shape and dimensions and the material of which it should be made, and further stipulated that "it should be steam tight and capable of sustaining a pressure of thirty pounds to the inch." It proved unfit for the purpose for which it was made and was not "steam tight" at a pressure greater than thirty pounds to the inch. The design or plan upon which the vendee had ordered it constructed seemed to have been defective. The court, by MARSHALL, J., thus laid down the general rule in such cases: "It cannot be admitted that an artificer of any sort is to be considered as undertaking that any machine, instrument, or vessel, which he makes for the use and by the direction of another, and according to specifications furnished by his employer, shall answer the purpose for which it was designed by the projector. It is the projector, the man who designs the instrument and controls its material, shape, and mode of construction, who is responsible for its adaptation in material, shape and mode of construction to the end for which it was intended. The artificer, who actually constructs it, is only bound to do his work in a substantial, workmanlike and skilful manner, and to pursue the specifications in the contract, or the direction of his employer, in regard to material, shape, and mode of construction. If he does this, he is entitled to a reasonable reward for his labor, though the machine, instrument, or vessel, may wholly fail to perform its intended office." *Ricketts v. Lisson*, 9 Dana (Ky.) 358; s. c., 35 Am. Dec. 141.

Plaintiff manufactured for defendant a boiler, the latter specifying the kind

of iron to be used. *Held*, that plaintiff was not liable as upon an implied warranty of the sufficiency of the material designated by defendant, there being no proof that he did not exercise ordinary diligence in selecting the plates used and in constructing the boiler. *Shoenberger v. McEwen*, 15 Ill. App. 496.

The principle that if an article is ordered for a special purpose, and is sold for that purpose, there is an implied warranty of fitness, does not apply to cases where a special thing is ordered, although intended for a special purpose, when the vendor makes or delivers the thing ordered. *Port Carbon Iron Co. v. Groves*, 68 Pa. St. 149; 1 *Parsons Con.* 586.

Where a known, described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, defined and described thing be actually supplied, there is no implied warranty that it shall answer that particular purpose intended by the buyer. *Jones v. Just*, L. R., 3 Q. B. Div. 197; *Chanter v. Hopkins*, 4 M. & W. 399; *Ollivant v. Bayley*, 5 Q. B. 288; *Tilton Safe Co. v. Tisdale*, 48 Vt. 83.

Where one agrees to furnish an article similar to a certain model or design, there is no implied warranty beyond conformity to the model or design. *Cosgrove v. Bennett*, 32 Minn. 371.

Where one selects a specific article the sale does not imply a warranty that it will answer the purpose for which it is bought. So *held* in reference to a fertilizer the ingredients and properties of which were known to the buyer. *Walker v. Pue*, 57 Md. 155. And see generally, *Biddle on Chat. War.*, § 171, 172; *Benjamin on Sales* (Bennett's ed. 1888), § 657; 1 *Smith's Lea. Cas.* (8th Am. ed.), p. 334; 2 *Sutherland on Dam.* 509; *Newmark on Sales*, § 346; *Story on Sales*, § 372.

2. On a sale of leather by the manufacturer to a shoe manufacturer, the sale being made with the specific purpose of furnishing the latter with leather from which to make shoes, there is an implied warranty that the leather sold is reasonably fit for such use, sound and

pursuant to an executory contract of sale impliedly warrants that such article has been made without fraud, and is free from latent defects resulting from the process of manufacture or inherent in the material used.¹

There are cases, however, which seem to limit such liability to the manufacturer's work upon the manufactured article, and do not hold him liable as on an implied warranty against latent defects in the article resulting from the work of others or inherent

suitable. *Downing v. Dearborn*, 77 Me. 457.

So where a dealer ordered iron of a quality known as "strictly neutral" from a manufacturer, who knew it was wanted by the dealer for a customer who required it to be of such quality, there was an implied warranty that the manufacturer would deliver iron of the quality ordered. *Phila. etc. Coal Co. v. Hoffman*, 4 Atl. Rep. (Pa.) 848.

The plaintiffs, manufacturers of steel at Pittsburgh, sold to the defendant, the Morris Axe and Tool Co., ten tons of steel, and it seems to have been held that the name of the defendant company was notice to the plaintiffs of the purpose for which the steel was wanted, and that a warranty was implied that it would be fit and suitable to manufacture tools and axes out of. *Parks v. Morris Axe and Tool Co.*, 4 Lans. (N. Y.) 103.

And see *Freeman v. Clute*, 3 Barb. (N. Y.) 424; *County v. Wade*, 12 U. C. Q. B. 614; *Gilson v. Bingham*, 43 Vt. 410; *Brown v. Murphee*, 31 Miss. 91; *Shepherd v. Pybus*, 3 M. & W. 868. But compare *Hight v. Bacon*, 126 Mass. 10.

1. Story on Sales (Perkins' ed.), § 371, 374, 375, 378, *et seq.*; Benj. on Sales (Bennett's ed. 1888), § 661 *a*, *et seq.*; 2 Schouler's P. P. (2nd ed.), §§ 357, 358, 365; Newmark on Sales, §§ 349, 350; Biddle on Chat. War., § 167, *et seq.*; 1 Smith's Lea. Cas. (8th Am. ed.), note, p. 332, *et seq.*

The plaintiff requested the court to charge the jury that "where produce requiring skill in the manufacture thereof, as in the case of the manufacture of butter and cheese, and especially where the same were subject to latent defects that could not be discovered by the purchaser, was sold by the manufacturer thereof to a dealer for a special purpose, then made known to the seller, and a sound price was paid for the article, the law would imply a warranty that the article was fit for such

purpose." The court declined so to charge the jury, and charged the reverse. In this we think there was error.

The principle seems to be now well settled by the authorities that when the manufacturer of an article sells it for a particular purpose, the purchaser making known to him at the time the purpose for which he buys it, the seller thereby warrants it fit and proper for such purpose, and free from latent defects. The law therefrom implies a warranty of the fitness of the article for the purpose. Certainly so, if the unfitness of the article for the particular purpose is occasioned by any want of skill or care, or is the result of any defect, from any cause, in the process of its manufacture: that is, he warrants it to be as fit and suitable for the purpose indicated, as any good, sound, well-made article of its kind would be. *Pease v. Sabin*, 38 Vt. 432; s. c., 91 Am. Dec. 364. And in the Supreme Court of the United States this doctrine has been clearly recognized. Thus in *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, where the vendee had purchased of the vendor portions of a bridge which the vendor had contracted to build, and at the same time assumed the contract for the completion of the work, it was held that the principle governing in the sale by a manufacturer of his products was applicable, and that there was an implied warranty on the part of the vendor that the work done and the material used by him were free from latent defects. *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108.

In a leading Ohio case where the vendor contracted to manufacture certain steam boilers for the vendees' use in their manufactory, it was held that there was an implied warranty of freedom from latent defects in the boilers, and that they should be skilfully built out of good materials. *Rodgers v. Niles*, 11 Ohio St. 48; s. c., 78 Am. Dec. 290; *Byers v. Chapin*, 28 Ohio St. 306;

in the raw material used.¹ And while it is the general rule that a manufacturer impliedly warrants his goods free from defects, the rule seems to be different, even in executory contracts, where the vendor is not the manufacturer and is ignorant of the

Dayton v. Hooglund, 39 Ohio St. 682; Leopold v. VanKirk, 27 Wis. 152.

In Jones v. Bright, 5 Bing. 533, it was argued by counsel that, notwithstanding the decision in Gray v. Cox, 4 B. & C. 108, it should not be held that there was a liability for latent defects in a manufactured article where there was no proof of a want of care and skill in its manufacture or in the selection of the material used. To this argument BEST, C. J., replied:

"I wish to put the case on a broad principle. If a man sells an article he thereby warrants that it is merchantable; that is, fit for some purpose. If he sells it for a particular purpose he thereby warrants it fit for that purpose. . . . Whether or not an article has been sold for a particular purpose is, indeed, a question of fact; but if sold for such purpose the sale is an undertaking that it is fit. . . . The law then resolves into this, that if a man sells generally, he undertakes that the article sold is fit for *some* purpose; if he sells it for a particular purpose, he undertakes that it shall be fit for that particular purpose." Jones v. Bright, 5 Bing. 533, 540.

In Randall v. Newson, 2 Q. B. Div. 102 C. A., the defendant was held liable for damages to plaintiff's horses from the breaking of a carriage pole made by the defendant for the plaintiff, and in the raw material of which there were latent defects. The defect in the wood was such that it could not have been discovered by the exercise of reasonable care, and the jury expressly absolved the defendant from any negligence. On this state of facts the court of appeals held that the defendant must be taken to have warranted the pole to be reasonably fit for the particular purpose, and that it was immaterial that the fracture was caused by a latent defect in the wood which he could not, by the exercise of any reasonable care or skill, have discovered. In the course of an opinion reviewing all the English cases, BRETT, L. J., said: "If the article or commodity offered or delivered does not in fact answer the description of it in the contract, it does not do so more or less because the defect is patent or

latent, or discoverable. And accordingly there is no suggestion of any such limitation in any of the judgments in cases relating to contracts of purchase and sale." Randall v. Newson, 2 Q. B. Div. 102 C. A.; s. c., in substance in note to Bragg v. Morrill, 24 Am. Rep. 106.

A manufacturer who, after furnishing, in obedience to several orders from a customer, an article—as here steel—of a certain quality, fills an order for the same kind of steel, is liable on an implied warranty, if the steel sent proves inferior; and this is so even though the customer did not test the steel before using. Bagley v. Cleveland Rolling Mill Co., 21 Fed. Rep. 159.

But it is said that where the goods purchased are open to examination "it cannot be generally maintained" "there is any engagement implied in the contract of sale that the seller warrants against latent defects unknown alike to himself and the purchaser." Egan v. Call, 34 Pa. St. 236; s. c., 75 Am. Dec. 653.

Perhaps in this and some other cases the true distinction is overlooked, viz: that when the goods purchased of the manufacturer are to be made or are not susceptible of examination there is an implied warranty, and that there is also an implied warranty, notwithstanding the goods may be subject to examination where the defects are latent and the vendee clearly relies on the skill and judgment of the maker and seller and is himself incompetent to determine by examination the fitness and freedom from defects of the thing purchased. Beals v. Olmstead, 24 Vt. 114; s. c., 58 Am. Dec. 150; Kellogg Bridge Co. v. Hamilton, 110 U. S. 108, 116; French v. Vining, 102 Mass. 132; Jones v. Just, L. R., 3 Q. B. 197; Murray v. Smith, 4 Daly (N. Y.) 277; Hoe v. Sanborn, 21 N. Y. 552; s. c., 78 Am. Dec. 163, and note; Parsons on Con. (5th ed.) 586, and note a; Biddle on Chat. War., §§ 174-182.

1. Defendant sold to plaintiff a shaft for the purpose of driving machinery. Defendant was carrying on the business of a foundry and machine shop, and held himself out as skilled in whatever per-

defects.¹ In England, however, it seems to be held that there is an implied warranty of fitness for the special purpose for which goods are sold,² and of freedom from defects,³ even where the vendor is not the manufacturer but a mere dealer or middleman.⁴ In America, on the other hand, a mere dealer is in many cases held not to be chargeable with an implied warranty of fitness or freedom from defects.⁵ But this seems to be true only in executed sales or sales upon inspection; and where the contract is executory or the facts and circumstances will justify it, a warranty of fitness for a particular purpose is frequently implied

tained to that business. He did not make the shaft but sold it by the pound and then charged an additional sum for turning and fitting it.

The selection of the shaft seems to have been made by the defendant. There were two defects in the shaft, one an imperfect weld and the other a flaw. These defects were alike unknown to the defendant and the plaintiff, and seem not to have been discoverable by any ordinary inspection or examination. There was no express warranty, and plaintiff relied upon an implied warranty of freedom from defects. It was *held* that there was no such warranty, and the court said:

"We think the result of the cases on implied warranty is, that the vendor of an article for a particular purpose does not impliedly warrant it against latent defects unknown to him, and which have been produced through the unskillfulness of some previous manufacturer or owner, without his knowledge or fault, except in those cases where the sale of the article by him is, in and of itself, legally equivalent to a positive affirmation that the article has certain inherent qualities inconsistent with the claimed defects, as is the case in the sale of provisions for domestic use. On this ground, the defendant is not liable on an implied warranty of the shaft for the latent defects, that caused it to break, and were wholly unknown to him, and were not produced through any fault or unskillfulness on his part, but wholly through the fault or unskillfulness of the manufacturer of the shaft from the raw material." *Bragg v. Morrill*, 49 Vt. 45; s. c., 24 Am. Rep. 102. See also *Hoe v. Sanborn*, 21 N. Y. 552; s. c., 78 Am. Dec. 163, 175; *Wilson v. Laurence*, 139 Mass. 318.

1. A sale by one merchant to another of manufactured goods made by a third person will not make the vendor liable

for defects, as a manufacturer would be, on an implied warranty. *Dickinson v. Gay*, 7 Allen (Mass.) 29; s. c., 83 Am. Dec. 656.

In a sale of pig iron by a dealer who was not a manufacturer, it was *held* by the New York court of appeals that there was no implied warranty of freedom from defects, and in the opinion *CHURCH, CH. J.*, says: "The plaintiff was not a manufacturer, but a dealer in 'pig metals,' and was not presumed to know the precise quality of every lot of pigs bought and sold by him, bearing that brand, and hence cannot be held to have warranted that the pigs in question were of any certain quality." *Dounce v. Dow*, 64 N. Y. 411, 415. See also *Bragg v. Morrill*, 49 Vt. 45; s. c., 24 Am. Rep. 102; *Hoe v. Sanborn*, 21 N. Y. 552; s. c., 78 Am. Dec. 163.

2. *Benj. on Sales* (Bennett's ed. 1888), §§ 657, 661, 661a; *Jones v. Just, L. R.*, 3 Q. B. 197; 37 L. J. Q. B. 89; *Brown v. Edgington*, 2 M. & G. 279; *Jones v. Bright*, 2 Bing. 533; *Randall v. Newson*, 2 Q. B. 102 C. A.

3. *Newmark on Sales*, §§ 349, 350; *Benj. on Sales* (Bennett's ed. 1888), §§ 661, 661a; *Randall v. Newson*, 2 Q. B. 102 C. A. And see authorities in preceding note.

4. *Benj. on Sales* (Bennett's ed. 1888), § 661; *Newmark on Sales*, § 349; *Brown v. Edgington*, 2 M. & G. 279; *Laing v. Fridgeon*, 6 Taunt. 108.

5. There is no implied warranty in the sale of guano by one not the manufacturer, that it is reasonably well adapted to the purpose for which it is purchased. *Farrow v. Andrews*, 69 Ala. 96.

But see *Gammell v. Gunby*, 52 Ga. 504, where it is *held* that a merchant selling guano or "superphosphate," to a farmer as a fertilizer, impliedly warrants it to be merchantable and reasonably suited to the use designated.

against mere dealers or middlemen.¹ A manufacturer, who is not otherwise a dealer, impliedly warrants that he will fill orders for articles of the kind he manufactures with goods of his own make.²

And to the same effect see *Sims v. Howell*, 49 Ga. 620.

There must be an express warranty or fraud to hold the vendor of a horse with a secret malady responsible to the purchaser. *Lindsay v. Davis*, 30 Mo. 406.

And such is the rule in the case where a cow proved unfit for breeding purposes although the price paid indicated that it was for such use she was bought. *Scott v. Renick*, 1 B. Mon. (Ky.) 63; s. c., 35 Am. Dec. 177.

And so it was held when sheep were unfit for the purpose for which they had been bought. *Williams v. Slaughter*, 3 Wis. 347.

The rule of *caveat emptor* requires that the vendee shall guard against latent defects by demanding a warranty or bear the loss himself. *Welsh v. Carter*, 1 Wend. (N. Y.) 185; s. c., 19 Am. Dec. 473. But see *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 118, where this common way of stating the rule is criticised by MR. JUSTICE HARLAN, who says: "That he did not exact an express warranty against latent defects not discoverable by inspection, constitutes, under the circumstances, no reason why a warranty may not be implied against such defects as were caused by the mode in which this false work was constructed. In the cases of sales by manufacturers of their own articles for particular purposes, communicated to them at the time, the argument was uniformly pressed that, as the buyer could have required an express warranty, none should be implied. But, plainly, such an argument impeaches the whole doctrine of implied warranty, for there can be no case of a sale of personal property in which the buyer may not, if he chooses, insist on an express warranty against latent defects."

Where there is no express warranty and the vendor sells the thing as sound which is unsound, having a latent defect unknown to him, he is not answerable to the buyer; the law will not raise an implied undertaking to make good the defect.

Westmoreland v. Dixon, 4 Hayw. (Tenn.) 223; s. c., 9 Am. Dec. 763; *Erwin v. Maxwell*, 3 Murph. (N. Car.)

241; s. c., 9 Am. Dec. 602; *Emerson v. Brigham*, 10 Mass. 197; s. c., 6 Am. Dec. 109; *Kimmel v. Lichty*, 3 Yeates (Pa.) 262; *Neilson v. Dickinson*, 1 Desau. (S. Car.) 133.

And in sales by sample, it seems that there is no implied warranty, by a dealer, against latent defects in both sample and bulk, where he sells in good faith, being ignorant of such defect. *Bradford v. Manly*, 13 Mass. 139; s. c., 7 Am. Dec. 122, and note; *Dickinson v. Gray*, 7 Allen (Mass.) 29; *Sands v. Taylor*, 5 Johns. (N. Y.) 404.

But in a recent English case it has been held that in a sale by sample there may be an implied warranty that the goods equal the sample, and that both sample and bulk are so far free from latent defects as to be suitable for a purpose for which the goods were knowingly sold. *Drummond v. Van Ingen*, 24 Rep. 731; 57 L. T. N. S. 1 (1887).

1. *Gammell v. Gunby*, 52 Ga. 504; *Sims v. Howell*, 49 Ga. 620; *Hook v. Stovall*, 21 Ga. 69.

In Georgia, indeed, the Code, § 2651, provides that the vendor of chattels is held to warrant that he knows of no latent defect. *Perdue v. Harwell* (Ga.), 4 S. E. Rep. 877.

But in the case of executory contracts there are numerous authorities for the doctrine stated in the text in the absence of any statutory provisions. *Pacific Iron Wks. v. Newhall*, 34 Conn. 67; *Hamilton v. Ganyard*, 34 Barb. (N. Y.) 204; *Kingsbury v. Taylor*, 29 Me. 508; *McClury v. Kelley*, 21 Iowa 508; *Hanks v. McKee*, 2 Litt. (Ky.) 227; *Murray v. Smith*, 4 Daly (N. Y.) 277; *French v. Vining*, 102 Mass. 132; s. c., 3 Am. Rep. 440; *Rodgers v. Niles*, 11 Ohio St. 48; s. c., 78 Am. Dec. 290; *Babcock v. Trice*, 18 Ill. 420; s. c., 68 Am. Dec. 560; *Doane v. Dunham*, 65 Ill. 516; *Howard v. Hoey*, 23 Wend. (N. Y.) 350; s. c., 35 Am. Dec. 572; *Hargous v. Stone*, 5 N. Y. 86; *Chapin v. Dobson*, 78 N. Y. 74, 82; *Morehouse v. Comstock*, 42 Wis. 626; *Brantley v. Thomas*, 22 Tex. 270; s. c., 73 Am. Dec. 264; *Jones v. George*, 61 Tex. 345; s. c., 48 Am. Rep. 280; 1 Smith's Lea. Cas. (8th Am. ed.), pp. 332, 333.

2. Where goods are purchased of a manufacturer, not otherwise a dealer in

And such is the rule against a mere dealer who undertakes to supply the goods of a particular manufacturer.¹ None of these rules implying a warranty of fitness are thought to apply in cases where an express warranty of quality has been given.² And in nearly all of these implied warranties of fitness the underlying principle is that where a vendee relies upon the skill and judgment of the vendor to make for or deliver to him articles fit for the use to which they are to be put, the law will imply a warranty, upon the part of such vendor, that he has done his duty and made or furnished articles adapted to the purpose for which they were ordered.³

them, in the absence of any custom or usage to the contrary, there is an implied condition that the goods are of the seller's own make, and that it is immaterial whether the goods proposed for delivery are as good as, or even better than, similar goods of the seller's own make." In this case, BRANWELL, L. J., dissented, and BRETT, L. J., on account of this dissent, reviewed the whole question very elaborately, and fully presented the arguments for and against such an implied warranty. In the closing part of his opinion, he said: "It seems to me, after long consideration, to be more consonant with the ordinary simplicity of fair mercantile business, and more in accordance with legal principles, to say that he who holds himself out to be a selling manufacturer of goods, and does not hold himself out as being otherwise a dealer in such goods, does hold out to a proposing purchaser that what he (the manufacturer) offers to do, on an order given to, or contract otherwise made with him, for the supply of goods, such as he professes to deal in, is that he will supply goods manufactured by himself." *Johnson v. Raylton*, L. R., 7 Q. B. Div. 439, C. A.; *Biddle on Chat. War.*, § 140; 2 *Schouler's P. P.* (2nd ed.), § 380; *Benj. on Sales* (Bennett's ed. 1888), § 609a.

And see *Chicago Packing etc. Co. v. Tilton*, 87 Ill. 547, where it was held that where one sells goods under circumstances to justify a buyer in believing them to be of the vendor's manufacture, a rule of a board of trade will have no application to prevent a warranty of their kind and quality as implied by law.

In two Scotch cases there seems to be some clashing of opinion over the doctrine stated in the text, and in *Johnson v. Raylton*, *supra*; but the better opinion in the Scotch courts seems in

full accord with the text. *West Stockton Iron Co. v. Neilson*, 17 Scotch L. R. 719; *Johnson v. Nicoll*, 18 Scotch L. R. 268. And see *Biddle Chat. War.* §§ 138, 139, whence these citations are derived.

1. "The buyer in such a case is assumed to have contracted in reliance upon the reputation of the particular firm with whom he deals," says Mr. Benjamin, speaking of the case where goods are ordered of a manufacturer, not otherwise a dealer, when it is implied that he will deliver goods of his own manufacture. *Benj. on Sales* (Bennett's ed. 1888), § 59, p. 59.

And the same principle seems equally applicable where there is an agreement by a dealer to supply the goods of a particular manufacturer. See *Johnson v. Raylton*, 7 Q. B. D. 438, C. A.

Indeed, in such a case the agreement is clearly a condition precedent that must be complied with by the vendor in order that the contract may become executed. See *ante*, section 7, CONDITIONS PRECEDENT.

1. *Benj. on Sales* (Bennett's ed. 1888), § 666; *Parkinson v. Lee*, 2 East 314; *Dickson v. Zizania*, 10 C. B. 602; 20 L. J., C. P. 72. But see *Randall v. Newson*, 2 Q. B. D. 102, C. A.; s. c. (in substance), note, 24 Am. Rep. 106.

An express warranty of quality excludes an implied warranty that the article is reasonably fit for its intended purpose. *International etc. Co. v. Smith*, 17 Mo. App. 264.

3. *Biddle on Chat. War.*, § 167, *et seq.*; 2 *Schouler's P. P.* (2nd ed.), §§ 356, 357, 358; *Benj. on Sales* (Bennett's ed. 1888), §§ 661, 661 a; *Story on Sales* (Perkins' ed.), §§ 371-374.

Many cases have already been cited to this division of the text that support the special statement of the rule here made; but see also the following, viz: *Jones v. Just*, L. R., 3 Q. B. 197; *Brown*

37. Food, Provisions, etc.—Implied Warranty in Sale of.—In England it seems that at common law there is no implied warranty of quality, fitness or wholesomeness in the sale of food or provisions, even when sold by a dealer for immediate domestic use, except in cases where such a warranty would be implied from the facts and circumstances of the sale independent of the fact that the thing sold was an article of food for domestic consumption.¹ In other

v. Edgington, 2 M. & G. 279; *Randall v. Newson*, L. R., 2 Q. B. D. 102, C. A.; s. c., note, 24 Am. Rep. 106; *Beals v. Olmstead*, 24 Vt. 114; s. c., 58 Am. Dec. 150; *Bigge v. Parkinson*, 7 H. & N. 955; *French v. Vining*, 102 Mass. 132; *Rodgers v. Niles*, 11 Ohio St. 48; s. c., 78 Am. Dec. 290; *Kenner v. Harding*, 85 Ill. 264; s. c., 28 Am. Rep. 615; *McClamrock v. Flint*, 101 Ind. 278; *Thompson v. Tate*, 1 Murph. (N. Car.) 97; s. c., 3 Am. Dec. 678.

1. Mr. Benjamin, after citing and commenting upon 3 Bl. Com. 166; *Pasley v. Freeman*, 3 T. R. 51; s. c., 2 Sm. L. C. 66, ed. 1879; *Chitty on Contracts*, 419, ed. 1881; *Emmerton v. Matthews*, 7 H. & N. 586; 31 L. J. Ex. 139, and *Burnby v. Bollett*, 16 M. & W. 644, says: "It is submitted that it results clearly from these authorities that the responsibility of a victualler, vintner, brewer, butcher, or cook, for selling unwholesome food, does not arise out of any contract or implied warranty, but is a responsibility imposed by statute, that they shall make good any *damage caused* by their sale of unwholesome food. *Emmerton v. Matthews*, therefore, when applying the maxim of *caveat emptor* to the sale of an article of food, even when the vendor is a general dealer, if the buyer has bought on his own judgment, without express warranty, does not seem to be at all in contradiction with the earlier authorities, as explained in *Burnby v. Bollett*, by PARKE, B. And the correctness of the decision has since been confirmed by the common pleas division." *Smith v. Baker*, 40 L. T. N. S. 261; *Benj. on Sales* (Bennett's ed. 1888), § 672.

And this doctrine is directly held in the leading case of *Burnby v. Bollett*. In that case a butcher sold to a farmer, who intended to use it for domestic consumption, the carcass of a dead pig; subsequently the farmer sold the carcass to a third person who had tried to purchase it at the butcher's stall and been referred to the farmer as the owner, the pig not having been taken away

from the stall. The butcher the farmer and the last purchaser were alike ignorant of any unsoundness or secret defects in the carcass of the pig and there was no express warranty of quality. It turned out that the pig was measly and its flesh was putrid and unfit for food. It was insisted that there was an implied warranty in the sale of food for domestic consumption that it was sound and fit for food; but BARON PARKE, delivering the opinion of the court, held otherwise, saying:

"On the part of the plaintiff the argument was that the sale of victuals to be used for man's consumption differed from the sale of other commodities, and that the vendor of such, without fraud, would be liable to the vendee on an implied warranty. This position is apparently laid down in *Keilway*, 91, but the authorities there referred to in the *Year Books* 9, Hen. 6, 53 B., and 11 Edw. 4, 6 B., and others when well considered, lead rather to the conclusion that there is no difference between the sale of food for man and other articles than this, viz, that victualler and common dealers in victuals are not merely in the situation of common dealers in other commodities; nor are they liable under the same circumstances as they are, as if an order be sent to them to be executed, they are to be presumed to undertake the supply of food and wholesome meat; and they are likewise punishable as a common nuisance for selling corrupt meat by virtue of an ancient *statute*, and this certainly if they know the fact, and probably if they do not. Such persons are, therefore, civilly responsible to those customers to whom they sell such victuals, for any special particular injury by the breach of the law which is thereby committed . . . The defendant in this case was not dealing in the way of a common trader, and was not punishable by indictment for what he did . . . He therefore falls within the reason of the former part of Lord Hale's distinction . . .

words, the general principles of the law relating to implied warranties govern, and are applicable in sales of food and provisions as in sales of other goods and chattels, but there are no special implied warranties in the sale of food that do not exist with reference to other articles.¹ But in England a victualler, vintner, brewer, butcher or cook was liable under old statutes for any damage caused by their sale of unwholesome food, and later and more comprehensive statutes apply to all sellers of food.² Some cases in the United States are in accord with the English common law rule as stated above.³ But generally speaking, in the United States the law is, that in all sales of food or provisions, for immedi-

and he is not liable." *Burnby v. Bollett*, 16 M. & W. 644.

In *Smith v. Baker* (1878), it was also held that meat sold in a public market by a dealer to a domestic consumer who bought upon inspection, was not impliedly warranted sound and fit for food so as to guard against secret defects unknown to the seller. *Smith v. Baker*, 40 L. T. R. N. S. 261.

That such is the law in England is also recognized by leading text writers besides Mr. Benjamin. See 1 Whart. on Con. (ed. 1882), 329; 2 Schouler's P. P. (2nd ed.), § 348; Biddle Chat. War, § 191; Newmark on Sales, § 348. But see 3 Bl. Com. *166; Chitty on Con. (ed. 1881), p. 419; Mr. Freeman's note to *Hunter v. State*, 73 Am. Dec. 164, 167.

And compare with the cases cited above the following: *Bigge v. Parkinson*, 7 H. & N. 955; *Beer v. Walker*, 46 L. J., C. P. 677.

1. 2 Schouler's P. P. (2nd ed.), § 348; *Bigge v. Parkinson*, 7 H. & N. 955, citing *Chitty* on Con. (ed. 1881), p. 417; *Beer v. Walker*, 46 L. J., C. P. 677; Biddle on Chat. War., § 191; *Emmerton v. Matthews*, 7 H. & N. 586; *Smith v. Baker*, 40 L. T., N. S. 261; *Benj. on Sales* (Bennett's ed. 1888), §§ 670-672; *Goad v. Johnson*, 6 Heisk. (Tenn.) 340, 347. But compare *Cooley on Torts* (2nd ed.), 479-482; *Freeman's note* to *Hunter v. State*, 73 Am. Dec. 167.

2. *Benj. on Sales* (Bennett's ed. 1888), §§ 671-672 a; 7 & 8 Vict., ch. 24; 38 & 39 Vict., ch. 63 (Sale of Food and Drugs act 1875); amended 42 & 43 Vict., ch. 30. And see the following cases decided under 38 & 39 Vict., ch. 63, as cited by Mr. Benjamin: *Barnes v. Chipp*, 3 Ex. D. 176; *Rook v. Hapley*, 3 Ex. D. 209; *Francis v. Maas*, 2 Q. B. D. 341; *Sandys v. Small*, 3 Q. B. D. 449; *Hoyle v. Hitchman*, 4 Q. B. D.

233; *Webb v. Knight*, 2 Q. B. D. 530; 26 W. R. 14; *Horder v. Scott*, 42 L. T., N. S. 660; 5 Q. B. D. 552; *Rough v. Hall*, 6 Q. B. D. 16.

3. The case of selling unwholesome provisions for consumption, therefore, furnishes no exception to the rule that where there is no deceit or fraud on the part of the seller, and where the buyer inspects and buys upon his own judgment, he buys subject to the rule of *caveat emptor*, even if there was a latent defect in the chattel sold, equally unknown to the seller and buyer, and hidden from detection by either. *Goad v. Johnson*, 6 Heisk. (Tenn.) 341, 347; *Lukens v. Freund*, 27 Kan. 664; s. c., 41 Am. Rep. 429, opinion by BREWER, J., *Giroux v. Stedman*, 145 Mass. 439; *Howard v. Emerson*, 110 Mass. 320; s. c., 14 Am. Rep. 608; *Emerson v. Brigham*, 10 Mass. 197; s. c., 6 Am. Dec. 109.

Perhaps none of the foregoing cases are quite in line with the English common law doctrine, but all of them question whether there is any implied warranty in the sale of provisions by a dealer to a consumer when such a warranty would not have been implied in the sale of other goods and chattels.

The learned editor of Benjamin on Sales says on this subject: "It is at least doubtful whether there be any such warranty, even though provisions are sold for immediate consumption by the buyer, unless when he trusts to the judgment or selection of the seller. If A selects of his butcher a *particular piece* of beef, and orders that identical piece to be sent, it is not easy to see, in the absence of any custom or usage to make it good, why there should be any implied warranty as to its quality any more than in any other sale. The buyer takes his risk, the same as in buying any other thing." Bennett's note to *Benj. on Sales* (ed. 1888), p.

ate domestic use, by one who exposes them for sale or is a dealer, there is an implied warranty of fitness and wholesomeness for consumption.¹ And this doctrine has been applied where food, known by the seller to be possibly unfit, was sold to the owner

630. And with this view Mr. Schouler and Mr. Biddle seem in accord. 2 Schouler's P. P. (2nd ed.), § 348; Biddle Chat. War., § 204.

1. *Van Bracklin v. Fonda*, 12 Johns. (N. Y.) 468; s. c., 7 Am. Dec. 339. This case clearly rests on the ground that the seller was guilty of fraud and deceit, he having without disclosure sold meat from a diseased cow, killed to prevent her from dying a natural death. *Moses v. Mead*, 1 Den. (N. Y.) 378; s. c., 43 Am. Dec. 676; affirmed 5 Den. (N. Y.) 617. In this case the distinction was taken between provisions sold for immediate domestic consumption and sales of provisions as merchandise, and it was inferentially held that on a sale of provisions by a dealer for immediate domestic consumption a warranty of wholesomeness would be implied on grounds of public policy. It is upon this ground that Mr. Story puts the rule. *Story on Sales* (Perkins' ed.), § 373.

In *Burch v. Spencer*, 15 Hun (N. Y.) 504, it was held that one selling the carcass of a hog at the highest market price as pork to be used for food, impliedly warranted that the hog was not a boar, which is unfit for food, the buyer being ignorant on the subject.

So, where a diseased heifer was sold, the vendor knowing that she was diseased, and also that the purchaser intended to kill her for food the next day, but the purchaser being ignorant of her disease, it was held that there was an implied warranty of soundness. *Divine v. McCormick*, 50 Barb. (N. Y.) 116.

In *Sinclair v. Hathaway*, 57 Mich. 60; s. c., 58 Am. Rep. 327, it was held that a baker selling bread to a peddler, who acted as a middleman between the baker and his customers, impliedly warranted the bread to be wholesome and fit for food. This decision was rested on the principle that the sale was for direct consumption, the peddler being in effect a mere go-between for the baker and his customers, as he was only required to pay for the bread he sold, receiving a discount from the retail price. This case might also have been rested on the presumption that the

baker knew the bread was unfit, and was liable on an implied warranty, being the maker.

And in an earlier Michigan case, it was held, "that there is an implied warranty of wholesomeness in the sale of provisions for direct consumption." *Hoover v. Peters*, 18 Mich. 51. In *Ryder v. Neitze*, 21 Minn. 70, it was said that a warranty that provisions are wholesome and fit for consumption, if implied at all, is implied only when they are sold for consumption, or immediate domestic use, by the vendee.

And the same interrogative way of stating the supposed rule is found in *Hyland v. Sherman*, 2 E. D. Smith (N. Y.) 234.

Where butter and potatoes were sold for table use, an inferior court in Pennsylvania held that there was an implied warranty that they were fit for such use, and wholesome. *McNaughton v. Joy*, 1 W. N. C. (Pa.) 470.

In a leading New York case there is a *dictum* that recognizes the existence of an implied warranty of wholesomeness, in the sale of provisions for immediate domestic use thus: "Although the doctrine of Blackstone [3 Com. 164, 165] cannot be supported in its whole extent, I am not disposed to deny that, on a sale of provisions for immediate consumption, the vendor may be held responsible, in some form, for the sound and wholesome condition of the articles which he sells. It is not, perhaps, too much to presume that butchers, grocers and others who furnish by retail the usual supplies for the families of customers, are, from the nature of their employment, acquainted with the quality of the articles in which they deal. In *Van Bracklin v. Fonda*, 12 Johns. (N. Y.) 468; s. c., 7 Am. Dec. 339, it was said that 'in the sale of provisions for domestic use, the vendor is bound to know that they are sound and wholesome, at his peril. This is a principle, not only salutary, but necessary to the preservation of health and life.' I find no difficulty in subscribing to that doctrine." *Moses v. Mead*, 1 Den. (N. Y.) 378; s. c., 43 Am. Dec. 676.

And in a Kansas case, *Brewer, J.*,

in an *obiter dictum*, says: "Where food is sold by a dealer for domestic consumption, there is an implied warranty that it is sound and wholesome." *Lukens v. Freund*, 27 Kan. 664; s. c., 41 Am. Rep. 429, 430 and 432.

So in a Maryland case there is a *dictum* to the effect that: In contracts for provisions it is always implied that they are wholesome. *Osgood v. Lewis*, 2 Har. & G. (Md.) 495; s. c., 18 Am. Dec. 317, 320.

And for other similar expressions of opinion, see *Wright v. Hart*, 17 Wend. (N. Y.) 267; s. c. affirmed, 18 Wend. (N. Y.) 449; *Hoe v. Sanborn*, 21 N. Y. 552; s. c., 78 Am. Dec. 163, 170; *Jones v. Murray*, 3 T. B. Mon. (Ky.) 83; *Moore v. McKinlay*, 5 Cal. 471; *Getty v. Rountree*, 2 Chand. (Wis.) 28; 2 Pin. (Wis.) 379; s. c., 54 Am. Dec. 138; *Giroux v. Stedman*, 145 Mass. 439; and see Mr. Freeman's note to *Hunter v. State*, 73 Am. Dec. 165, *et seq.*; and note to *Reynolds v. Palmer*, 21 Fed. Rep. 453.

Upon a view of the preceding cases—and we believe there are no others that even approximately support the rule—it will be seen that it is more than questionable whether, in the United States, there is an absolute implied warranty upon the sale of provisions, even for immediate domestic consumption, of their wholesomeness and fitness for food. Doubtless, in such cases, the tendency of the courts, upon grounds of public policy, is to always imply such a warranty when the facts will justify it, but further than this we do not think the cases have gone.

Compare Biddle on Chat. War., § 204; 2 *Schouler's P. P.* (2nd ed.), § 348; *Newmark on Sales*, § 348; *Story on Sales*, § 373.

Perhaps the true rule on the subject—as between the English and American extremes—has been reached in Massachusetts. There, in the early case of *Emerson v. Brigham*, it was said: Justice Blackstone, 3 Bl. Com. 164, 165, has classed the cases of deceit and breaches of express warranties in contracts for sales, under the head of implied contracts. He says it is constantly understood that the seller undertakes that the commodity he sells is his own; and in contracts for provisions, it is always implied that they are wholesome; and in a sale with a warranty, the law annexes a tacit contract that, if the article be not as warranted, compensation shall be made to the

buyer; and if the vendor knows his goods to be unsound, and hath used any art to disguise them, or if they be in any shape different from what he represents them to be to the buyer, this artifice shall be equivalent to an express warranty, and the vendor is answerable for their goodness. It is obvious that in this very general classification, the details and examples are imperfectly introduced, and with some inaccuracy. It is not implied in every sale of provisions that they are wholesome, any more than it is in sales of other articles, where proof of a distinct affirmation seems, in Justice Blackstone's opinion, to be requisite. The contrary may be and often is understood between the parties; and it is only when the false representation to be proved in the one case may be presumed or taken to be proved in the other, that the rule of law applies, and the remedy, as in a case of deceit, is allowed. An artifice must be proved to entitle the suffering to the remedy, equivalent to a remedy upon an express warranty, as well in the case of provisions as in any other case. The difference is that in the case of provisions the artifice is proved when a victualler sells meat as fresh to his customers at a sound price, which at the time was stale and defective, or unwholesome from the state in which the animal died. For, in the nature of the bargain, the very offer to sell is a representation or affirmation of the soundness of the article, when nothing to the contrary is expressly stated; and his knowledge of the falsehood in this representation is also to be presumed from the nature and duties of his calling and trade.

But cases may be supposed where this presumption being repelled by contrary evidence, the seller would not be liable; as where a different representation is made, and this is proved directly, or is necessarily to be presumed from the nature of the article, the state of the market or other circumstances. *Indeed, there is nothing to be inferred in a sale of provisions which may not be inferred to a like purpose in other cases, where the calling or profession of the seller, the soundness of the price, and the nature of the article sold have been made the grounds of decision.* *Emerson v. Brigham*, 10 Mass. 197; s. c., 6 Am. Dec. 109.

This statement of the true doctrine by SEWALL, J., in *Emerson v. Brig-*

of domestic animals for consumption by them; but its application is doubted when the vendor is ignorant of the unfitness and free from fault.¹ The great weight of authority is that there is no

ham, has the high sanction of CHIEF JUSTICE SHAW, in a later case, thus: "It is supposed that a different rule applies to the case of all provisions from that applicable to other merchandise. This matter is well explained by MR. JUSTICE SEWALL, in *Emerson v. Brigham*, 10 Mass. 197. In a case of provisions it will be readily presumed that the vendor intended to represent them as sound and wholesome, because the very offer of articles of food for sale implies this, and it may readily be presumed that a common vendor of articles of food, from the nature of his calling, knows whether they are unwholesome and unsound or not. From the fact of their being bad, therefore, a false and fraudulent representation may readily be presumed." *Winsor v. Lombard*, 18 Pick. (Mass.) 61.

So in a much later case than either of the foregoing, the true principle is thus stated: "It may perhaps be more accurate to say, that, independently of any express and formal stipulation, the relation of the buyer to the seller may be of such a character as to impose a duty upon the seller, differing very little from a warranty. The circumstances attending the sale may be equivalent to a distinct affirmation on his part as to the quality of the thing sold. A grocer, for instance, who sells at retail may be presumed to have some general notion of the uses which his customers will probably make of the articles which they buy of him. If they purchase flour or sugar or other articles of daily domestic use for their families, or grain or meal for their cattle, the act of selling to them under such circumstances is equivalent to an affirmation that the things sold are at least wholesome, and reasonably fit for use; and proof that he knew, at the time of the sale, that they were not wholesome and reasonably fit for use, would be enough to sustain an action against him for deceit, if he had not disclosed the true state of facts. The buyer has a right to suppose that the thing which he buys, under such circumstances, is what it appears to be, and such purchases are usually made with a reliance upon the supposed skill or actual knowledge of the vendor." *French v. Vining*, 102 Mass. 132, 136; s. c., 3 Am. Rep. 440.

And the same principles appear in two yet more recent decisions in the same State. *Howard v. Emerson*, 110 Mass. 320; s. c., 14 Am. Rep. 608; *Giroux v. Stedman*, 145 Mass. 439.

1. Thus, where white lead had been spilled on hay and the owner of the hay sold it without warning to one who purchased it to feed to his cow, it was *held* that the vendor was liable in damages for the poisoning of the cow by the white lead on the hay, and this notwithstanding the fact that the vendor, before selling the hay, had tried to free it from the white lead and believed he had succeeded.

In the case at bar, the plaintiff bought the hay in small quantities, and the defendant must be considered as knowing generally the kind of use to which it was to be applied. The act of sale under such circumstances was equivalent to an express assurance that the hay was suitable for such use. If he knew that the hay had a defect about it, or had met with an accident that rendered it not only unsuitable for that use, but dangerous or poisonous, it would plainly be a violation of good faith, and an illegal act, to sell it to the plaintiff without disclosing its condition. Silence in such a case would be deceit. *Langridge v. Levy*, 2 M. & W. 519; *Thomas v. Winchester*, 6 N. Y. 397; *McDonald v. Snelling*, 14 Allen (Mass.) 290, 295, and cases cited; *French v. Vining*, 102 Mass. 132, 133; s. c., 3 Am. Rep. 440.

On the other hand, in *Lukens v. Freund*, 27 Kan. 664, a farmer bought of a miller a sack of bran for his cows. Before it was removed from the mill two copper clasps accidentally fell into it, without negligence on the miller's part, and one of the cows swallowed them and was killed thereby. The bran was part of a quantity on hand open to inspection. There was no express warranty. *Held*, that the buyer had no remedy against the miller. This decision recognized the principle that, on grounds of public policy for the protection of human health and life, there may be an implied warranty in the sale of provisions for immediate domestic use, but refused to extend the rule to food sold for consumption by domestic animals. *Lukens v. Freund*, 27 Kan.

implied warranty of fitness, soundness or wholesomeness arising simply from the sale of food, or provisions, as mere merchandise, to a dealer or middleman who buys to sell again.¹ And such seems to be the rule even in sales for immediate domestic use where the vendor is not a dealer and does not expose the food or provisions for sale generally.² But these two latter statements are subject to the limitation that exactly such warranties of quality or fitness will be implied in such cases as would arise in the sale of other merchandise or chattels.³ Indeed the principle of this limitation seems likely to be recognized as the only true rule even in the sale of provisions by a dealer for immediate domestic use; except that the courts will scrutinize the conduct of the vendor more closely in such cases than in sales of ordinary merchandise; be more loth to apply the maxim *caveat emptor*, and more willing to charge the vendor with notice of defects and constructive, if not actual, fraud. This they may well do upon the highest principles of public policy.⁴ Damages may of course

664; s. c., 41 Am. Rep. 429. But see Cooley on Torts (2nd ed.), *480, 481, and note to *Hunter v. State*, 73 Am. Dec. 165, 168.

1. Thus, where a live cow was sold by a farmer to a butcher, it was held that there was no implied warranty of her soundness or fitness for food, even though the farmer knew she was bought for the purpose of being slaughtered immediately and sold for beef. *Howard v. Emerson*, 110 Mass. 320; s. c., 14 Am. Rep. 608.

So when a farmer kills and sells hogs to be used as food there is no implied warranty of their fitness and wholesomeness unless there is fraud or deceit. *Giroux v. Stedman*, 145 Mass. 439.

And the same is true of a sale made by a cattle drover to a butcher. *Goldrich v. Ryan*, 3 E. D. Smith (N. Y.) 324.

Where a commission merchant sold spoiled and unmerchantable veal to a retail dealer it was held that there was no implied warranty against latent defects that made the veal unfit for food, the buyer having had a chance to inspect before buying. *Rinschler v. Jelliffe*, 9 Daly (N. Y.) 469.

When provisions are bought to be sold again there is no implied warranty of soundness or wholesomeness. *Moses v. Mead*, 1 Den. (N. Y.) 378; s. c., 43 Am. Dec. 676; *Hyland v. Sherman*, 2 E. D. Smith (N. Y.) 234.

And see generally, in support of the rule in the text, *Winsor v. Lombard*, 18 Pick. (Mass.) 61; *Humphreys v. Comline*, 8 Blackf. (Ind.) 516; *Ryder v.*

Neitze, 21 Minn. 70; *Jones v. Murray*, 3 T. B. Mon. (Ky.) 83; *Rocchi v. Schwabacher*, 33 La. Ann. 1364; *Wright v. Hart*, 17 Wind. (N. Y.) 267; s. c., affirmed, 18 Wend. (N. Y.) 449.

2. *Giroux v. Stedman*, 145 Mass. 439. But see *Hoover v. Peters*, 18 Mich. 51.

3. Thus, on a sale of hogs, known by the seller to be intended for the market, and with no opportunity for inspection by the vendee, there is an implied warranty of fitness. *Best v. Flint*, 58 Vt. 543; s. c., 56 Am. Rep. 570. But compare *Ryan v. Ulmer*, 108 Pa. St. 332; s. c., 56 Am. Rep. 210.

And see in support of the text, *Emerson v. Brigham*, 10 Mass. 197; s. c., 6 Am. Dec. 109; *Winsor v. Lombard*, 18 Pick. (Mass.) 61; *Moses v. Mead*, 1 Den. (N. Y.) 378; s. c., 43 Am. Dec. 676; *Humphreys v. Comline*, 8 Blackf. (Ind.) 516; *Bigge v. Parkinson*, 7 H. & N. 955; *Beer v. Walker*, 46 L. J., C. P. 677; *Burch v. Spencer*, 15 Hun (N. Y.) 504; *Cooley on Torts* (2nd ed.) *480; 2 *Schouler's P. P.* (2nd ed.), § 348; *ante*, section 1, 5, 13, 28.

4. As we have seen, such is the English rule, *ante*, section 37; *Benj. on Sales* (Bennett's ed. 1888), § 672; *Burnby v. Bollett*, 16 M. & W. 644; *Biddle on Chat. War.*, § 187.

And the late American text writers regard the doctrine of the text as the real rule in the United States. *Biddle on Chat. War.*, § 204; 2 *Schouler's P. P.* (2nd ed.), § 348; *Bennett's note to Benj. on Sales* (ed. 1888), p. 630.

There are but two cases that directly

be recovered for injuries resulting from the use of unwholesome provisions sold or furnished by a dealer, or by any other person with knowledge of their character,¹ and in such cases knowledge on the part of the dealer is often presumed by the law.² There

hold that a warranty of wholesomeness is implied in *all* sales of provisions for food. *Hoover v. Peters*, 18 Mich. 51; *McNaughton v. Joy*, 1 W. N. C. (Pa.) 470. And the latter of these two is entitled to but little weight, being from an inferior court. On the other hand, the rule stated in the text, by which the usual doctrines of implied warranties are strictly applied in cases of the sales of provisions, seems in full accord with the best cases.

It is said that in the sale of provisions for domestic use a warranty is implied that they are sound and wholesome, on the ground that such a warranty is necessary for the preservation of health and life. But it has been denied that anything can be inferred from the sale of provisions, which may not be inferred to a like purpose in other cases. *Wright v. Hart*, 18 Wend. (N. Y.) 464; Senator Tracy's opinion; *Emerson v. Brigham*, 10 Mass. 197; *Winsor v. Lombard*, 18 Pick. (Mass.) 57. In the last two cases the warranty was put upon the ground of the deceit; and it is said the only difference is, that in the case of provisions the fraud is more obvious, as when a butcher sells stale and unwholesome meat to his customers as fresh and sound, the artifice is proved by the fact itself, as his knowledge of the falsehood is to be presumed from the nature and duties of his trade or calling. *Humphreys v. Comline*, 8 Blackf. (Ind.) 516, 521.

So the law readily raises a presumption where food has been sold by a dealer that he knew whether it was sound and wholesome and warranted it to be sound.

If it is bad a false and fraudulent representation may be presumed from the fact that it was exposed for sale. *Winsor v. Lombard*, 18 Pick. (Mass.) 61; *Emerson v. Brigham*, 10 Mass. 197; s. c., 6 Am. Dec. 109.

Indeed, there is nothing to be inferred in a sale of provisions, which may not be inferred to a like purpose in other cases, where the calling or profession of the seller, the soundness of the price and the nature of the article sold have been made the grounds of decision. *Emerson v. Brigham*, 10 Mass. 197; s. c., 6 Am. Dec. 109, 112.

And see *Goad v. Johnson*, 6 Heisk. (Tenn.) 340.

Upon what ground is an implied warranty rested in the case of a sale of provisions, which does not exist in the case of a sale of other articles? Obviously it is not upon any property grounds, or because thereby the estate of either party is affected; but for reasons of public policy, for the preservation of life and health, the law deems it wise that he who engages in the business of selling provisions for domestic use should himself examine and know their fitness for such use, and be liable for a lack of such knowledge. One may not place poison where it is likely to be taken by one ignorant of its qualities. Regard for human life compels this. No more may he sell food unfit to be eaten to a man who he knows is buying it to eat. The same reason controls, to wit, regard for life and health. But this, it will be remembered, is an exception to the general rule of the common law, and the exception should not be extended beyond the reach of the reasons upon which it is based.

If the preservation of human life and health be, as we think it is, the foundation of this exception, then it should not be extended to cases in which human life and health are in no wise endangered. *Lukens v. Freijund*, 27 Kan. 664; s. c., 41 Am. Rep. 429, 432. And see *Story on Sales* (Perkins' ed.), § 373; *Cooley on Torts* (2nd ed.), 561. It is also submitted that the numerous cases cited by the learned editor of the *American Decisions* to *Hunter v. State*, 73 Am. Dec. 165, scarcely support the rules on this subject as stated in that note, but on the contrary, when examined, they will be found in line with the text. See also, in support of the text, the numerous cases quoted and cited *supra*, on this general subject-matter.

1. *French v. Vining*, 102 Mass. 132; s. c., 3 Am. Rep. 440; *Emerson v. Brigham*, 10 Mass. 197; s. c., 6 Am. Dec. 109; *Van Bracklin v. Fonda*, 12 Johns. (N. Y.) 468; s. c., 7 Am. Dec. 339; *Moses v. Mead*, 1 Den. (N. Y.) 378; s. c., 43 Am. Dec. 676.

2. See *Cooley on Torts* (2nd ed.),

is also, in many States, and under various statutes and decisions, a criminal liability for exposing to sale, or selling unsound and unwholesome provisions, but the discussion of this subject comes more properly in the domain of the criminal law.¹ So there is a civil liability for the violation of statutory provisions by the sale of unsound or unwholesome food and provisions, but while such cases have been frequently treated and rested upon the principle of implied warranties, they are, in fact, scarcely analogous.²

38. Drugs—Implied Warranty in Sale of.—In the sale of drugs, medicines or chemicals by a druggist the rule *caveat emptor* has no application if the purchaser is not an expert and buys in reliance upon the knowledge and skill of the druggist. In such case there is an implied warranty that the thing sold is what it purports to be, fit for the uses to which it is usually put or for which the druggist has recommended it, and not a different or more dangerous drug than the one called for by the purchaser. For a breach of any or all of these implied warranties a druggist is liable in damages; and if he sells as a harmless drug a dangerous and poisonous one, he is liable for any injuries that follow, even though such sale was to a dealer who sold again to the person injured, relying, in making such sale, on the knowledge, skill and representations of the original seller.³

561-564, and cases cited. Also generally the cases referred to and quoted *supra*, on this general subject.

1. See cases collected in note to *State v. Hunter*, 73 Am. Dec. 172-175.

2. *Burnby v. Bollett*, 16 M. & W. 644; *Goad v. Johnson*, 6 Heisk. (Tenn.) 346; *Hunter v. State*, 1 Head (Tenn.) 160; s. c., 73 Am. Dec. 164, and notes 171, 172.

3. It is claimed that in the sale of chattels, where the purchaser has an opportunity to examine before the purchase is made, the common law rule of *caveat emptor* applies without exception. As a general rule, the doctrine does apply in the purchase of chattels when an opportunity for examination by the purchaser is shown. But where, from the nature of the article, or the peculiar character of the business in which the thing is being sold, it is shown that an examination would not avail the purchaser anything, it might constitute an exception to the general rule, dependent upon the circumstances of each particular case.

The appellee was engaged in the business of a druggist, holding himself out to the public as one having the peculiar learning and skill necessary to a safe and proper conducting of the busi-

ness. The general customer is not supposed to be skilled in the matter, and as represented in this case, does not know one drug from another; but in the purchase of drugs, the customer must rely upon the druggist to furnish the article called for; and in this particular business, the customer who has not the experience and learning necessary to a proper vending of drugs would not be held to the rule that he must examine for himself. It would be but idle mockery for the customer to make the examination, when it would avail him nothing.

On the contrary, the business is such that in the very nature of things the druggist must be held to warrant that he will deliver the drug called for and purchased by the customer. If as claimed, the appellee delivered to appellant some harmless or useless drug instead of the *paris green* asked for by appellant, he would be held liable for the damages resulting from the act as a natural or legal consequence. *Jones v. George*, 56 Tex. 149; s. c., 42 Am. Rep. 689.

"A druggist being applied to for '*paris green*,' knowing that it is required for killing cotton worms, and delivering an inferior article as '*paris green*,' although in good faith and without ex-

39. Identity of Quality, Kind or Species.—The distinction between an implied warranty and a condition precedent of kind or species has already been treated.¹ But in many cases, where a condition precedent has not been complied with, the vendee, by receiving and accepting a substantial part of that which was to be performed in his favor, changes the condition precedent into an implied warranty of kind or quality, for a breach of which he may maintain an action.² But a condition precedent as to kind or species cannot thus be changed into an implied warranty that the thing delivered and received shall be of any certain quality of such kind or species.³ Yet the buyer may reject goods not of the quality specified, as failing to comply with a condition precedent, or may maintain his action for a breach of an implied warranty, if after delivery they prove not to be of the quality bargained for.⁴

press warranty, is liable in damages for the failure of the crop caused thereby, and the measure of damages is the value of the crop just before its destruction, with the cost of the compound and its preparation and application, and interest on the moneys thus expended." *Jones v. George* (second appeal), 61 Tex. 345; s. c., 48 Am. Rep. 280.

And in a famous New York case a manufacturing druggist was held liable, on the ground of negligence, for the poisoning of the plaintiff by labelling and selling as extract of dandelion a jar of extract of belladonna. In this case the manufacturing druggist sold to a jobber, who in turn sold to a retail druggist, of whom the plaintiff bought. *Thomas v. Winchester*, 6 N. Y. 397; s. c., 57 Am. Dec. 455.

1. See CONDITIONS PRECEDENT NOT IMPLIED WARRANTIES, *ante*, section 7 of text.

2. *Benj. on Sales* (Bennett's ed. 1888), § 564, citing *Ellen v. Topp*, 6 Ex. 424; *Behn v. Burness*, 3 B. & S. 751; 32 L. J., Q. B. 204; *Jud. Act. 1875*; *Ord. 19*, r. 3 (Eng.). And see Mr. Bennett's note to Benjamin, pp. 551, 619.

But in a number of instances it has been held that statements descriptive of the subject-matter, if intended as a substantive part of the contract, will be regarded in the first instance as conditions, on the failure of which the other party may repudiate *in toto*, by a refusal to accept, or a return of the article, if that be practicable, or if part of the consideration has been received, and rescission, therefore, has become impossible, such representations change

their character as conditions, and become warranties, for the breach of which an action will lie to recover damages. The rule of law is thus stated by WILLIAMS, J., in *Behn v. Burness*, as established on principle and sustained by authority, 3 B. & S. 755. *Wolcott v. Mount*, 36 N. J. L. 262; s. c., 13 Am. Rep. 438, 441.

3. Where goods of the specified kind are delivered, a defect in the quality of such goods will not release the vendee. 2 Schouler's P. P. (2nd ed.), § 351; *Ryan v. Ulmer*, 108 Pa. St. 332; s. c., 56 Am. Rep. 210; *Whitaker v. Eastwick*, 75 Pa. St. 229; *Jennings v. Gratz*, 3 Rawle (Pa.) 168; s. c., 23 Am. Dec. 111; *Wiesler v. Schilizzi*, 17 C. B. 619; *Gossler v. Eagle Sugar Refinery*, 103 Mass. 331, 334; *Swett v. Shumway*, 102 Mass. 365; s. c., 3 Am. Rep. 471; *Dounce v. Dow*, 64 N. Y. 411; *Whitman v. Freeze*, 23 Me. 212; *Tilton Safe Co. v. Tisdale*, 48 Vt. 83; *Ilyatt v. Boyle*, 5 Gill & J. (Md.) 110; s. c., 25 Am. Dec. 276; *Gunther v. Atwell*, 19 Md. 157.

4. Substantially the description is warranted. It will comport with sound legal principles to treat such engagements as conditions in order to afford the purchaser a more enlarged remedy by rescission than he would have on a simple warranty, but when his situation has been changed, and the remedy by repudiation has become impossible, no reason supported by principle can be adduced why he should not have upon his contract such redress as is practicable under the circumstances. In that situation of affairs the only available means of redress is by an action for damages. Whether the action shall be

In regard to quantity, there is an implied warranty that it shall be as great or the same in amount as represented by the vendor.¹ But a mere expression of opinion as to quantity is not to be con-

technically considered an action on a warranty or an action for the non-performance of a contract is entirely immaterial. . . . The purchaser

may contract for a specific article as well as for a particular quality, and if the seller makes such a contract, he is bound by it. The state of the case presented shows that the plaintiff inquired for seed of a designated kind, and informed the defendants that he wanted it to raise a crop for the New York market. The defendant showed him the seed, and told him it was the kind he inquired for, and sold it to him as such. Inspection and examination of the seed were of no service to the plaintiff. The facts and circumstances attending the transaction were before the court below, and from the evidence it decided that the proof was sufficient to establish a contract of warranty. The evidence tended to support that conclusion, and this court cannot, on *certiorari*, review the finding of the court below, on a question of fact, where there is evidence from which the conclusion arrived at may be lawfully inferred. *Wolcott v. Mount*, 36 N. J. L. 262; s. c., 13 Am. Rep. 438, 442, 443. And see *Pope v. Allis*, 115 U. S. 363; *Norrington v. Wright*, 115 U. S. 188; *Filley v. Pope*, 115 U. S. 213; *White v. Miller*, 71 N. Y. 118; s. c., 27 Am. Rep. 13; *Hawkins v. Pemberton*, 51 N. Y. 198; s. c., 10 Am. Rep. 595; *Van Wyck v. Allen*, 69 N. Y. 61; s. c., 25 Am. Rep. 136; *Catchings v. Hacke*, 15 Mo. App. 51; *Whitaker v. McCormick*, 6 Mo. App. 114; *Richmond etc. Co. v. Farquar*, 8 Blackf. (Ind.) 89; *Hyatt v. Boyle*, 5 Gill & J. (Md.) 110; s. c., 25 Am. Dec. 276; *Borrekins v. Bevan*, 3 Rawle (Pa.) 23; s. c., 23 Am. Dec. 85; *Jennings v. Gratz*, 3 Rawle (Pa.) 168; s. c., 23 Am. Dec. 111; *Adams v. Rogers*, 9 Watts (Pa.) 121.

1. In the case of the sale of cattle to be paid for according to weight as determined by the vendor's scales, it was held that the vendor was liable on an implied warranty for money paid for excess of weight shown by his defective scales. *Clifton v. Sparks*, 82 Mo. 115.

So when a certain quantity of a thing is ordered, and a less or greater quantity is offered in fulfilment of the contract by the vendor, the vendee may

refuse to accept, on the ground that the failure to deliver the quantity specified is a breach of a condition precedent. 2 *Schouler's P. P.* (2nd ed.), §§ 380, 388; *Benj. on Sales* (Bennett's ed. 1888), §§ 689, 690.

The contract of the defendants was, in substance, that they would purchase a cargo of 375 tons of Scranton and Wilkesbarre coal, at the prices named by the plaintiff, to be shipped on board a vessel ready to be loaded at once. It is obvious that both the quantity of coal and the time of delivery were essential elements of the contract. *Rommel v. Wingate*, 103 Mass. 330. *Compare Norrington v. Wright*, 115 U. S. 1888; *Filley v. Pope*, 115 U. S. 213.

Where ten hogsheads of claret were ordered and fifteen were delivered, it was held that the vendee was justifiable in refusing to receive any of the hogsheads. *Cunliffe v. Harrison*, 6 Exch. 903.

And the rule was carried still further in *Levy v. Green*, where it was held that the vendee was not obliged to accept the exact quantity of the kind of goods ordered when a lot of other goods, not ordered, were shipped with them, and the duty of assorting and selecting would have fallen on the vendee. *Levy v. Green*, 8 E. & B. 575; 1 E. & E. 969; 27 L. J., Q. B. 111; 28 L. J., Q. B. 319. See also *Nicholson v. Bradford Union, L. R.*, 1 Q. B., 620; 35 L. J., Q. B. 176; *Tarling v. O'Riorden*, 2 Ir. L. R. 82; *Dixon v. Fletcher*, 3 M. & W. 146; *Hart v. Mills*, 15 M. & W. 85; *Renta v. Sala*, 4 C. P. D. 239; *Chandler v. DeGraff*, 27 Minn. 208; *Croninger v. Crocker*, 62 N. Y. 151. But *compare Iron Cliffs Co. v. Buhl*, 42 Mich. 86.

In cases involving the offer of a less quantity than that contracted for, the rule against the vendor is even more stringent than where he offers a quantity too great. *Smith v. Lewis*, 40 Ind. 98; *Bruce v. Pearson*, 5 Johns. (N. Y.) 534; *Rockford etc. R. Co. v. Lent*, 63 Ill. 288; *Wright v. Barnes*, 14 Conn. 518; *Morgan v. Gath*, 3 H. & C. 748; *Waddington v. Oliver*, 2 B. & P. N. R. 61. *Compare Oxendale v. Wetherell*, 9 B. & C. 386; *Marland v. Stanwood*, 101 Mass. 470; *Haines v. Tucker*, 50 N. H. 307. And see

strued as an implied warranty.¹ Nor is an estimate of quantity, where both parties have equal means of knowledge, and the sale is, in gross, binding upon the vendor as an implied warranty of quantity.²

40. Genuineness—Implied Warranty of.—In certain cases there is an implied warranty or condition precedent of the genuineness of the thing sold; and this is especially true of the sale of choses in action.³ Thus, on a sale of accounts, there is an implied warranty that they are genuine and owing.⁴ And the vendor is liable for the reasonable expenses of the vendee made in an attempt to collect transferred accounts which are fictitious.⁵ So in the sale of commercial paper, there is an implied warranty against forgery, and that the signatures are genuine and the signers competent to make a contract.⁶ But usually there is no implied warranty of

² Schouler's P. P. (2nd ed.), § 394.

¹ *Switzer v. Pinconning Mfg. Co.*, 59 Mich. 488.

² *McCrea v. Longstreth*, 17 Pa. St. 316. And see *McConnell v. Murphy*, L. R., 5 P. C. 203; *Shepard v. Lynch*, 26 Kan. 377; *Pembroke Iron Co. v. Parsons*, 5 Gray (Mass.) 589; *McKay v. Evans*, 48 Mich. 597; *Brawley v. U. S.*, 96 U. S. 168; 2 Schouler's P. P. (2nd ed.), § 389.

³ *Newmark on Sales*, § 326; *Benj. on Sales* (Bennett's ed. 1888), § 607-609; also, *Mr. Bennett's note to same*, p. 620; *Biddle Chat. War.*, §§ 131-137, 150.

⁴ *Gilchrist v. Hillard*, 53 Vt. 592; s. c., 38 Am. Rep. 706; *Marshall v. Morgan*, 58 Vt. 60.

⁵ *Kingsley v. Fitts*, 55 Vt. 253.

⁶ A bank discounted, in the usual course of business, two promissory notes at the instance of one Sheldon, both notes purporting to have been made by one Senas Cook, and endorsed by Levi Russell and Geo. Shipman respectively, being the payees named in the notes. The endorsements were forged, and an action was brought against the administrators of the vendor, the count being on an implied warranty that the endorsements were genuine. *SHAW, C. J.*, delivering the opinion of the court, said: "The question here is, whether the plaintiffs in their declaration have set forth any legal cause of action. The action proceeds on the ground of contract—of an implied stipulation, growing out of the nature of the transaction, that the signatures of the names of the parties, borne on the notes, were as they purported to be, their real and genuine signatures, so that the notes

were entitled to all the credit due to them in case such signatures were real and genuine. Both parties must be presumed to understand the law; both, therefore, must have known that, if the endorsements were genuine, the endorers would be, conditionally liable for the payment; otherwise not.

"The case does not proceed on the ground of fraud; it does not suggest that the intestate had any knowledge of the forgery, or any purpose wilfully to utter and pass a forged security. . . . Looking at the case in this point of view, it seems to fall under a general rule of law, that in every sale of personal property the vendor impliedly warrants that the article is in fact what it is described and purports to be, and that the vendor has a good title or right to transfer it. In the present case, it will be perceived that the plaintiffs not only failed to obtain the responsibility of the endorser—say Levi Russell; they failed to obtain the responsibility even of the promisor, whose signature was genuine. The note was payable to the order of Russell; nobody else could endorse or transfer it, or make a legal title to it. He did not endorse it, and of course he conveyed no title to anybody to claim it of the promisor."

And it was accordingly held that the vendor had impliedly warranted the genuineness of the endorsements. *Cabot Bank v. Morton*, 4 Gray (Mass.) 456.

In *Ellis v. Wild*, 6 Mass. 321, one party contracted with the other for a certain amount of rum. When the rum was delivered the vendee gave, and the vendor received in payment, certain promissory notes signed by one Clark

and endorsed by one Withington. Both vendor and vendee supposed the endorsement to be genuine, but Clark absconded and the endorsement proved a forgery; whereupon the seller of the rum sued the buyer, who had given him the notes in payment for the price of the rum. The buyer insisted that the notes were payment, and this raised the question whether there was an implied warranty that the endorsement was not forged. PARSONS, C. J., said:

"The real question in the case is, on which of the parties, both being equally innocent, the loss of the notes shall fall. And it is our opinion if it was the original intent of the defendant to sell, and of the plaintiff to buy, the notes, and to make payment in rum, the defendant has fulfilled his contract, and the plaintiff cannot maintain this action.

"But if the plaintiff intended to sell the rum for money, and the defendant intended to buy rum, and the payments of the notes was not a part of the original stipulation, but an accommodation to the defendant, then he has not paid for the rum, and the action is maintainable." *Ellis v. Wild*, 6 Mass. 321, 322.

The distinction made in *Ellis v. Wild*, 6 Mass. 321, between the case when viewed as a purchase of the notes, and when viewed as a mere acceptance of the notes in payment, has not since met with the approval or the Massachusetts courts, but, on the contrary, has been expressly denied.

Thus, in *Merriam v. Wolcott*, 3 Allen (Mass.) 258, it is said:

"The first question presented by this case is, whether a person who purchases a note of a broker for cash, and takes the note by delivery, can recover back the money paid, if the maker's signature turns out to be forged. The text books state the law to be that he can recover it back on the ground of an implied warranty that the note is in reality what it purports to be. *Bayley on Bills*, 148; *Chitty on Bills* (10th Am. ed.), 245. The English cases are referred to in these treatises. The recent case of *Gurney v. Womersley*, 4 El. & Bl. 132, asserts the same doctrine. It has been repeatedly so held in New York. *Markle v. Hatfield*, 2 Johns. (N. Y.) 455; *Herrick v. Whitney*, 15 Johns. (N. Y.) 240; *Shaver v. Ehle*, 16 Johns. (N. Y.) 201; *Murray v. Judah*, 6 Cow. (N. Y.) 484; *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.) 287.

It is so held in Rhode Island. *Aldrich v. Jackson*, 5 R. I. 218. Also in Vermont. *Thrall v. Newell*, 19 Vt. 202. But there are two cases which state a distinction in respect to this implied warranty that is not recognized in the other cases."

The court then cites *Ellis v. Wild*, 6 Mass. 321, and *Baxter v. Duren*, 29 Me. 434; s. c., 50 Am. Dec. 602, states the doctrine held in them, being as stated above, and continues:

"If this is the law of this commonwealth, then the plaintiff cannot recover; for he bought the notes for cash and did not take them in payment of a debt. But it is difficult to see any valid reason for such a distinction. Whether the purchaser pays cash or discharges a debt in payment for the forged paper, the injury is the same to him. There is in both cases a failure of consideration growing out of a mistake of facts. The actual contract and the implied understanding as to the genuineness of the note is in both cases the same. And we think that the authorities which hold the seller to an implied warranty, in such case, that the note is genuine, are in conformity with the principles of sound reason and justice, and with the understanding of the parties in making such a contract." And it was accordingly held that in the sale of a note there was an implied warranty of the genuineness of the signature. *Merriam v. Wolcott*, 3 Allen (Mass.) 258; s. c., 80 Am. Dec. 69. And see *Worthington v. Cowles*, 112 Mass. 30; *Hussey v. Sibley*, 66 Me. 192. But compare *Fisher v. Rieman*, 12 Md. 511.

Day v. Kinney, 131 Mass. 37, is not in conflict with *Merriam v. Wolcott*, just cited, although the language of GRAY, C. J., when separated from the facts, might be so construed. In *Day v. Kinney*, the only point decided was that where a sale of commercial paper was in good faith, and the paper was genuine, no warranty of the solvency of the maker would be implied.

There are several other Massachusetts cases that support the text. Thus it is said by way of *dictum* in Boston etc. R. Co. v. *Richardson*, 135 Mass. 475, that "the seller" of a promissory note "impliedly warrants that the previous signatures are genuine."

And in another case it is said: "Apart from the form of the action, the foundation of the obligation of the defendant was the warranty, implied in the sale

the pecuniary responsibility or solvency of the signers.¹ And it has been held that, on the transfer of a note void against the maker for usury, by a holder without knowledge of the usury, there is no implied warranty of freedom from the taint of usury.² But this doctrine is vigorously denied, and upon principle is more than questionable.³

Where bank bills or money is transferred by delivery there is an implied warranty of genuineness.⁴ And such is the rule in

of negotiable paper, that the names upon it are genuine and of persons competent to contract." *Potts v. Chapin*, 133 Mass. 276, 281.

And see also *Worthington v. Cowles*, 112 Mass. 30; *Carpenter v. Northborough Nat. Bank*, 123 Mass. 70; *Wilder v. Cowles*, 100 Mass. 487; *Mason v. Massa*, 122 Mass. 480; *Coolidge v. Brigham*, 1 Met. (Mass.) 547; s. c., 5 Met. (Mass.) 68; *Weddigen v. Boston etc. Co.*, 100 Mass. 422.

In *Lobdell v. Baker*, 1 Met. (Mass.) 193, an early case, it was held that one selling an endorsed note impliedly warrants that the endorser is *sui juris*, and that the endorsement constitutes a valid contract. *Lobdell v. Baker*, 1 Met. (Mass.) 193; s. c., 35 Am. Dec. 358. And as we have seen above this doctrine is expressly approved in a late case. *Potts v. Chapin*, 133 Mass. 276, 281, 282.

The doctrines established in Massachusetts are in harmony with those reached in most if not all of the other States, and in England. Thus in Indiana it is held that "the person who sells promissory notes, whether by endorsement or delivery without endorsement, warrants them to be genuine and not forgeries." *Bell v. Cafferly*, 21 Ind. 411.

It appears to be very well settled that the vendor of a bill or note, without endorsement, is responsible for the genuineness of the paper. *Thompson v. McCullough*, 31 Mo. 224; s. c., 77 Am. Dec. 644; *Lyons v. Miller*, 6 Gratt. (Va.) 427; s. c., 52 Am. Dec. 129; *Flynn v. Allen*, 57 Pa. St. 482; *Swanzy v. Parker*, 50 Pa. St. 441; *McCay v. Barber*, 37 Ga. 423; *Aldrich v. Jackson*, 5 R. I. 218; *Bell v. Dagg*, 60 N. Y. 530; *Ross v. Terry*, 63 N. Y. 613; *People's Bank v. Bogart*, 81 N. Y. 101; *Whitney v. Nat. Bank*, 45 N. Y. 305; *Hussey v. Sibley*, 66 Me. 192; *Challis v. McCrum*, 22 Kan. 157; *Allen v. Clark*, 49 Vt. 390; *Bartsch v. Atwater*, 1 Conn. 409; *Bankhead v.*

Owen, 60 Ala. 475; *Giffert v. West*, 37 Wis. 116; *Barton v. Trent*, 3 Head (Tenn.) 167; *Hurst v. Chambers*, 12 Bush (Ky.) 155; *Snyder v. Reno*, 38 Iowa 329; and that the English rule accords with that stated above, see *Jones v. Ryde*, 1 Marsh. 157; 5 Taunt. 488; *Gurney v. Womersley*, 4 E. & B. 133; 24 L. J., Q. B. 46; 2 Daniel's Neg. Inst. (3rd ed.), § 731a.

1. *Day v. Kinney*, 131 Mass. 37, 38; *Bricknall v. Waterman*, 5 R. I. 43; *Burgess v. Chapin*, 5 R. I. 225; *Beckwith v. Farnum*, 5 R. I. 230; *Lyons v. Miller*, 6 Gratt. (Va.) 427; s. c., 52 Am. Dec. 129; *Persons v. Jones*, 12 Ga. 371; s. c., 58 Am. Dec. 476.

2. *Littauer v. Goldman*, 72 N. Y. 506; s. c., 28 Am. Rep. 170. But compare s. c. in court below, when contrary was held, 9 Hun (N. Y.) 232.

3. 2 Daniel Neg. Inst. (3rd ed.), §§ 733, 733a; *Persons v. Jones*, 12 Ga. 371; s. c., 58 Am. Dec. 476; *Giffert v. West*, 33 Wis. 618. See also *Giffert v. West*, 37 Wis. 115; *Hurd v. Hall*, 12 Wis. 112; *Costigan v. Hawkins*, 21 Wis. 552; *Lawton v. Howe*, 14 Wis. 241; *Delaware Bank v. Jervis*, 20 N. Y. 228; *Webb v. Odell*, 49 N. Y. 583; *Challis v. McCrum*, 22 Kan. 157; *Young v. Cole*, 3 Bing. N. C. 724.

4. It must be presumed that he who passes a bill as money, passes it as genuine, and the law implies an *assumpsit* or warranty that it is so. And if the bill should be counterfeit and worthless, this implied promise is immediately, upon passing the bill, broken, and an action lies for its breach; nor does it matter whether he who passes it knows that it is a counterfeit or not. The action is not an action for a fraud, but for the breach of a promise implied by law. *Watson v. Cresap*, 1 B. Mon. (Ky.) 195; s. c., 36 Am. Dec. 572; *Buck v. Doyle*, 4 Gill (Md.) 478; s. c., 45 Am. Dec. 176; *Edmund v. Digges*, 1 Gratt. (Va.) 359; s. c., 42 Am. Dec. 561; *Markle v. Hatfield*, 2 Johns. (N. Y.) 455; s. c., 3 Am. Dec.

the sale of railroad or other negotiable bonds.¹ So there is an implied warranty that shares of stock sold are genuine.² But not, it is said, that they have not been fraudulently issued in excess of the charter limit.³ There may be an implied warranty of genuineness in the sale of a non-negotiable certificate of corporate indebtedness⁴ as well as of the validity of a land warrant,⁵ or the existence of a judgment.⁶ In England, statutory provisions give rise to the implication of the genuineness of trade marks.⁷

41. Sale by Sample—Implied Warranty in.—In a sale by sample there is usually an implied warranty—more properly, a condition precedent—that the bulk of the goods, when delivered, shall conform to the sample by which the sale is made in kind, character and quality.⁸

In Pennsylvania, however, the rule seems to be that in a sale by sample there is no implied warranty that the bulk shall equal

446. But the receiver must use proper diligence in giving notice to the person from whom he received a bad bill or money. *Raymond v. Baar*, 13 S. & R. (Pa.) 318; s. c., 15 Am. Dec. 603; *Curcier v. Pennock*, 14 S. & R. (Pa.) 56.

1. The telegraph correspondence in this case, in relation to the sale and purchase of certain bonds, considered, and held to constitute a complete contract of sale, upon the condition, or with an implied warranty, that the bonds were genuine. *Utley v. Donaldson*, 94 U. S. 29.

Where a stockbroker sent bonds ordered by a customer by telegraph, wiring him, "all right; bonds forwarded by express to-day," held, that there was a contract of sale, and a warranty of the genuineness of the bonds implied. *Donaldson v. Newman*, 9 Mo. App. 235.

On a sale of negotiable bonds—here of school bonds—a warranty is implied that they are genuine. *Smith v. McNair*, 19 Kan. 330.

When the maxim *caveat emptor* does not apply to a sale of counterfeit bonds. *Porter v. Bright*, 82 Pa. St. 441.

Speaking of certain municipal bonds, MR. JUSTICE SWAYNE, *obiter dictum*, said: "Such securities through the channels of commerce, which they are made to seek, and where they find their market. They pass from hand to hand like bank-notes. The seller is liable *ex delicto* for bad faith; and *ex contractu* there is an implied warranty on his part that they belong to him, and that they are not forgeries. Where there is no express stipulation, there is no lia-

bility beyond this." *Otis v. Cullum*, 92 U. S. 447, 449.

2. 2 *Waterman on Corp.* 89; *People's Bank v. Kurtz*, 99 Pa. St. 344; s. c., 44 Am. Rep. 112.

3. *People's Bank v. Kurtz*, 99 Pa. St. 344; s. c., 44 Am. Rep. 112. And see *White v. Robinson*, 50 Mich. 73.

4. The legal rules that apply to the sale of a non-negotiable certificate of indebtedness, issued by a corporation, are the same as when a chattel is sold, and there is, under ordinary circumstances, a warranty implied on such sale. *Wood v. Sheldon*, 42 N. J. L. 421; s. c., 36 Am. Rep. 523.

5. *Presbury v. Morris*, 18 Mo. 165; *Boyd v. Anderson*, 1 Overt. (Tenn.) 438; s. c., 3 Am. Dec. 762.

6. A party assigning a judgment must be held to an implied warranty that there is such a judgment and that the defendant is liable thereunder. *Lile v. Hopkins*, 12 Smed. & M. (Miss.) 299; s. c., 51 Am. Dec. 115; but in the sale and assignment of a judgment "without recourse," there is no implied warranty that the judgment and proceedings are free of error. *Glass v. Read*, 2 Dana (Ky.) 168.

7. "Merchandise Marks act 1862" (25 & 26 Vict., ch. 88); *Benj. on Sales* (Bennett's ed. 1888), § 673, where two sections of the act are quoted.

8. In a sale of goods by sample, the vendor warrants the quality of the bulk equal to that of the sample. *Benj. on Sales* (Bennett's ed. 1888), § 648; *Parker v. Palmer*, 4 B. & Ald. 387; *Parkinson v. Lee*, 2 East 314; *Azemar v. Cassella*, L. R., 2 C. P. 446; *McMullen v. Helberg*, 4 L. R., Ir. 94, 100;

the sample in quality, but only a condition precedent that the goods shall correspond with the sample in kind or species, and be salable as goods of such kind.¹ The warranty implied in sales by

Megaw *v.* Molloy, 2 L. R., Ir. 530 C. A.

The sale was by sample. On such a sale it is admitted that the law implies a warranty that the bulk of the goods shall be equal in quality to the sample. Dickinson *v.* Gay, 7 Allen (Mass.) 29; s. c., 83 Am. Dec. 656; Bradford *v.* Manly, 13 Mass. 139; s. c., 7 Am. Dec. 124.

A manufacturer of a superior brand of iron sold some to A, and advised B, knowing him to be a manufacturer of bolts and nuts, to buy of A, "a ton or so for sample, should you wish to test the quality with a view to import this year." B, acting on this suggestion, found the iron satisfactory, and so wrote the manufacturer, at the same time ordering twenty tons. *Held*, that there was a warranty that the twenty tons would be equal in quality to the sample obtained from A. Dayton *v.* Hooglund, 39 Ohio St. 671.

The drawing of fresh samples by a purchaser of packed cotton to ascertain if they correspond with the first samples, does not make it any the less a sale by sample, and the vendor is liable on his warranty if the bulk of the cotton does not correspond with the samples. Beebee *v.* Robert, 12 Wend. (N. Y.) 413; s. c., 27 Am. Dec. 132.

A sale by sample is tantamount to an express warranty that the article sold is of the same kind as the sample. Bradford *v.* Manly, 13 Mass. 138; s. c., 7 Am. Dec. 122; Borrekens *v.* Bevan, 3 Rawle (Pa.) 23; s. c., 23 Am. Dec. 85; Boorman *v.* Jenkins, 12 Wend. (N. Y.) 566; s. c., 27 Am. Dec. 158.

A offered to sell B certain barley, like a sample formerly furnished, and the offer was accepted. *Held*, that there was a warranty that the goods were equal in quality to the sample. Myer *v.* Wheeler, 65 Iowa 390.

And see, as to the general rule, as stated in the text, Hughes *v.* Bray, 60 Cal. 284; Moore *v.* McKinlay, 5 Cal. 471; Leonard *v.* Fowler, 44 N. Y. 289; Sands *v.* Taylor, 5 Johns. (N. Y.) 395; Hargous *v.* Stone, 5 N. Y. 73; Foot *v.* Bentley, 44 N. Y. 166; s. c., 4 Am. Rep. 652; Moses *v.* Mead, 1 Den. (N. Y.) 378; s. c., 43 Am. Dec. 676; Waring *v.* Mason, 18 Wend. (N. Y.) 425; Osborn *v.* Gantz, 60 N. Y. 540;

Magee *v.* Billingsley, 3 Ala. 679; Brantley *v.* Thomas, 22 Tex. 270; s. c., 73 Am. Dec. 264; Whitaker *v.* Hueske, 29 Tex. 355; Conrad *v.* Dater, 2 Biss. (U. S.) 342; Willings *v.* Consequa, 1 Pet. (U. S.) 301; Voss *v.* McGuire, 18 Mo. App. 477; Hollander *v.* Hoetter, 20 Mo. App. 79; Graff *v.* Foster, 67 Mo. 512; Hall *v.* Plassan, 19 La. Ann. 11; Rose *v.* Beattie, 2 Nott & M. (S. Car.) 538; Gunther *v.* Atwell, 19 Md. 157; Home etc. Co. *v.* Neff, 60 Iowa 138; Myer *v.* Wheeler, 65 Iowa 390; Merriman *v.* Chapman, 32 Conn. 146; Webster *v.* Granger, 78 Ill. 230; Hubbard *v.* George, 49 Ill. 275; Hanson *v.* Busse, 45 Ill. 499; Gill *v.* Kaufman, 16 Kan. 571; Wilcox *v.* Howard, 51 Ga. 298; Day *v.* Raquet, 14 Minn. 273; Taylor *v.* Mueller, 30 Minn. 343; s. c., 44 Am. Rep. 199; Boothby *v.* Plaisted, 51 N. H. 436; Morrill *v.* Wallace, 9 N. H. 116; Proctor *v.* Spratley, 78 Va. 254; Merriam *v.* Field, 24 Wis. 640; Bradford *v.* Manly, 13 Mass. 138; s. c., 7 Am. Dec. 122, and note; Dickinson *v.* Gay, 7 Allen. (Mass.) 29; s. c., 83 Am. Dec. 656, and note; Schnitzer *v.* Oriental Print Works, 114 Mass. 123; Schuchardt *v.* Allens, 1 Wall. (U. S.) 359; Barnard *v.* Kellogg, 10 Wall. (U. S.) 383; Reynolds *v.* Palmer, 21 Fed. Rep. 433, and note; 2 Schouler's P. P. (2nd ed.), §§ 359, 360; Biddle Chat. War., §§ 159, 184; Story on Sales (Perkins' ed.), §§ 376, 376 a; Newmark on Sales, § 336.

If a broker has no authority to sell by sample, still the vendors, whom he represents, cannot affirm the sale, get an increased price on account of the warranty and keep it, and at the same time refuse to be bound by the warranty on the ground that they did not authorize it. Brower *v.* Lewis, 19 Barb. (N. Y.) 574.

And in the same case it was *held* that damaged articles may be sold by sample, where the warranty would be that the bulk of the goods and the sample should fairly correspond. The sample in such case, in order to bind the buyer to accept the bulk, would have to be a fair specimen of the bulk both good and bad. Brower *v.* Lewis, 19 Barb. (N. Y.) 574.

1. A sale of chattels by sample, without fraud or other circumstances fixing the character of the sample as a standard of quality, does not imply a warrant-

sample is not ordinarily one of merchantability.¹ But when the facts and circumstances justify it, such a warranty may be implied.² Where the seller is not a manufacturer, it is said that there is no implied warranty against *latent* defects in both sample and bulk.³ But this not true where the defects are known to the vendor or when he is guilty of fraudulent conduct in creating or concealing them, or when he is the producer or manufacturer.⁴ And where goods are sold, by sample, for a particular purpose, there may be an implied warranty against *latent* defects unfitting them for the purpose, but undiscoverable by ordinary examination of the sample.⁵

Where a sale is really by sample the implied warranty of conformity of bulk and sample in kind and quality may exist, even though the bulk might have been examined.⁶ But where the sale was not really by sample, although a sample may have been shown, there is no such implied warranty, and the rule is *caveat emptor* when the buyer might have examined and failed to do so.⁷

ty of quality, but only that the goods shall correspond with the sample in kind and be merchantable as that kind. *Selser v. Roberts*, 105 Pa. St. 242; *Boyd v. Wilson*, 83 Pa. St. 319; s. c., 24 Am. Rep. 176; *Sidney etc. Co. v. School Dist. of Warsaw* (Pa. 1887), 7 Atl. Rep. 65; *Borrekins v. Bevan*, 3 Rawle (Pa.) 23; s. c., 23 Am. Dec. 85; *Jennings v. Gratz*, 3 Rawle (Pa.) 168; s. c., 23 Am. Dec. 111; *Kirk v. Nice*, 2 Watts (Pa.) 367; *M'Farland v. Newman*, 9 Watts (Pa.) 56; *Fraleay v. Bispham*, 10 Pa. St. 320; s. c., 51 Am. Dec. 486; *Carsen v. Baillie*, 19 Pa. St. 375; *Wetherhill v. Neilson*, 20 Pa. St. 448; *Eagan v. Call*, 34 Pa. St. 236; s. c., 75 Am. Dec. 653; *Weimer v. Clement*, 37 Pa. St. 147; s. c., 78 Am. Dec. 411; *Whitaker v. Eastwich*, 75 Pa. St. 229. But see *Biddle Chat. War.*, §§ 208–210; *Maute v. Gross*, 56 Pa. St. 250; s. c., 94 Am. Dec. 62.

But notwithstanding this rule a stipulation that future deliveries will equal the sample may become a term of the contract and be enforced as such. *West Republic Mining Co. v. Jones*, 108 Pa. St. 55.

1. *Benj. on Sales* (Bennett's ed. 1888), § 667.

2. *Benj. on Sales* (Bennett's ed. 1888), § 667; *Mody v. Gregson*, L. R., 4 Exch. 49.

3. *Bradford v. Manly*, 13 Mass. 138; s. c., 7 Am. Dec. 122; *Sands v. Taylor*, 5 Johns. (N. Y.) 404; *Dickinson v. Gay*, 7 Allen (Mass.) 29; s. c., 83 Am. Dec. 656. See also *Hoe v. Sanborn*, 21 N. Y. 552; s. c., 78 Am. Dec. 163. But compare *Drummond v. Van Ingen*, 24

Rep. 731; 57 L. T. (N. S.) 1 (1887); also the Pennsylvania rule as stated heretofore in this paragraph.

4. *Newmark on Sales*, § 339; *Benj. on Sales* (Bennett's ed. 1888), § 651, *et seq.*; *Biddle Chat. War.*, §§ 146, 184–185, 212, 2 *Schouler's P. P.* (2nd ed.), § 364; *Heilbutt v. Hickson*, L. R., 7 C. P. 438; s. c., 3 Eng. Rep. 328; *Mody v. Gregson*, L. R., 4 Exch. 49; *Grimoldby v. Wells*, L. R., 10 C. P. 391; *Dayton v. Hooglund*, 39 Ohio St. 671; *Dickinson v. Gay*, and note, 83 Am. Dec. 656, 658.

5. *Drummond v. Van Ingen*, 24 Rep. 731; s. c., 57 L. T., N. S. 1. But compare *Gachet v. Warren*, 72 Ala. 288.

6. Thus where one purchased indigo, judging thereof from a specimen which he took from an aperture in the case, it was held that this was a sale by sample, and that the seller was liable in *assumpsit* on a warranty that the whole case was equal to the sample. *Williams v. Spafford*, 8 Pick. (Mass.) 250.

So a sale of packed cotton has been held "of necessity" a sale by sample. *Boorman v. Jenkins*, 12 Wend. (N. Y.) 566; s. c., 27 Am. Dec. 158. But compare *Barnard v. Kellogg*, 10 Wall. (U. S.) 383.

See also *Gallagher v. Waring*, 9 Wend. (N. Y.) 20; *Heilbutt v. Hickson*, L. R., 7 C. P. 438; s. c., 3 Eng. Rep. 328.

7. A wool broker sent samples of foreign wool to the buyer and offered to sell if the latter would come and examine the wool. The buyer went, and examined some of the bales and was offered an opportunity to examine

This makes it important that the distinction should be clearly drawn between a sale by sample and a sale not by sample, yet where a sample was shown. To constitute a sale by sample, the contract must have been made solely with reference to the sample exhibited; both parties must have understood that they were dealing upon the understanding that the bulk should conform to the sample.¹ How far custom or usage may justify parties in treating the mere exhibition of a sample on a sale as a sale by sample has been mooted; but if by custom it be so in any case it must be because the parties understood the custom to imply that the contract between them was made solely with reference to the sample.² Whether there was a sale by sample in such a case is, therefore, a question of intent for a jury.³ A sale by average

all, which he declined. He purchased the wool and it proved to have been deceitfully packed and full of rotten fleeces. *Held*, not a sale by sample; and that it was a case where the doctrine of *caveat emptor* applied. *Barnard v. Kellogg*, 10 Wall. (U. S.) 383; s. c., (in court below) 6 Blatchf. (U. S.) 279; *Salisbury v. Stainer*, 19 Wend. (N. Y.) 159; s. c., 32 Am. Dec. 437; *Beirne v. Dord*, 5 N. Y. 95; s. c., 55 Am. Dec. 321; *Waring v. Mason*, 18 Wend. (N. Y.) 425.

But a sale is not a sale by sample when there is a full opportunity to examine the bulk, and there is no evidence that a sale by sample was intended. *Selser v. Roberts*, 105 Pa. St. 242.

So where the vendee's agent took a sample of barley from the vendor's warehouse, and the vendee after inspecting the sample, purchased the barley, which proved inferior to the sample, it was *held* that it did not appear that the vendor knew the vendee's agent to have taken a sample of the barley and that in any event on such a state of facts there was no sale by sample. *Ames v. Jones*, 77 N. Y. 614. And see *Carter v. Crick*, 4 H. & N. 412. Also *Hargous v. Stone*, 5 N. Y. 73; *Proctor v. Spratley*, 78 Va. 254; *Bothwick v. Young*, 12 Ont. App. 671; *Jones v. Wasson*, 3 Baxt. (Tenn.) 211.

1. To constitute a sale by sample with warranty implied it must appear that the parties contracted solely with reference to the sample, and mutually understood that they were so dealing with the quality of the bulk. *Reynolds v. Palmer*, 21 Fed. Rep. 433 and note.

A sale is not by sample unless both parties deal with the sample with the mutual understanding that the bulk is like it; and unless they do so the

doctrine *caveat emptor* applies. *Proctor v. Spratley*, 78 Va. 254.

To constitute a sale by sample the contract must have been made solely with reference to the sample exhibited; both parties must have understood that they were dealing upon the understanding that the bulk was like the sample. *Day v. Ragnet*, 14 Minn. 273.

And see, in illustration of the doctrine of the text, *Benj. on Sales* (Bennett's ed. 1888), § 649, *et seq.*; 2 *Schouler's P. P.* (2nd ed.), § 359; *Biddle, Chat. War.*, § 213, *et seq.*; *Salisbury v. Stainer*, 19 Wend. (N. Y.) 159; s. c., 32 Am. Dec. 437; *Barnard v. Kellogg*, 10 Wall. (U. S.) 383; *Carter v. Crick*, 4 H. & N. 412; *Powell v. Horton*, 2 Bing. N. C. 668; *Tye v. Fynmore*, 3 Camp. 462; *Meyer v. Everth*, 4 Camp. 22; *Russell v. Nicolopolulo*, 8 C. B. N. S. 362; *Gardiner v. Gray*, 4 Camp. 144; *Towerson v. Aspatria etc.*, 27 L. T., N. S. 276; *Ames v. Jones*, 77 N. Y. 614; *Beirne v. Dord*, 5 N. Y. 95; s. c., 55 Am. Dec. 321; *Sands v. Taylor*, 5 Johns. (N. Y.) 395; *Waring v. Mason*, 18 Wend. (N. Y.) 425; *Moulton v. Parker*, 1 Gray (Mass.) 123; *Schnitzer v. Oriental Pr. Works*, 114 Mass. 123; *Atwater v. Clancy*, 107 Mass. 369; *Jones v. Wasson*, 3 Baxt. (Tenn.) 211; *Borthwick v. Young*, 12 Ont. App. 671.

2. *Ante*, section 14 of text; *Biddle, Chat. War.*, § 219, *et seq.* And compare *Boorman v. Jenkins*, 12 Wend. (N. Y.) 566; s. c., 27 Am. Dec. 158; *Barnard v. Kellogg*, 10 Wall. (U. S.) 383; *Dickinson v. Gay*, 7 Allen (Mass.) 29; s. c., 83 Am. Dec. 656 and note; *Beirne v. Dord*, 5 N. Y. 95; s. c., 55 Am. Dec. 321; *Thompson v. Ashton*, 14 Johns. (N. Y.) 317; *Atwater v. Clancy*, 107 Mass. 369.

3. *Jones v. Wasson*, 3 Baxt. (Tenn.)

sample exists when the vendor takes samples from various lots or packages and, mixing them, shows the mixture as a sample of the average bulk of the lots or packages. On such a sale, the implied warranty is not that any particular lot of the bulk shall not be inferior to the sample, but only that the bulk of the various lots, when mixed, shall equal the mixed sample in quality.¹ In all sales by sample the right of final inspection by the vendee before acceptance is implied, and the implied warranty of quality is that, at the time of such final inspection, the bulk shall be equal in kind and quality to the sample shown.² If it is not, the buyer may reject the goods or take them and bring an action for a breach of the warranty.³ But if, on a final inspection, the goods are accepted as in conformity with the sample in kind and quality, such acceptance may be binding on the vendee, especially if he is guilty of any laches in discovering the defects or in notifying the vendor of them when discovered. Each case of this kind must, however, be determined largely with reference to the particular facts, as there can be no binding rule of universal application one way or the other.⁴ Of course, where the vendor imposes upon the vendee, at the time of final inspection and acceptance, by

211; *Beirne v. Dord*, 5 N. Y. 95; s. c., 55 Am. Dec. 321.

1. *Schnitzer v. Oriental Pr. Works*, 114 Mass. 123; 2 *Schouler's P. P.* (2nd ed.), § 361; *Leonard v. Fowler*, 44 N. Y. 289.

2. In a sale of goods by sample, it is an implied condition that the buyer shall have a fair opportunity of comparing the bulk with the sample; and an improper refusal by the vendor to allow this, will justify the buyer in rejecting the contract. *Benj. on Sales* (Bennett's ed. 1888), §§ 594, 648; *Lorymer v. Smith*, 1 B. & C. 1; *Heilbutt v. Hickson*, L. R., 7 C. P. 438; *Grimoldby v. Wells*, L. R., 10 C. P. 978; *Couston v. Chapman*, L. R., 2 Sc. App. 250.

In a sale by sample the articles sold, must, on delivery, correspond with the sample or they may be rejected. *Gatling v. Newell*, 9 Ind. 572.

And on a refusal to accept, in such a case, the burden of proving that the article conformed to the sample is thrown upon the vendor. *Merriman v. Chapman*, 32 Conn. 146.

The delivery of goods by the seller, where the goods were sold by sample, will not be a delivery to the consignee so as to pass the title and make him liable, if the goods do not correspond in quantity with the order and in quality with the sample. *Barton v. Kane*, 17 Wis. 38; s. c., 84 Am. Dec. 728. And

see on the right of final inspection, 2 *Schouler's P. P.* (2nd ed.), §§ 362, 363.

3. Where goods are sold by sample, the law implies a warranty that they shall be equal to the sample in quality; if they are inferior to the sample the buyer may accept them and sue for breach of warranty. *Hughes v. Bray*, 60 Cal. 284.

A sale by sample implies a warranty of quality equal to the sample, and in an action by the seller for the price, the buyer may set up the defect in quality in diminution of damages. *Voss v. McGuire*, 18 Mo. App. 477.

Where goods are sold by sample and the goods delivered are not only not equal in quality to the sample, but are wholly worthless, the contract price cannot be recovered. *Home Lightning Rod Co. v. Neff*, 60 Iowa 138. But compare the English doctrine: *Benj. on Sales* (Bennett's ed. 1888), §§ 652, 652a; *Couston v. Chapman*, L. R., 2 Sc. App. 250; *Grimoldby v. Wells*, L. R., 10 C. P. 391; *Lucy v. Monfiet*, 5 H. & N. 223, 233.

4. *Couston v. Chapman*, L. R., 2 Sc. App. 250; *Barton v. Kane*, 17 Wis. 38; s. c., 84 Am. Dec. 728, and note; *Muller v. Eno*, 3 Duer (N. Y.) 421; *Barnard v. Kellogg*, 10 Wall. (U. S.) 383; *McCormick v. Sarson*, 45 N. Y. 265; s. c., 6 Am. Rep. 80; *Dutchess Co. v. Harding*, 49 N. Y. 321; *Pennock v. Sty-*

fraudulent conduct, devices or concealment, the vendee may still rely on the implied warranty.¹

42. Damages for Breach of Implied Warranty—Remedies Generally.

—Where there is a breach of an implied warranty of title, the loss of the vendee is usually the same as if there had been a failure to deliver.² The measure of damages for a failure to deliver in an executory contract of sale is, ordinarily, the difference between the contract price and the market value of the goods at the time and place of delivery.³ So where there is a failure of title, it is said that the measure of damages is the purchase price and interest.⁴ But this rule has been denied and the law declared to be that the measure of damages is the value of the property at the time the vendee is deprived of possession, with the costs and expenses to which he is put.⁵ Into the conflicting reasons of the courts and the various limitations and extensions of these rules it is not needful to go at length here.⁶ For the breach of an implied warranty of quality or soundness the measure of damages is the difference between the actual value of the property at the time of sale and what its value would have been had it conformed to the warranty.⁷ It is said that the fact that the vendee had contracted to sell

gles, 54 Vt. 226; *Carson v. Baillie*, 19 Pa. St. 375; s. c., 57 Am. Dec. 659; *Morse v. Brackett*, 98 Mass. 205.

1. *Heilbutt v. Hickson*, L. R., 7 C. P. 438; *Dutchess Co. v. Harding*, 49 N. Y. 321; *Mody v. Gregson*, L. R., 4 Ex. 49; *Hubbard v. George*, 49 Ill. 275; *Farmer v. Gray*, 16 Neb. 401; *Kent v. Friedman*, 101 N. Y. 616; s. c., 30 Hun 222, affirmed; *Brigg v. Hilton*, 99 N. Y. 517; s. c., 52 Am. Rep. 63.

2. 2 *Sutherland Dam.* 418; 5 Am. & Eng. Encyc. of L., tit. DAMAGES, pp. 30-34; 2 *Schouler's P. P.* (2nd ed.), § 571.

3. 5 A. & E. Ency. of L., tit. DAMAGES, pp. 30-34, and many cases cited and quoted from, stating the rule at length and with its various limitations. 2 *Schouler's P. P.* (2nd ed.), §§ 571-574; *Newmark on Sales*, §§ 398, 399; 2 *Suth. Dam.* 365, *et seq.*

4. *Armstrong v. Percy*, 5 Wend. (N. Y.) 535; *Burt v. Dewey*, 31 Barb. (N. Y.) 540; *Ellis v. Gosney*, 7 J. J. Marsh. (Ky.) 109; *Woods v. Woods*, 1 Metc. (Ky.) 512; *Anding v. Perkins*, 29 Tex. 348; *Goss v. Dysant*, 31 Tex. 186; *Grawberry v. Hawpe*, 30 Tex. 409; *Crittenden v. Posey*, 1 Head (Tenn.) 311; *Shattuck v. Green*, 104 Mass. 42; *Eaton v. Mellus*, 7 Gray (Mass.) 566; *Noel v. Wheatly*, 30 Miss. 181; *Rowland v. Shelton*, 25 Ala. 217; *Ware v. Weathnall*, 2 McCord (S. Car.) 413; *Arthur v. Moss*, 1 Oreg. 193; *Atkins*

v. Hosley, 3 Thomp. & C. (N. Y.) 322; *Case v. Hall*, 24 Wend. (N. Y.) 102; s. c., 35 Am. Dec. 605; *Wilkinson v. Ferree*, 24 Pa. St. 190; *Johnson v. Meyer*, 34 Mo. 255; *Butler v. Moore*, 68 Ga. 780; s. c., 45 Am. Rep. 508.

5. *Hoffman v. Chamberlain*, 40 N. J. Eq. 663; s. c., 53 Am. Rep. 783. In closing a note to this case Mr. Browne says: "After examining all the conflicting authorities we are satisfied that the rule deducible from them is that of the principal case, namely, that the true measure is the value, unless that is less than the price paid, and then it is the price paid and interest and costs; and where there is no evidence of value, the price paid controls." *Hoffman v. Chamberlain*, 40 N. J. Eq. 663; s. c., 53 Am. Rep. 790; *Grose v. Hennessey*, 13 Allen (Mass.) 389; *Browne v. Pierce*, 97 Mass. 46; *Dabovich v. Emeric*, 12 Cal. 171; *Marlatt v. Clary*, 20 Ark. 251; *Boyd v. Whitfield*, 19 Ark. 447; *Kingsbury v. Smith*, 13 N. H. 109; *Brown v. Woods*, 3 Coldw. (Tenn.) 182; *Burt v. Dewey*, 40 N. Y. 283; s. c., 100 Am. Dec. 482.

6. See 2 *Sutherland on Dam.* 418; 1 *Sedgw. on Dam.* *294, note; 53 Am. Rep. 788; 5 Am. & Eng. Encyc. of L., tit. DAMAGES, pp. 30-32; 2 *Schouler's P. P.* (2nd ed.), § 589.

7. *Biddle, Chat. War.*, § 333, *et seq.*; 2 *Sutherland Dam.*, pp. 397, 400, 407, 420, 421, 422-436; 5 Am. & Eng. Encyc. of

the property at an increased price does not alter this rule.¹ But the purpose of the law being to compensate the vendee for the actual loss he sustains, the special value of the article to the vendee, if known to the vendor at the time of sale, may be considered on the question of damages.² And so expenses or special damages proximately flowing from the breach of the implied warranty, may be recovered.³ Where the purchase price of goods has been paid and they prove utterly worthless or have been returned or refused for a failure to conform to an implied warranty or condition precedent, the measure of damages is the purchase price of the goods and any special damage that may have been

L., tit. DAMAGES, pp. 30-32; 2 Schouler's P. P. (2nd ed.), §§ 571-574; Newmark on Sales, § 353; Benj. on Sales (Bennett's ed. 1888), note to pp. 865, 866; Cary v. Gruman, 4 Hill (N. Y.) 625; s. c., 40 Am. Dec. 299 and note, collecting many cases; Passenger v. Thornburn, 34 N. Y. 640; s. c., 90 Am. Dec. 753 and note; Hoe v. Sanborn, 36 N. Y. 98; Fisk v. Tank, 12 Wis. 276; s. c., 78 Am. Dec. 737; Aultman v. Hetherington, 42 Wis. 622; Freyman v. Knecht, 78 Pa. St. 141; Howe Machine Co. v. Reber, 66 Ind. 498; Street v. Chapman, 29 Ind. 142; Ferguson v. Hosier, 58 Ind. 438; Booher v. Goldsborough, 44 Ind. 490; Herring v. Staggs, 62 Ala. 180; Foster v. Rodgers, 27 Ala. 602; Tatum v. Mohr, 21 Ark. 349; Wright v. Davenport, 44 Tex. 164; Morse v. Brackett, 98 Mass. 205; Reggio v. Braggiotti, 7 Cush. (Mass.) 166; Tuttle v. Brown, 4 Gray (Mass.) 457; Birdsall v. Carter, 11 Neb. 143; Horn v. Buck, 48 Md. 358; Thoms v. Dingley, 70 Me. 100; Wright v. Roach, 57 Me. 600; McCormick v. Vanatta, 43 Iowa 389; Likes v. Baer, 8 Iowa 368; Lacey v. Stranghan, 11 Iowa 258; Wilson v. King, 83 Ill. 232; McClure v. Williams, 65 Ill. 390; Carr v. Moore, 41 N. H. 131; Hook v. Stovall, 26 Ga. 704; Scranton v. Mechanics etc. Co., 37 Conn. 130; Smith v. Cozart, 2 Head (Tenn.) 526; Field v. Kinnear, 4 Kan. 476; Woodward v. Thatcher, 21 Vt. 580; Slaughter v. McRae, 3 La. Ann. 455; Stearns v. McCullough, 18 Mo. 411. But with the last case compare Courtney v. Boswell, 65 Mo. 196; see also, Caswell v. Coare, 1 Taunt. 566, in comparison with Clare v. Maynard, 7 Car. & P. 741; Jones v. Just, L. R., 3 Q. B. 197; and Loder v. Kekule, 3 C. B. N. S. 128. Compare also Thornton v. Thompson, 4 Gratt. (Va.) 121, and Boyles v. Overby, 11 Gratt. (Va.) 205.

1. Brown v. Bigelow, 10 Allen. (Mass.) 242; Texada v. Camp, Walk. (Miss.) 150; 2 Suth. Dam., note 3, whence these references. No later ones to this point have been found.

2. 2 Sutherland Dam. 423-436, reviewing many cases; Wood's Mayne on Dam. 267; Borradaile v. Brunton, 8 Taunt. 535; Randall v. Newson, L. R., 2 Q. B. D. 102; 46 L. J., Q. B. 259; Milburn v. Belloni, 39 N. Y. 53; s. c., 100 Am. Dec. 403; Parks v. Morris-Axe and Tool Co., 54 N. Y. 586, 592; Ferris v. Comstock, 33 Conn. 513; Wolcott v. Mount, 36 N. J. L. 262; s. c., 13 Am. Rep. 438; Wolcott v. Mount, 38 N. J. L. 496; s. c., 20 Am. Rep. 425; White v. Miller, 71 N. Y. 118; s. c., 27 Am. Rep. 13; Passenger v. Thornburn, 34 N. Y. 634; s. c., 90 Am. Dec. 753, but in considering the New York cases compare VanWyck v. Allen, 69 N. Y. 61; s. c., 25 Am. Rep. 136. See further to the rule as stated above, Randall v. Raper, E. B. & E. 84; 27 L. J., Q. B. 266; Pinney v. Andrus, 41 Vt. 631; Bradley v. Rea, 14 Allen (Mass.) 20; Rose v. Wallace, 11 Ind. 112; Brown v. Woods, 3 Coldw. (Tenn.) 182; Sherrod v. Langdon, 21 Iowa 518; Marsh v. Webber, 16 Minn. 418; Nintz v. Morrison, 17 Tex. 372; Thomas v. Winchester, 6 N. Y. 397; s. c., 57 Am. Dec. 455; George v. Skirington, L. R., 5 Ex. 1; 39 L. J. Ex. 8; Longmeid v. Holliday, 6 E. L. & Eq. 562; Gas Light Co. v. Colliday, 25 Md. 1; Shepard v. Milwaukee Gas Light Co., 15 Wis. 318.

3. 2 Sutherland Dam. 430, *et seq.*; Passenger v. Thornburn, 34 N. Y. 634; s. c., 90 Am. Dec. 753 and note; Milburn v. Belloni, 39 N. Y. 53; s. c., 100 Am. Dec. 403; White v. Miller, 71 N. Y. 118; s. c., 27 Am. Rep. 13; Butler v. Moore, 68 Ga. 780; s. c., 45 Am. Rep. 508; Ferris v. Comstock, 33 Conn. 513;

sustained.¹ Where the seller seeks to recover the full price of goods not conforming to an implied warranty or a condition precedent, the breach of the warranty or condition will go in mitigation of damages to the extent of the difference between the goods delivered and those which should have been delivered.² And where an article not in conformity with an implied warranty is used, in good faith and without laches, by the vendee, who believes it to be the thing contracted for, he may recover for the difference in value between the profits resulting to him from the use of the thing actually delivered and the greater profits that would naturally have followed had the thing delivered been in conformity with the condition precedent or implied warranty.³ Profits merely prospective and uncertain cannot, however, be recovered.⁴ Into the general doctrine of remedies for the breach of an implied warranty it is not necessary to enter *in extenso*.⁵

Jones v. George, 61 Tex. 345; s. c., 48 Am. Rep. 280. See also the cases cited in the preceding note, and compare Thoms v. Dingley, 70 Me. 100; s. c., 35 Am. Rep. 310; Herring v. Skaggs, 62 Ala. 180; s. c., 34 Am. Rep. 4; McCormick v. Vanatta, 43 Iowa 389.

1. Biddle, Chat. War., § 333; Kimball v. Cunningham, 4 Mass. 502; Conner v. Henderson, 15 Mass. 319; Williamson v. Canaday, 3 Ired. L. (N. Car.) 349; Jones v. George, 61 Tex. 345; s. c., 48 Am. Rep. 280; Ferris v. Comstock, 33 Conn. 513; Fisk v. Tank, 12 Wis. 276; s. c., 78 Am. Dec. 737. See also cases cited in two last preceding notes.

2. Hoe v. Sanborn, 36 N. Y. 93; Parks v. Morris Axe and Tool Co., 54 N. Y. 586; Mixer v. Coburn, 11 Metc. (Mass.) 561; s. c., 45 Am. Dec. 230; Harrington v. Stratton, 22 Pick. (Mass.) 510; Dorr v. Fisher, 1 Cush. (Mass.) 271; Collins v. Delaporte, 115 Mass. 159; Morse v. Brackett, 98 Mass. 205, 210; Morse v. Brackett (3rd Appeal), 104 Mass. 494, 496; Ward v. Reynolds, 32 Ala. 384; Caldwell v. Sawyer, 30 Ala. 283; Jemison v. Woodruff, 34 Ala. 143; Wheelock v. Pacific etc. Co., 51 Cal. 223; Polehemus v. Heiman, 45 Cal. 573; Luftburrow v. Henderson, 30 Ga. 482; Rotan v. Nichols, 22 Ark. 244; Brantley v. Thomas, 22 Tex. 270; s. c., 73 Am. Dec. 264; 1 Sutherland Dam. 261, 278; 2 Sutherland Dam. 438, 439.

3. White v. Miller, 71 N. Y. 118; s. c., 27 Am. Rep. 13; Passenger v. Thornburn, 34 N. Y. 634; s. c., 90 Am. Dec. 753; Milburn v. Belloni, 39 N. Y. 53; s. c., 100 Am. Dec. 403; Parks v. Morris Ax & Tool Co., 54 N. Y. 592; Van Wyck v. Allen, 69 N. Y. 61; s. c., 25

Am. Rep. 136; Wolcott v. Mount, 36 N. J. L. 262; s. c., 13 Am. Rep. 438; s. c., 20 Am. Rep. 425; Flick v. Wetherbee, 20 Wis. 392; Frohreich v. Gammon, 28 Minn. 476; Jones v. George, 61 Tex. 345; s. c., 48 Am. Rep. 280; Ferris v. Comstock, 33 Conn. 513; Lewis v. Rountree, 78 N. Car. 323; Oldham v. Kerchner, 81 N. Car. 430; Griffin v. Colver, 16 N. Y. 489; s. c., 69 Am. Dec. 718; Messmore v. New York Steel etc. Co., 40 N. Y. 422; Thorne v. McVeagh, 75 Ill. 81; Fessler v. Love, 48 Pa. St. 407; McHose v. Fulmer, 73 Pa. St. 365; Borries v. Hutchinson, 18 C. B. (N. S.) 445; Marsh v. Webber, 16 Minn. 418; Nye v. Iowa City, 51 Iowa 129; Hammer v. Schoenfelder, 47 Wis. 455.

4. Herring v. Skaggs, 62 Ala. 180; s. c., 34 Am. Rep. 4; McCormick v. Vanatta, 43 Iowa 389; Hadley v. Baxendale, 9 Exch. 341.

5. Biddle, Chat. War., ch. 5, § 271, *et seq.* Newmark on Sales, §§ 351-353, 397-403; Benj. on Sales (Bennett's ed. 1888), book 5, part 2. ch., 1 & 2, § 869, *et seq.*, 893, *et seq.*; 2 Schouler's P. P. (2nd ed.), ch. 15, §§ 570-592; Story on Sales (Perkins' ed.), ch. 13, 14 & 15; § 386, *et seq.*, 415, *et seq.*, 429, *et seq.* In the foregoing works will be found extended reviews of all the remedies both of vendor and vendee, and especially those applicable to breaches of warranty. Authorities upon some important doctrines relating to the remedies of the buyer, are as follows: Where a vendee relies on a warranty of title, either express or implied, there must be a recovery by the real owner before an action can be maintained. Case v. Hall, 24 Wend. (N. Y.) 102; s. c., 35

Formerly, an action for the breach of such a warranty was always in tort, and it was necessary to allege deceit and knowledge on the part of the vendor.¹ Later, however, and now almost universally, the action of *assumpsit* became the remedy. It follows that no *scienter* need be averred or proved when the action is based upon the breach of the implied contract of warranty.²

43. General Summary—Modifications of Old Rules.—It will thus be seen that with the change in the form of action by which a remedy for the breach of an implied warranty was sought, came a modification of the general doctrines relating to implied warranties.³

Am. Dec. 605; Gross v. Kierski, 41 Cal. 116; Burt v. Dewey, 31 Barb. (N. Y.) 542; s. c. (in Ct. of Appeals), Burt v. Dewey, 40 N. Y. 283; s. c., 100 Am. Dec. 482; Delaware Bank v. Jarvis, 20 N. Y. 230. But *contra*, Perkins v. Whelan, 116 Mass. 542; Grose v. Hennessey, 13 Allen (Mass.) 389.

The purchaser must, however, sustain some loss before he can recover. Burt v. Dewey, 40 N. Y. 283; s. c., 100 Am. Dec. 482; Krumbhaar v. Birch, 83 Pa. St. 428. But *compare* Perkins v. Whelan, 116 Mass. 542; Grose v. Hennessey, 13 Allen (Mass.) 389. But when actually dispossessed by a better title, or surrendering possession to the true owner without waiting a recovery against him at law, he may have his action against his vendor. Read v. Staton, 3 Hayw. (Tenn.) 159; s. c., 9 Am. Dec. 740; Bordwell v. Collie, 45 N. Y. 494; McGiffin v. Baird, 62 N. Y. 329; O'Brien v. Jones, 91 N. Y. 193, 198; Dryden v. Kellogg, 2 Mo. App. 92.

When the goods tendered by the vendor are not of the kind and quality contracted for they may be refused, but under such circumstances the vendee cannot receive and hold the goods contrary to the wishes of the vendor, and at the same time refuse to comply with the contract on his own part for payment at the time of delivery. If he attempts this, the vendor may recover the goods, and the question of a breach of warranty cannot arise, the contract never having become executed. Osborn v. Gantz, 60 N. Y. 540.

But the vendor, by leaving the goods and waiving the payment or special terms of the contract, may change the rule, and upon principles heretofore stated, give the vendee an opportunity to plead a breach of warranty in mitigation of damages. Parker v. Baxter, 86 N. Y. 586, 593.

Or in such case the vendee may accept the goods, treat the contract as executed, and bring an action as for a breach of warranty. In such cases the failure to deliver goods of the kind and quality described at the time the executory contract was made is by the American courts treated as a breach of warranty, rather than of a condition precedent. Wolcott v. Mount, 36 N. J. L. 262; s. c., 13 Am. Rep. 438, 441; Behm v. Burness, 3 B. & S. 755; White v. Miller, 71 N. Y. 118; s. c., 27 Am. Rep. 13; Henshaw v. Robins, 9 Met. (Mass.) 83; Flint v. Lyon, 4 Cal. 17.

1. It was upon this ground that the famous case of Chandelor v. Lopus, really rested, but from a failure to fully apprehend this many erroneous applications of the maxim *caveat emptor* have been made by the courts. See Chandelor v. Lopus, 1 Sm. Lea. Cas. (8th Am. ed.) 294 and notes; Seixas v. Woods, 2 Cai. (N. Y.) 48; s. c., 2 Am. Dec. 215 and note; Story on Sales (Perkins' ed.), § 364; Schuchardt v. Allens, 1 Wall. (U. S.) 359, 368; Biddle, Chat. War., § 274, *et seq.*

2. Notes to Chandelor v. Lopus, 1 Smith's Lea. Cas. (8th Am. ed.) 295, *et seq.*; Biddle Chat. War., § 280, *et seq.*; Story on Sales (Perkins' ed.), §§ 364-365; Schuchardt v. Allens, 1 Wall. (U. S.) 359, 368; Williamson v. Allison, 2 East 446; Stuart v. Wilkins, Douglas 18; Crosse v. Gardiner, Carth. 90; 1 Shower 68; 3 Mod. 261; Medina v. Stoughton, Salk. 210; Wolcott v. Mount, 38 N. J. L. 496; s. c., 20 Am. Rep. 425.

3. Wolcott v. Mount, 38 N. J. L. 496; s. c., 20 Am. Rep. 425; Story on Sales (Perkins' ed.), §§ 364, 365; note to Chandelor v. Lopus, 1 Smith's Lea. Cas. (8th Am. ed.) 295, *et seq.*

In Wolcott v. Mount, 38 N. J. L. 498, BEASLEY, C. J., said: "The tendency of recent adjudications has been,

Caveat emptor was no longer applied improperly to cases where the law implied a contract of warranty and the distinction between cases governed by the maxim and cases of implied warranty became clear. If the doctrines of *caveat emptor* and implied warranty are still sometimes confused in the decisions of the courts, the fault is with the lawyers and the judges, and not with the progressive common law, the principles whereof upon these subjects are now distinctly marked and limited by that right reason which is the essence of the law.¹

I think, to put this subject on a reasonable footing. Starting from the admission that, in the absence of fraud and of a warranty, the rule of *caveat emptor* applies, the effort is, not to elevate particular expressions contained in a given contract into a general rule of law, but to regard each case in the light of its own circumstances, and with respect solely to the understanding of the parties. Whether the representation or affirmation accompanying a sale shall be regarded as a warranty, or as *simplex commendatio*, is a question to be solved by a search for the intention of the contracting parties. The two cases of *Tendwine v. Slade*, 2 Espinasse 572; and *Power v. Barham*, 4 A. & E. 473, are conspicuous examples of this rule. In the former there was a sale shown of two pictures, the catalogue of the auction describing one as a sea piece, by Claude Lorraine, and the other a fair, by Teniers. This description was held by LORD KENYON to be no warranty that the pictures were the genuine works of the artists referred to, but merely an expression of the opinion of the vendor to that effect. In the other case, it "appeared that, at a sale of four pictures, they were described as 'four pictures, views in Venice—Canaletto,' and it was left to the jury to decide whether the intention was to warrant the pictures as authentic, the court distinguishing this case from the former one by the circumstance that Canaletto was comparatively a modern painter, the authenticity of whose works was capable of being known as a *fact*, while, with respect to the productions of very old painters, an assertion as to their genuineness was necessarily a matter of opinion. . . . The question consequently is, in every case of this kind, whether the conditions were such that the vendee had the right to understand, and did so understand, that an affirmation or representa-

tion made by the vendor was meant as a warranty."

Such modification in the doctrines of the law relating to implied warranties has already been fully treated in the discussion of "*caveat emptor*," ante, and need not be repeated. How far the change in the form of action has been instrumental in causing the modification is discussed by Mr. Story, in the sections cited above.

1. Compare 2 Schouler's P. P. (2nd ed.), § 381; Story on Sales (Perkins' ed.), §§ 359, 364, 365; notes to *Chandelor v. Lopus*, 1 Smith's Lea. Cas. (8th Am. ed.) 294, *et seq.*, and the paragraphs of this article treating of *caveat emptor* and its limitations in modern times.

Authorities: In closing this article, the writer cannot too much acknowledge his indebtedness to the admirable notes in the American Decisions and Reports, whence much of his authority has been derived. Biddle on Chat. War. has also been serviceable by reason of its clear and accurate statements of the law. From the time-honored work of W. W. Story on Sales much help has been received, as also from the extensive notes to *Chandelor v. Lopus*, in 1 Smith's Lea. Cas. (8th Am. ed.). The lucid treatise on Sales of Mr. Benjamin, with the scholarly notes of E. H. Bennett, has been indispensable, and Mr. Schouler's clear enunciation of principles in the second volume of his "Personal Property" has been greatly relied upon. Not less valuable than any of the foregoing in its collection of authorities is the work on Sales by Mr. Newmark, in the practitioners' series.

* While all of the works have been freely used, for which acknowledgment is here made, the writer has tried, as far as possible, to examine the cases for himself and state in his text the principles established by the cases.

IMPORT—IMPORTATION—IMPORTER.—(See IMPOST, REVENUE LAW).—To bring from a foreign jurisdiction into this jurisdiction merchandise not the product of this country.¹

“Imports” are things imported.²

IMPOSE.—To lay or levy.³

1. The Steamboat Forrester, Newb. Admr. (U. S.) 94.

2. “What then are ‘imports’? The lexicons inform us they are ‘things imported.’ If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought into the country. ‘A duty on imports’ then is not merely a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country.” A license tax on importers is a duty on imports, within the meaning Const. U. S., art. 1, § 10, cl. 2: “No State shall . . . lay any impost or duties on imports,” etc. Brown v. Maryland, 12 Wheat. (U. S.) 419.

Under this clause of the constitution, “imports” are confined to things brought from foreign countries, and does not include things brought from foreign States. Woodruff v. Parham, 8 Wall. (U. S.) 123; License Cases, 5 How. (U. S.) 594; Brown v. Houston, 114 U. S. 622; People v. Maring, 3 Keyes (N. Y.) 374; State v. Pinckney, 10 Rich. (S. Car.) 474; Territory v. Farnsworth (Mont.), 5 Pac. Rep. 869.

The word “imports” applies to things, property only, and not to persons, as passengers and immigrants. People v. Compagnie Generale Transatlantique, 107 U. S. 59; Norris v. City of Boston, 4 Metc. (Mass.) 282. And see Passenger Cases, 7 How. (U. S.) 477. The word “importation” is used in Const. U. S., art. 1, § 9, in reference to slaves, but these were property.

In Wynne v. Wright, 1 Dev. & B. (N. Car.) 23, “imports” was said to include in its meaning both “the act of importation” and “the articles imported,” which latter retain their character as imports until by the first wholesale disposition of them they have passed from the control of the importer and become incorporated in the mass of property of the State, or until they have been broken up from the original cases, or other form in which they have been imported, and are offered for sale at

retail, or in any other peculiar manner. Lew v. Austin, 13 Wall. (U. S.) 29; King v. McEvoy, 4 Allen (Mass.) 110.

Importation.—“To constitute an importation so as to attach the right to duties, it is necessary, not only that there should be an arrival within the limits of the United States and of a collection district, but also within the limits of some port of entry.” Arnold v. United States, 9 Cr. (U. S.) 104; United States v. Vowell, 7 Cr. (U. S.) 368. To constitute an importation, under a non-importation act, it is also necessary that there should be an intent to land the goods there. “It is undoubtedly true that the mere act of coming into port, though without breaking bulk, is *prima facie* evidence of importation. Yet even this presumption may be rebutted. If a vessel come in by distress, or to avoid capture, it has not been considered as an importation.” STORY, J., in Schooner Mary & Cargo, 1 Gall. (C. C.) 206; Schooner Boston & Cargo, 1 Gall. (C. C.) 239.

Importer.—A person engaged in foreign commerce, McLEAN, J., in License Cases, 5 How. (U. S.) 594. By the English Customs Amendment Act, 1859, § 8, “the word importer in any act relating to the customs is to apply to and include any owner or other person for the time being possessed of or beneficially interested in any goods imported.” See Budenberg v. Roberts, L. R., 1 C. P. 575; s. c., 1 Han. & Ruth. 836.

3. “Without entering into any nice or hypercritical consideration of the signification of the word, it is sufficient to say that the latin word ‘*impono*,’ from which it is derived, was as generally used in that tongue, among the ancient Romans, to mean to lay or levy a tax, as the derivative of it in our tongue has since been used in this country, and among all English speaking people, to signify the same thing; and from it is also derived the word ‘*impost*’ in our language, which has scarcely had any other meaning than a tax, however assessed, levied, or collected by a government, although it has by usage acquired a more restricted meaning, and is now confined in its applica-

IMPOSITION—IMPOSSIBLE CONTRACTS.

IMPOSITION.—An impost; tax; contribution.¹

IMPOSSIBLE CONTRACTS.

- I. Definition, 176.
- II. Impossibility Arising from Nature of Contract, 176.
- III. Intervening Impossibility, 178.
 - 1. *General Rule*, 178.
 - 2. *Performance Dependent on*

Existence of Person or Thing, 181.

3. *From Statutory Enactment*, 182.

4. *From Act of Oblige*, 183.

I. Definition.—Impossible contracts which will be deemed void in the eye of the law, or of which the performance will be excused, are such contracts as cannot be performed, either because of the nature of the obligation undertaken, or because of some supervening event which renders the performance of the obligation either physically or legally impossible.²

II. Impossibility Arising from Nature of Contract.—To render a contract invalid because of an impossibility arising from its nature, it is essential that the thing to be done cannot by any means be accomplished.³ If it is only improbable, or out of the

tion to taxes or duties imposed by government on imports. But any tax authorized by the legislature of the State, for whatever purpose, and however ascertained, which is fixed in its amount, or is assessed and collected by the instrumentality provided for it in the act, is in effect imposed by law on the person who is bound to pay it, whether it be laid directly or indirectly upon him." *Neary v. P. W. & B. R. Co.*, (Del.) 9 At. Rep. 411.

1. Whart. Law Lex., Repalje & L. Law Dict. An assessment for benefits in widening a street is a "civil imposition," within the meaning of the term in a clause of a charter of a college, exempting its lands from taxation. "'All civil impositions, taxes and rates,' include burdens and duties to be rendered in money or otherwise, imposed by the civil authority, either specifically upon the lands, or upon the owner or occupant in respect thereof, as well as those contributions to the public revenue exacted from citizens and subjects according to their several abilities; the measure of those abilities being rated by the estimated value of their real and personal estates. . . . The association and order of the terms may indicate that 'civil impositions' are to be limited to such as are in the nature of taxes; but at the same time they show that the taxes thereby intended are not to be taken in a narrow or restricted sense." *Harvard College v. Aldermen of Boston*, 104 Mass. 470.

2. "An impossible contract may be defined to be one which the law will not hold binding upon the parties, because of the natural or legal impossibility of the performance by one party of that which is the consideration for the promise of the other." 7 Wait Act. & D. 124.

"If the thing to be performed is notoriously physically impossible, and was known to be so at the time of the making of the contract, the contract will be a void contract, unless the promisor has taken upon himself to warrant that it is possible." Addison on Cont. (8th Eng. ed.), p. 1196.

3. Addison on Contracts (8th Eng. ed.), 1196; Benj. Sales, § 551 (Bennett's ed.); 1 Pars. Cont. 460; 2 Story Cont. § 1334; Powell on Cont. 160; 5 Vin. Abr. 110, 111; 1 Roll. Abr. 419; 2 Bl. Com. 341; Co. Litt. 206 a; Supt. etc. of Public Schools of Trenton v. Bennett, 26 N. J. (3 Dutch.) L. 513; Beebe v. Johnson, 19 Wend. (N. Y.) 500; s. c., 32 Am. Rep. 518.

Legal Impossibility.—In *Nerot v. Wallace*, 3 T. R. 17, an agreement was entered into by the assignees of a bankrupt that, in consideration of an obligation of a friend of the bankrupt to pay a sum of money, the bankrupt would not be called upon to account for certain sums received by him, and would not be examined by the bankruptcy commissioners with reference thereto. It was held that as the assignees had not the power to dis-

power of the obligor, it is not, in law, deemed impossible, no matter how absurd or improbable the idea of its execution may be.¹

pense with the bankrupt's examination, the contract was invalid. LORD KENYON said: "I do not say that this is a *nudum pactum*; but the ground on which I found my judgment is this: that every person who, in consideration of some advantage, either to himself or to another, promises a benefit, must have the power of conferring that benefit up to the extent to which that benefit professes to go; and that not only in fact but in law. Now, the promise made by the assignees in this case, which was the consideration of the defendant's promise, was not in their power to perform; because the commissioners had, nevertheless, a right to examine the bankrupt. And no collusion of the assignees could deprive the creditors of the right of examination, which the commissioners would procure them. The assignees did not stipulate only for their own acts, but also that the commissioners should forbear to examine the bankrupt, but clearly they had no right to tie up the hands of the commissioners in any way."

Covenant to Pay Money to Oneself.—A covenant by C to pay A, B and C on their joint account has been declared to be senseless and impossible of performance, because no man can pay money to himself. *Faulkner v. Lowe*, 2 Exch. 595.

Covenant Ultra Vires of Servant.—An undertaking by a servant that he would discharge a debt due to his master, in consideration of the debtor doing certain repairs upon the property of the servant, is beyond the power of the servant to perform, and will not form a consideration for the counterpart of the contract. *Harvey v. Gibbons*, 2 Lev. 161.

Contract that Land Will Sell at Specified Price.—In *Stevens v. Coon*, 1 Pin. (Wis.) 356, the court held that a contract in writing that certain lands would be sold on or before a specified date at a stated price was void as binding the obligor to the performance of a legal impossibility, inasmuch as he had no power to compel the sale of the land on the day named. The court said: "Is it not legally impossible for him to perform this undertaking? Certainly, no man can in

legal contemplation, force the sale of another's property by a given day, or by any day, as of his own act."

Warranty of Performance of the Impossible.—In *Clifford v. Watts*, L. R., 5 C. P. 576, WILLES, J., uses language which seems to imply that a man may warrant the happening of the impossible in such terms as will bind him. He says: "Cases may be conceived in which a man may undertake to do that which turns out to be impossible, and yet he may still be bound by his agreement. I am not prepared to say that there may not be cases in which a man may have contracted to do something which, in the present state of scientific knowledge, may be utterly impossible, and yet he may have so contracted as to warrant the possibility of its performance by means of some new discovery, or be liable in damages for the non-performance, and cannot set up by way of defence that the thing was impossible. But before we arrive at such a conclusion we must be satisfied, if no other reasonable conclusion suggests itself, that the party really did intend to warrant that to be possible which was impossible."

Royalty on Minerals Not in Existence.—In *Clifford v. Watts*, L. R., 5 C. P. 576, a land owner, in consideration of a rent, etc., demised the mines, pits, etc., of clay under certain lands particularly described. The lease granted the lessee a license to enter upon the land to dig and search for clay and to make pits, etc. There was no stipulation or condition having reference to the contingency of no clay being found. The lessor brought an action against the lessee for breach of the covenants of the lease, and the lessee pleaded that it was impossible to raise the quantity stipulated, because it was not in the ground, and that he had entered into the contract in ignorance of that fact. The court held that he was not bound by the obligation in the lease. The court distinguished the case from *Marquis of Bute v. Thompson*, 13 M. & W. 487, on the ground that in the latter case there was an express stipulation that rent should be paid, whether coal was got or not.

1. See *Jones v. St. John's College*, L. R., 6 Q. B. 124; 40 L. J., Q. B. 80;

III. Intervening Impossibility.—1. *General Rule.*—It is a general rule that where a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good or answer in damages, although prevented in the performance by an inevitable accident.¹ But if a contract be made to do work on a building

Hills v. Sughrue, 15 Mee. & W. 253; *Beebe v. Johnson*, 19 Wend. (N. Y.) 500; s. c., 32 Am. Dec. 518; *Paradine v. Jane*, Aleyn 27; *Dermott v. Jones*, 69 U. S. (2 Wall.) 1.

Improbability and Absurdity.—"If the covenant be within the range of possibility, however absurd or improbable the idea of execution may be, it will be upheld; as where one covenants it shall rain to-morrow, or that the pope shall be at Westminster on a certain day. To bring the case within the rule of dispensation, it must appear that the thing to be done cannot by any means be accomplished; for if it be only improbable, or out of the power of the obligor, it is not to be deemed in law impossible. 3 Com. Dig. 93. If a party enter into an absolute contract, without any qualification or exception, and receives from the party with whom he contracts the consideration of such engagement, he must abide by the contract, and either do the act or pay the damages; his liability arises from his own direct and positive undertaking." *Beebe v. Johnson*, 19 Wend. (N. Y.) 500; s. c., 32 Am. Dec. 518; *Supt. of Public Schools of Trenton v. Bennett*, 26 N. J. (3 Dutch.) L. 513; s. c., 72 Am. Dec. 373.

Contract to Obtain Foreign Patent.—In *Beebe v. Johnson*, 19 Wend. (N. Y.) 500; s. c., 32 Am. Dec. 518, the vendor of a patent right had undertaken to perfect a patent right in England, and to secure to the vendee the exclusive privilege of selling the patented articles in Upper and Lower Canada. The vendee brought action upon the covenant to recover damages, and defendant urged that as both vendor and vendee were citizens of the United States, and by the laws of both England and Canada a patent right could only be obtained by a British subject, the contract was impossible of performance, and therefore void. The court held, however, that fulfillment was within the range of possibility, and sustained a verdict for the plaintiff. NELSON, C. J., who delivered the opinion, said: "It is clear that the fulfillment in this case cannot be considered an impossibility within the rule; because, for anything

we know to the contrary, the exclusive right to make, use, and vend the machine in the Canadas might have been secured in England by act of parliament, or otherwise; at least, there is nothing in all this necessarily impossible. These provinces are a part of the British Empire, and subject to the power of the parliament at home, which body might very well grant the privilege the defendant covenanted to procure. Certainly we are unable to say the government cannot or would not by any means grant it."

Destruction of Building by Defects in Soil.—If a contractor undertakes to erect a building of any kind, and is prevented by reason of the nature of the soil, his contract is binding upon him notwithstanding, and he must answer in damages. *Supt. etc. of Public Schools of Trenton v. Bennett*, 26 N. J. (3 Dutch.) L. 513; s. c., 72 Am. Dec. 373; *Dermott v. Jones*, 69 U. S. (2 Wall.) 1.

Shipment of Cargo Not in Existence.—In *Hills v. Sughrue*, 15 M. & W. 253, a shipowner contracted that his vessel should proceed to Ichaboe, one of the Guano islands, on the west coast of Africa, and there load a full and complete cargo of guano, and carry the same to a British port. In a suit against the shipowner for breach of his contract he pleaded that no guano could be found at Ichaboe. It was held that this constituted no defence to the action.

1. This was first stated in terms which fixed it as a rule of law in *Paradine v. Jane*, Aleyn 26.

Covenant to Repair House.—If a lessee covenants in his lease that he will repair the demised buildings, he is bound to do so, although they be burned by lightning, or thrown down by enemies. *Phillips v. Stevens*, 16 Mass. 238; *Coles v. Celluloid Manufacturing Co.*, 39 N. J. L. 326; *Paradine v. Jane*, Aleyn 26; *Bullock v. Dammit*, 6 T. R. 650; *Holtzapffel v. Baker*, 18 Ves. 115; *Walton v. Waterhouse*, 2 Wms. Saunders 420, 422, n; *Earl of Chesterfield v. Duke of Bolton*, cited in 2 Wms. Saund. 422, a.

Contract to Erect and Repair Bridge.—In *Brecknock etc. Canal Co. v.*

Pritchard, 6 T. R. 751, the plaintiff sued upon a covenant to build a bridge and keep it in repair. The defendant pleaded that the bridge was carried away by the act of God, by a great and extraordinary flood, although well built and in good repair. A demurrer to the plea was sustained. See, also, *Police Jury v. Taylor*, 2 La. Ann. 272.

Contract to Erect Building.—If a contractor undertake to erect and complete a building on or before a specified date for a specified price, he is bound to do so, and the law will not admit any excuse founded upon the destruction of the building by fire or by storm. *School District v. Dauchy*, 25 Conn. 530; s. c., 68 Am. Dec. 371; *Doster v. Brown*, 25 Ga. 24; s. c., 71 Am. Dec. 153; *Adams v. Nichols*, 36 Mass. (19 Pick.) 275; s. c., 31 Am. Dec. 137; *Boyle v. Agawam Canal Co.*, 39 Mass. (22 Pick.) 381; *Fildew v. Besley*, 42 Mich. 100; s. c., 36 Am. Rep. 433; *Tompkins v. Dudley*, 25 N. Y. 272; s. c., 82 Am. Dec. 349; *Jones v. St. John's College, L. R.*, 6 Q. B. 124; 40 L. J., Q. B. 80. Or because the latent softness of the soil rendered the foundation insecure. *Supt. etc. of Public Schools of Trenton*, 26 N. J. (3 Dutch.) L. 513; s. c., 72 Am. Dec. 373; *Dermott v. Jones*, 64 U. S. (23 How.) 220; s. c., 69 U. S. (2 Wall.) 1; *Stees v. Leonard*, 20 Minn. 494. In *Maryon v. Carter*, 4 Car. & P. 295, it was held that a contractor, who had undertaken to do certain paving by a specified date, could not recover, having failed to complete it within the stipulated time, although the failure was caused by a cessation of the work during four days when the weather was unsuitable.

Executory Contract of Sale.—In *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487, it was held that a manufacturer who had contracted to manufacture certain articles could not plead in justification that he was prevented by his mill being burnt down; and in *Eddy v. Clement*, 38 Vt. 486, a lumber dealer who had contracted to deliver certain lumber, and who was known to depend for his supplies on certain mills, was not allowed to justify non-performance on the ground of the impossibility of obtaining the lumber by reason of a drought which had caused the mills to stop work.

In *McGehee v. Hill*, 4 Porter (Ala.) 170; s. c., 29 Am. Dec. 277, a person who had contracted to sell and deliver a certain quantity of corn and fodder, was held to be bound by his contract,

although his crops had failed owing to an excessive drought. Similarly, a dairyman who has agreed to deliver certain dairy produce, cannot justify a failure to do so by reason of the drying of his cows. *Oakley v. Morton*, 11 N. Y. 25.

Sales—Failure to Deliver.—A failure to deliver goods sold, within the contract time, is not excused by the fact that the government has taken possession of the means of transportation, and that no facilities are available for private persons. *Bacon v. Cobb*, 45 Ill. 47. Nor by the fact that a river which is the usual route, is frozen, if other means are available. *Engster v. West*, 35 La. Ann. 119; s. c., 48 Am. Rep. 232. In *Tobias v. Lissberger*, 105 N. Y. 404, a seller was held responsible for delay in shipment, although at the time of contract the goods were in a German port, situated upon a river forty miles from the sea, and the river was frozen. An impossibility of shipping goods safely which arises from the nature of the goods and the state of the weather, is no justification. *Kitzinger v. Sanborn*, 70 Ill. 146; *Kribs v. Jones*, 44 Md. 396.

Bond to Return Chartered Vessel.—In *Steele v. Buck*, 61 Ill. 343; s. c., 14 Am. Rep. 60, the charterers of a vessel bound themselves by a bond, with surety, to return the vessel in good order. Whilst in the possession of the charterers the vessel was destroyed in a gale by the "act of God." The court held that the grantors of the bond were liable for a breach, notwithstanding the loss. But see *Singleton v. Carroll*, 6 J. J. Marsh. (Ky.) 527; s. c., 22 Am. Dec. 95, where it was held that the failure of the lessee of a slave to return him in terms of a covenant in his lease, was justified by impossibility arising from his escape without the lessee's fault.

Closing School for Sickness.—If a public school is closed by reason of an epidemic in the neighborhood, the trustees must pay the salary of the teacher, notwithstanding. *Dewey v. Alpena School District*, 43 Mich. 480; s. c., 38 Am. Rep. 206.

Promise of Marriage.—In *Hall v. Wright, E. B. & E.* 746; 27 L. J., Q. B. 145, the plaintiff sued to recover damages for breach of promise of marriage. The defendant pleaded that it was impossible for him to enter into the married state without danger to his life; but the court held that the plea constituted no defence.

already in existence, whether by way of repairs or alterations, or for work which forms only part of a new building, the destruction of the building before completion excuses the contractor from the performance of his contract, and he is entitled to the value of any work that may have been done at the time of the destruction.¹

Contract of Affreightment.—If a shipowner contract that his vessel shall proceed to a certain port and there load a cargo, contrary winds and bad weather which prevent the vessel from reaching the port of loading form no excuse. *Shubrick v. Salmond*, 3 Burr. 1639. Similarly, an embargo declared by a foreign port which prevents the loading of the vessel, is no justification. *Monk v. Cooper*, 2 Stra. 763; *Atkinson v. Ritchie*, 10 East 530; *Hadley v. Clark*, 8 T. R. 259. Nor is the fact that an infectious disease exists which prevents communication with the shore. *Barker v. Hodgson*, 3 Man. & Sel. 267. Nor the fact that the loading cannot be completed within the stipulated time by reason of ice. *Barrett v. Dutton*, 4 Camp. 333. Or that the cargo cannot be discharged for the same reason. *Hodgdon v. New York & N. H. & H. R. Co.*, 46 Conn. 277; *Aylward v. Smith*, 2 Low. C. C. 192. In *Hand v. Baynes*, 4 Whart. (Pa.) 204; s. c., 33 Am. Dec. 54, a shipmaster who, by his charterparty, was to proceed by way of canal, on finding that it was impossible to do so because the locks were out of repair, deviated from his course. It was held that the deviation was not justified in face of a positive contract to proceed by canal; and in *Harmony v. Bingham*, 12 N. Y. 99; s. c., 62 Am. Dec. 142, the court held that a freshet which rendered it impossible to travel by way of a canal was no justification to a carrier for a failure to deliver the goods within the stipulated time.

Contract of Carriage.—In *Williams v. Vanderbilt*, 28 N. Y. 217, a common carrier of passengers agreed to transport the plaintiff from New York to San Francisco, *via* Lake Nicaragua. The contract specified that the portion of the route between San Juan del Sur and San Francisco should be by a steamer, named the "North America." It was held that the promise to carry plaintiff in that particular steamer was a minor part of the contract which was to carry the plaintiff through, and that the loss of the "North America" did not excuse the carrier for failing to do so.

Foreign Process.—In *Wareham Bank v. Burt*, 87 Mass. (5 Allen) 113, a carrier agreed to obtain the renewal of certain notes by the maker and indorsers, who were resident in Canada, or to return the original notes within a reasonable time. The notes were delivered by him to one of the indorsers in order that the latter might obtain the renewals. While in his hands they were garnished at the instance of a prior indorser. In an action for breach of his contract to return the notes, he pleaded impossibility by reason of the garnishment, but it was held that the plea constituted no justification.

1. *Rawson v. Clark*, 70 Ill. 656; *Schwartz v. Saunders*, 46 Ill. 18; *Lord v. Wheeler*, 67 Mass. (1 Gray) 282; *Niblo v. Binsse*, 1 Keyes (N. Y.) 476; *Hollis v. Chapman*, 36 Tex. 1; *Cook v. McCabe*, 52 Wis. 250; s. c., 40 Am. Rep. 765; *Menetone v. Athawes*, 3 Burr. 1592. But see *Brumby v. Smith*, 3 Ala. 123; *Fildew v. Besley*, 42 Mich. 100; s. c., 36 Am. Rep. 433; *Appleby v. Meyers*, L. R., 1 C. P. 614.

Contract for Completed Job.—In *Brumby v. Smith*, 3 Ala. 123, the court held that the contractor could not recover on a contract which called for a completed job. See, also, *Fildew v. Besley*, 42 Mich. 100; s. c., 36 Am. Rep. 433. The Wisconsin supreme court, in *Cook v. McCabe*, 53 Wis. 250; s. c., 40 Am. Rep. 765, disapproved of *Brumby v. Smith*, and declined to follow it. In Texas, a recovery can be had on a *quantum meruit* although the contract stipulates that the work should be finished before payment. *Hollis v. Chapman*, 36 Tex. 1.

Contract to Erect House—Payment by Measurement.—If the contractor agree to erect a house for which he is to be paid according to the material and labor done—on measurement,—if the house is destroyed before completion the loss falls upon the owner, and the contractor can recover for material and labor. *Wilson v. Knott*, 3 Humph. (Tenn.) 473; *Clark v. Franklin*, 7 Leigh (Va.) 1.

2. *Performance Dependent on Existence of Person or Thing.*—In all contracts in which the performance depends on the continued existence of a specified person or thing, a condition is implied that impossibility of performance arising from the perishing of the person or thing shall excuse non-performance.¹

1. *Janin v. Browne*, 59 Cal. 37; *Ryan v. Dayton*, 25 Conn. 188; s. c., 65 Am. Dec. 560; *Knight v. Bean*, 22 Me. 531; *Dickey v. Linscott*, 20 Me. 453; s. c., 37 Am. Dec. 66; *Shultz v. Johnson's Admr.*, 5 B. Mon. (Ky.) 500; *Stewart v. Loring*, 87 Mass. (5 Allen) 306; *Dexter v. Norton*, 47 N. Y. 62; s. c., 7 Am. Rep. 415; *Spalding v. Rosa*, 71 N. Y. 40; s. c., 27 Am. Rep. 7; *Siler v. Gray*, 86 N. C. 566; *Billings's Appeal*, 106 Pa. St. 558; *Yerrington v. Greene*, 7 R. I. 589; s. c., 84 Am. Dec. 578; *Poussard v. Spiers*, L. R., 1 Q. B. D. 410; *Howell v. Coupland*, L. R., 9 Q. B. 462; aff'd, 1 Q. B. D. 258; *Whincup v. Hughes*, L. R., 6 C. P. 78; *Boast v. Firth*, L. R., 4 C. P. 1; *Robinson v. Davison*, L. R., 6 Exch. 267; *Simeon v. Walker*, 46 L. J., C. P. D. 679; *Tasker v. Shepherd*, 6 H. & N. 575; 30 L. J., Exch. 207; *Taylor v. Coldwell*, 3 B. & S. 826.

Sale of Specific Chattel.—In keeping with the principle stated in the text, the vendor of a specific chattel is excused from the delivery if, without his fault, it perishes, although the title has never passed. *Dexter v. Norton*, 47 N. Y. 62; s. c., 7 Am. Rep. 415. In *Howell v. Coupland*, L. R., 9 Q. B. 462, 1 Q. B. D. 258, it was held that a person who had contracted to deliver a specified quantity of potatoes, to be grown on specified lands, was excused from performance, if it became impossible to deliver the contract quantity owing to the failure of the land to produce it.

Contracts for Service.—If a servant die during the term of his service, or if he be disabled by sickness so that he cannot fulfil the remainder of his contract, the impossibility justifies the non-performance. *Ryan v. Dayton*, 25 Conn. 188; s. c., 65 Am. Dec. 560; *Dickey v. Linscott*, 20 Me. 453; s. c., 37 Am. Dec. 66; *Wolfe v. Howes*, 20 N. Y. 197; *Poussard v. Spiers*, L. R., 1 Q. B. D. 410; *Boast v. Firth*, L. R., 4 C. P. 1; *Robinson v. Davison*, L. R., 6 Exch. 267. But see *Greene v. Linton*, 7 Porter (Ala.) 133. Or, if the employer die during the term of service, non-performance on his part is likewise excused. *Yerrington v. Greene*, 7 R.

I. 589; s. c., 84 Am. Dec. 578; *Whincup v. Hughes*, L. R., 6 C. P. 78; *Tasker v. Shepherd*, 6 H. & N. 575; 30 L. J. Ex. 207. The existence of an infectious disease in the neighborhood which exposes the servant to danger is sufficient to justify the termination of the contract. *Lakeman v. Pollard*, 43 Me. 463.

Contract for Tuition.—The sickness of the pupil which prevents his receiving tuition in terms of a contract, is a sufficient excuse for non-performance. *Stewart v. Loring*, 87 Mass. (5 Allen) 306. And a pupil who has been taken sick may be removed from school without notice, although notice be required by the contract. *Simeon v. Watson*, 46 L. J., C. P. D. 679.

Sickness of Performer.—Sickness, which prevents a performer from appearing at the opening of a series of performances, annuls the entire contract and releases both parties. *Poussard v. Spiers*, L. R., 1 Q. B. D. 410. In *Robinson v. Davison*, L. R., 6 Exch. 267, a husband contracted that his wife would perform as a pianiste at a series of concerts. It was held that sickness, which rendered it impossible for her to perform, released him from liability.

In *Spalding v. Rosa*, 71 N. Y. 40; s. c., 27 Am. Rep. 7, the defendants contracted with plaintiffs, who were proprietors of a theatre, to furnish the "Wachtel opera troupe" to give a certain number of performances. Wachtel, from whom the company took its name, was the leader and chief attraction, and his connection with the company was the inducement to the plaintiffs to enter into the contract. Wachtel, because of illness, was unable to sing, and in consequence defendants did not perform. In an action to recover damages for breach of the contract, it was held that the presence of Wachtel was the principal thing contracted for, and was of the essence of the contract; that plaintiffs would not have been bound to accept the services of the troupe without him; and that the sickness and disability of Wachtel, having occurred without the fault of

3. *From Statutory Enactment.*—If, subsequently to the making of a contract, a statute is enacted which makes the performance of the contract unlawful, a legal impossibility supervenes which releases the promisor from his obligation.¹ But if the perform-

the defendants, constituted a valid excuse for non-performance, and a good defence to the action.

Hire of Music Hall.—In *Taylor v. Caldwell*, 3 B. & S. 826, a contract was entered into for the use of a music hall and gardens during a series of concerts. The court *held*, that as the existence of the music hall in a state fit for a concert was essential to the fulfilment of the contract, both parties were excused from performance by its destruction by fire.

Exhaustion of Coal Mine.—The performance of a covenant in a lease of a coal mine, that the lessee shall work the same during the continuance of the lease in a good and workmanlike manner, is excused if the coal become exhausted. *Walker v. Tucker*, 70 Ill. 527. See also *Clifford v. Watts*, L. R., 5 C. P. 576. In the latter case the court distinguished the case of *Marquis of Bute v. Thompson*, 13 M. & W. 487, in which it was *held* that the minimum rent was payable whether coal existed or not, on the ground that there was an express covenant therefor.

Lessee.—A lessee for hire who has promised to return an animal hired, is excused from doing so if, without his fault, the animal die. *Williams v. Hyde*, Palm. 548. In *Singleton v. Carroll*, 6 J. J. Marsh. (Ky.) 527; s. c., 22 Am. Dec. 95, the lessee of a slave who had covenanted to return him was *held* to be released from his obligation by the escape of the slave without his fault. But see *Steele v. Buck*, 61 Ill. 343; s. c., 14 Am. Rep. 60.

1. *Cordes v. Miller*, 39 Mich. 581; *Brady v. Northwestern Ins. Co.*, 11 Mich. 425; *Jones v. Judd*, 42 N. Y. 411; *Brewster v. Kitchell*, 1 Salk. 198; *Davis v. Cary*, 15 Q. B. 418; *Doe v. Rugeley*, 6 Q. B. 107; *Slipper v. Tottenham Junc. Ry. Co.*, L. R., 4 Eq. 112; *Newington Local Board v. Cottingham Local Board*, L. R., 12 Ch. Div. 725; *Neway v. Sharpe*, L. R., 8 Ch. Div. 39; *Baily v. DeCrespigny*, L. R., 4 Q. B. 180; *Brown v. Mayor etc. of London*, 9 C. B., N. S. 726; 31 L. J., C. P. 280; *Wynn v. Shropshire Union Ry. etc. Co.*, 5 Ex. 420.

This rule was first laid down in *Brew-*

ster v. Kitchell, 1 Salk. 198. In that case *HOLT, C. J.*, said: "Where H covenants not to do an act or thing which was lawful to do, and an act of parliament comes after and compels him to do it, the statute repeals the covenant. So if H covenants to do a thing which is lawful, and an act of parliament comes in and hinders him from doing it, the covenant is repealed. *Vide Dyer*, 27 pl. 278. But if a man covenants not to do a thing which was unlawful, and an act of parliament comes and makes it lawful to do it, such act of parliament does not repeal the covenant."

Land Taken Under Power of Eminent Domain.—In *Baily v. DeCrespigny*, L. R., 4 Q. B. 180, an action was brought for the breach of a covenant in a deed that the grantee or his assigns should not erect any buildings upon certain lands. Defendant pleaded that the lands had been acquired by a railway company under compulsory powers, and it was *held* that as the railway company was authorized to take the land and build thereon the covenantor was released from his covenant thereby, and the action could not be maintained. *HARMEN, J.*, who delivered the opinion of the court, said: "It was, indeed, conceded on the argument by the plaintiff's counsel, that the defendant would not be liable for all acts of the railway company, as he would have been for the acts of any other assignee; but it was contended that the defendant was relieved from liability on his covenant as to those acts only which the company was required by the act of parliament to do, and not as to those which the company was merely empowered to do. We do not think that this distinction is well founded. The rule laid down in *Brewster v. Kitchell*, 1 Salk. 198, rests upon this ground, that it is not reasonable to suppose that the legislature, while altering the condition of things with reference to which the covenantor contracted, intended that he should remain liable on a covenant which the legislature itself prevented his fulfilling; but the covenantor in this case is equally disabled from preventing the railway company from doing

ance of the obligation is merely rendered more burdensome or expensive, the enactment of the statute creates no such impossibility as will excuse the obligor.¹

4. *From Act of Party*.—If one of the parties to a contract prevents the performance of a condition, or makes its performance impossible by his own act, he cannot take advantage of the non-performance, and avoid liability thereby.² Similarly, if the act of the obligee in a contract is the cause of the non-performance, the

those things which it is *empowered* to do, as those which it is required to do; why then should there be a difference in the liability of the covenantor with respect to the one and the other?"

Covenant in Lease to Rebuild.—The lessor of a wooden building covenanted to rebuild it in case of its destruction by fire. The building was so destroyed, but before the lessor could rebuild it the municipality passed an ordinance forbidding the erection of wooden buildings. The court *held* that, although the landlord had covenanted to rebuild the building he leased, there was no undertaking that if not allowed to build he would put up another on the same plan, of more substantial and presumably more costly material; and that performance of the covenant having become impossible he was no longer bound by it. *Cordes v. Miller*, 39 Mich. 581. But under similar circumstances the Iowa supreme court *held* that such an ordinance did not render the performance of the covenant impossible, but only more burdensome and expensive, and did not release the covenantor from the obligation. *David v. Ryan*, 47 Iowa 642. In *Rogers v. Snow*, 118 Mass. 118, the court *held* that a statute in terms very similar to the ordinances referred to above could not impair the obligation of such a covenant.

Performance of Bond.—In *Davis v. Cary*, 15 Q. B. 418, a bond was given by the treasurer of certain turnpike roads that he would account and pay according to the directions of a certain statute. Subsequently the statute was repealed. The treasurer had accounted in terms of the statute up to the date of the repeal. The court *held* that subsequently to the repeal there could be no breach under the statute, as its repeal had rendered performance impossible.

Annuity Payable Out of Corporate Funds.—The corporation of London were empowered by various acts of parliament, passed at the time when they

claimed a right to the soil and bed of the river Thames and exercised the power of conservancy thereon, to borrow money to be expended in the improvement of the navigation of the river, and to levy tolls and duties upon boats and vessels navigating the river, and charge the moneys borrowed upon such tolls. The corporation accordingly raised large sums on bonds conditioned for the payment of certain yearly sums "out of the tolls and duties granted and made payable by virtue of the said acts" until payment of the principal; and such yearly sums were duly paid by them down to the passing of the Thames Conservancy act. By that act, which professed to be passed for the purpose of carrying out an agreement between the crown and the corporation for the settlement of conflicting claims between them in respect to the right to the soil and bed of the Thames, the conservancy of the river was taken away from the corporation and vested in a newly created body of twelve conservators, in whom all the right of the crown and of the corporation in the bed and soil of the river were vested, as well as the power to receive and apply the tolls above mentioned, and all other tolls, dues, etc. There was no express provision in the last mentioned statute either for discharging the corporation from liability on the securities or imposing any liability on the newly created body in respect of them. *Held*, that the performance of the obligation by the corporation having been rendered impossible by act of the laws, the obligation was discharged, and no action would lie against the corporation. *Brown v. Mayor etc. of London*, 9 C. B., N. S. 726; 31 L. J., C. P. 280.

1. *David v. Ryan*, 47 Iowa 642; *Baker v. Johnson*, 42 N. Y. 126.

2. Co. Lit. 20 b; *Jones v. Walker*, 13 B. Mon. (Ky.) 163; s. c., 56 Am. Dec. 557; *Majors v. Hickman*, 2 Bibb. (Ky.) 217; *Marshall v. Craig*, 1 Bibb. (Ky.)

obligor is thereby discharged from liability.¹ And if the obligor in a condition has rendered services, but has been prevented from completely fulfilling his contract by the act of the obligee,

383; *Cape Fear etc. Nav. Co. v. Wilcox*, 7 Jones (N. Car.) L. 481; s. c., 78 Am. Dec. 260; *Gallagher v. Nichols*, 60 N. Y. 438; *Guidet v. Mayor etc. of New York*, 36 N. Y. Super. Ct. (4 J. & S.) 557, 562; *Young v. Hunter*, 6 N. Y. 203; *Goodwin v. Holbrook*, 4 Wend. (N. Y.) 377; *Grice v. Noble*, 59 Mich. 519; *Ketchum v. Zeilsdorff*, 26 Wis. 514; *Pontifex v. Wilkinson*, 1 C. B. 75; *Holme v. Guppy*, 3 Mee. & W. 387; *Cort v. Ambergate etc. Ry. Co.*, 17 Q. B. 127; *Hotham v. East India Co.*, 1 T. R. 645.

Preventing Completion of Sub-contract.—In *Gallagher v. Nichols*, 60 N. Y. 438, one Lewis, who had contracted to erect certain buildings on the lands of the defendant Nichols, entered into a sub-contract with the firm of Gosson & Monahan, by which the latter were to do the cellar work. The contract price of the cellar work was to become payable when the first tier of beams should be laid, and Lewis gave Gosson & Monahan an order upon the defendant for the amount specified, payable on the completion of the said contract and approval of the work by Lewis. This order was accepted by the defendant. After the completion of the cellars, but before the laying of the first tier of beams, the defendant and Lewis cancelled their contract, and the former sold the land. * *Held*, that as the defendant had thus made the performance of the condition impossible, he could not insist upon its fulfilment, and was liable upon the order.

Contract to Saw Lumber.—A contract for the sawing of lumber provided that it should be scaled before shipment or when being loaded on the cars. The defendants shipped about one half of the lumber while the sawing was being done, and measured the same as shipped. After the completion of the contract the sawmillers (plaintiffs) requested defendants to finish the scale, but they declined to do so until they shipped the balance of the lumber. Plaintiffs thereupon brought suit for the saw-bill, and on the trial one of the plaintiffs was allowed to testify to the measurement made by him in the mill, as the boards came from the saw, and he was corroborated by some of his

employees. *Held*, that the defendants, having put it out of the power of the plaintiffs to scale the lumber sold, could not insist on a scale of the balance. *Grice v. Noble*, 59 Mich. 515.

Production of Inspector's Certificate.—If, under a contract for the erection of a building, the owner reserves the right "to appoint" inspectors, and it is provided that the contractor should not be entitled to payment until the work has been certified by the inspectors, it is the duty of the owner to keep inspectors on the work, and, upon completion, to cause the inspectors to furnish the necessary certificates, and a refusal to furnish the certificates will excuse non-production by the contractor, and he will be entitled to recover notwithstanding. *Guidet v. Mayor etc. of New York*, 36 Super. Ct. (4 J. & S.) 557, 562.

Contract to Deliver Goods.—In *Goodwin v. Holbrook*, 4 Wend. (N. Y.) 377, the defendant had agreed to pay a debt in salt, packed in barrels to be furnished by the plaintiff, but the plaintiff did not furnish the barrels. It was *held* that the defendant was not in default for not delivering the salt, as delivery, according to the terms of the contract, was not possible while plaintiff's part of the contract was not performed.

1. *Kennedy v. Kennedy*, 2 Bibb (Ky.) 484; s. c., 5 Am. Dec. 629; *Doughty v. O'Donnell*, 4 Daly (N. Y.) 60; *Dearborn v. Cross*, 7 Cow. (N. Y.) 48; *Fleming v. Gilbert*, 3 Johns. (N. Y.) 520; *Ketchum v. Zeilsdorff*, 26 Wis. 514; *United States v. Peck*, 102 U. S. 64; *Russell v. Banderia*, 13 C. B., N. S. 149; *Ellen v. Topp*, 6 Ex. 424; *Mackay v. Dick*, L. R., 6 App. Cas. 251; *Armitage v. Insole*, 14 Q. B. 728.

Contract to Deliver Produce.—In *United States v. Peck*, 102 U. S. 64, a claimant in a proceeding in the court of claims had agreed to deliver at Fort Buford, Dak., a quantity of wood and hay. The facts disclosed in the case showed that the parties could not have had any other hay in view in making the contract than that which was to be found in the region or country bordering on the Yellowstone river. He failed to deliver the hay, and on presenting his claim for the wood delivered by him, the officers of the government

he is entitled to recover for the services rendered on a *quantum meruit*, and not according to the contract price.¹

claimed to deduct therefrom damages for such failure. It appeared that the officers of the fort had caused other parties to cut the hay in question and to deliver it before the claimant had an opportunity to do so, and he pleaded that, as it was thus rendered impossible for him to fulfil his contract, his non-performance was excused. The court held that the facts of the case were such as to allow the introduction of parol evidence for the purpose of showing by the surrounding circumstances the subject-matter of the contract, namely, hay to be cut and gathered in a certain region, and that, as the officers of the fort had acted on behalf of the government in preventing him from performing the contract by directing other parties to cut the hay, he was not responsible for any breach.

Failure to Cancel Mortgage.—In *Fleming v. Gilbert*, 3 Johns. (N. Y.) 527, the defendant was sued on a bond obliging him by a certain time to procure and cancel a mortgage of the plaintiff, and deliver the same to him. The defendant was allowed to prove by parol that he procured the mortgage, and having inquired of the plaintiff what he should do with it, was directed to place it in the hands of a third person. This was held to be an excuse for not having fully performed the condition. THOMPSON, J., who delivered the opinion of the court, said: "It is a sound principle that he who prevents a thing being done shall not avail himself of the non-performance he has occasioned. Had not the plaintiff dispensed with a further compliance with the condition of the bond, it is probable that the defendant would have taken measures to ascertain what steps were requisite to get the mortgage discharged of record, and would have literally complied with the condition of the bond."

Failure to Convey Premises.—In *Dearborn v. Cross*, 7 Cow. (N. Y.) 48, a bond was given for the conveyance of certain premises, but subsequently the parties agreed by parol to rescind the contract. The seller thereupon sold and conveyed the premises to a third party. It was held that, although the bond had not been given up or cancelled, yet by the parol agreement and the acts of the parties under it the vendee had practically put it out of the

power of the vendor to confer the premises, and he was released from performance.

Non-delivery of Goods Sold.—In *Ketchum v. Zeilsdorff*, 26 Wis. 514, the seller of certain logs contracted to deliver them at a certain time, but before that time they were seized in a replevin suit brought by a third party. The purchaser became surety on the bond of the plaintiff in the replevin suit. In an action by the purchaser against the seller for damages for non-delivery, it was held that, as the plaintiff, by becoming surety on the replevin bond, had put it out of the defendant's power to deliver in terms of the contract, the non-delivery was excused.

1. *Moses v. Bierling*, 31 N. Y. 462; *Merrill v. Ithaca & O. R. R. Co.*, 16 Wend. (N. Y.) 386; *Doughty v. O'Donnell*, 4 Daly (N. Y.) 60.

Contract to Foreclose Mortgage.—The defendant had employed the plaintiffs to foreclose a certain chattel mortgage, and agreed to pay them a percentage upon the proceeds of the sale for their services. Plaintiffs entered upon the performance of their duties and rendered services, and incurred expense therein, but were prevented by the defendant from completing the transaction. It was held that the recovery of the plaintiffs was not limited to the contract rates, but that they were entitled to recover the reasonable value of the services rendered. The court said: "It is a general rule that the contract furnishes the standard of relief, but compensation will only be given for actual loss sustained. But when the party for whom the service is to be rendered wilfully delays and embarrasses the performance of the contract by the other party who endeavors to complete it, and finally is compelled to abandon the work, the rule that the special contract must control the rate of compensation no longer prevails, and the party is entitled to the actual value of his services. There seems to be no reason why, in a case for damages for breach of contract, the performance of which the defendant has prevented, the plaintiff may not recover for services rendered. Such recovery is in reality but compensation in damages *pro tanto*; and if by his neglect or default defendant has precluded plaintiff from ascer-

IMPOST—IMPOTENCE—IMPOUND—IMPOUNDING.

IMPOST—(See IMPORT; IMPOSE).—A tax,¹ particularly a duty on imports.²

IMPOTENCE.—See BASTARDY; DIVORCE.

IMPOUND.³

IMPOUNDING.—(See ANIMALS; FENCES; HORSES.)

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taining the actual amount of damages under the contract, he should be *held* for services actually rendered, the amount of which he does not pretend to deny was in excess of damages fixed by the contract."

1. Bouv. L. Dict. *Neary v. P. W. & B. R. Co.* (Del.), 9 At. Rep. 441; *Pacific Ins. Co. v. Soule*, 7 Wall. (U. S.) 433. See next note. An impost tax or duty is an exaction to fill the public coffers for the payment of the debts and for the promotion of the welfare of the country, and does not extend to a retribution provided to defray the expense of a bridge, or removing obstructions in a water-course, or the like, to be paid by those only who enjoy the advantages resulting therefrom. *Worsley v. New Orleans*, 9 Rob. (La.) 324.

Costs against a garnishee are not a "tax, impost, assessment or municipal fine." *Wearne v. Haynes*, 13 Nev. 103.
2. Const. U. S., art. 1, § 10, cl. 2. "An impost or duty on imports is a custom or a tax levied on articles brought into a country, and is most usually secured before the importer is allowed to exercise his right of ownership over them." It is not the less an impost because levied upon them after landing or in the form of a license tax upon the importer. *Brown v. Maryland*, 12 Wheat. (U. S.) 419. See *Crow v. State*, 14 Mo. 237, 335.

"Impost is a duty on imported goods and merchandise. In a larger sense, it is any tax or imposition." *Story Const. Abr.*, § 474. Cowell says it is distinguished from custom "because custom is rather the profit which the prince makes on goods shipped out." Cowell, *Interpreter*, tit. IMPOST. Mr. Madison considered the terms "duties" and "imposts" in the clauses (of the constitution) as synonymous. 1 *Story Const.*

669. JUDGE TUCKER thought "they were probably intended to comprehend every species of tax or contribution not included under the ordinary terms 'taxes and excises.'" *SWAYNE, J.*, in *Pacific Ins. Co. v. Soule*, 7 Wall. (U. S.) 433.

"Imposts or duties on imports" do not cover pilotage fees and penalties. *Cooley v. Bd. of Port Wardens of Phila.*, 12 How. (U. S.) 299.

3. Under an act by which persons making distresses for rent "may impound or otherwise secure the distress" on a convenient place or part of the premises, and sell the same upon the premises, the securing of the property distrained, together with a notice that it has been impounded, is sufficient to complete the impounding, so as to defeat a tender subsequently made. "The words 'or otherwise secure' appear to me to enlarge 'impound,' and to give a wider meaning to it than if the latter well-known term, implying an *inclosed* place, had alone been used." *TINDAL, C. J.*, *Thomas v. Harries*, 1 M. & G. 695.

Under an act providing that any person might take possession of any animal, pasturing in the highway in front of his land, and upon giving immediate notice to the owner, may demand from him a certain penalty, upon the payment of which he might recover the animal, and upon his failure to pay which the animal might be sold, a notice is sufficient in the following words: "To S G: This is to notify you that I have taken up and impounded in my yard your horse according to the laws of this State, L D." The words "in my yard," used in connection with impounded, show that the impounding meant was not that under the general laws for impounding animals. *Goodsell v. Dunning*, 34 Conn. 251.

1. **Definition.**—Impounding is the confining or restraining of animals in a pound.¹ A pound is defined as an enclosed piece of land, secured by a firm structure of stone or posts and timber placed in the ground.²

2. **Common Law Not in Force in United States.**—In the United States, the common law right to impound animals, such as existed in England, is not in force, but has been generally superseded by statutory enactments covering the same ground.³

3. **Statutory Law.**—(a) *Power of Legislature to Pass.*—Under the police power of the States, it is within the province of the legislature to enact laws to prohibit the running at large of stock, to provide for the impounding of the same and sale thereof, to pay the expenses of impounding.⁴

(b) *Constitutionality of.*—It has been held that laws authorizing the impounding and sale of stock without notice or judicial investigation are unconstitutional, as a sale of private property without "due process of law."⁵

This has, however, been denied in some recent cases, in

1. Webster's Dict.

2. *Wooley v. Groton*, 2 Cush. (Mass.) 305.

To impound is to place in a pound goods or cattle distrained or estray. *Bouv. Dig.*, 3 Bl. Com. 12.

3. *Eastman v. Rice*, 14 Me. 419; *Crocker v. Mann*, 3 Mo. 472; *Mooney v. Maynard*, 1 Vt. 470.

As this subject is regulated entirely by statute, the statutes and decisions of any State should be examined.

4. *Cooley on Const. Lim.* 588; *Dill. on Mun. Corp.*, § 345; *Wilcox v. Hemming* (Wis.), 15 N. W. Rep. 437, and authorities cited in succeeding notes.

5. *Rockwell v. Nearing*, 35 N. Y. 302. See *Cooley on Const. Lim.* 364, 403; *Anderson v. Locke*, 64 Miss. 283; *Rose v. Hardie*, 98 N. Car. 44; *Bonner v. De Loach* (Ga.), 2 S. E. Rep. 546.

PORTER, J.: "The defendant claims to have acquired title in the plaintiff's cow, through his own act in siezing, selling and buying her without judicial authority, and without the consent of the owner. She was in his door-yard and there is no pretence of any warrant for her seizure, unless it can be justified under the provision of the 'act to prevent animals from running at large in the public highways.' (Laws of 1862, p. 844.) The first section of that act declares that it shall not be lawful for any cattle, horses, sheep and swine to run at large in any public highway in this State. The second section authorizes any person to take into his custody and possession: 1. Any ani-

mal which may be in any public highway, opposite to his land, against the provision of the first section. 2. Any animal which may be trespassing upon his lands. The third section requires that immediate notice of the seizure be given to some justice or commissioner of the highways of the town, who shall post notice that the animal will be sold at a time and place to be specified, and who shall make such a sale for cash. From the proceeds in a case like this he is to retain half a dollar for his fees, and pay half a dollar to the captor, with a reasonable compensation in addition 'for keeping the animal.' The surplus he is to pay to the owner, on demand and proof of the title; whose claim is to be barred, unless made within one year, and the money, in that case, to be paid to the supervisor for the use of the town. The fourth section authorizes the owner to reclaim possession of his property, before sale on making proof of title, and paying the like sums to the captor and the officer, with an abatement of half the bonus, if paid three days or more before the day appointed for the sale. The fifth section relieves him from the payment of any bonus, and entitles him to restitution, on payment of compensation for keeping the animal, if the running at large or trespassing was caused by the wilful act of a person other than the owner, in order to effect the seizure; but it provides for no mode of ascertaining or proving the fact.

"The question whether the act is valid

so far as it relates to the seizure and sale of animals running at large in a public highway is not involved in the present appeal. That issue might well be controlled by considerations connected with the police powers of the government. No such authority can be invoked in support of its provision, so far as they relate to the seizure and confiscation of animals found on the premises of the captor, as a punishment for a private trespass. The legislature transcends the limits of its authority when it enacts that one citizen may take, hold and sell the property of another without judicial process and without notice to the owner, as a mere penalty for a supposed private injury. Such an enactment is within the terms and intent of the provision in the bill of rights that no person shall be deprived of life, liberty or property without due process of law. (Const., art. 1, § 6.) The importance of these words is familiar to every student of constitutional law. It would scarcely be possible to find, in the records of our jurisprudence, a definition of this historic and memorable clause in terms which do not carry with them a condemnation of the enactment under consideration."

"The words 'due process of law' in this place," said CHIEF JUSTICE ROBINSON, "cannot mean less than prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt or determining the title to property. It will be seen that the same measure of protection against legislative encroachment is extended to life, liberty and property; and if the latter can be taken, without a forensic trial and judgment, there is no security for the others.

"If the legislature can take the property of A and transfer it to B, they can take A himself and either shut him in prison or put him to death." In another portion of the same opinion he observes: "It must be ascertained, judicially, that he has forfeited his privileges, or that someone else has a superior title to the property he possesses, before either of them can be taken from him. It cannot be done by mere legislation." *Taylor v. Porter, 4 Hill* (N. Y.) 146, 147. The court had occasion, in the case of *Westervelt v. Gregg* (12 N. Y. 209, 212), to define the language of this provision of the constitution. "Due process of law undoubtedly means, in the due course of legal proceedings, according to those rules and forms which

have been established for the protection of private rights. Such an act as the legislature may, in the uncontrolled exercise of its power, think fit to pass is, in no sense, the process of law designated by the constitution." JUDGE DENIO, in the same case, said: "The provision was designed to protect the citizen against all mere acts of power, whether flowing from the legislative or executive branch of the government. It does not, of course, touch the right of the State to appropriate private property to public use, upon making due compensation, which is fully recognized in another part of the constitution; but no power in the State can legally confer upon one person, or class of persons, the property of another person or class without their consent, whatever motives of policy may exist in favor of such transfer." In view of the foregoing exposition, by the courts, of the design and effect of the constitutional restriction, the legislature has no authority either to deprive the citizen of his property for other than public purposes, or to authorize its seizure without process or warrant, by any person other than the owner, for the mere punishment of a private trespass. So far as the act in question relates to animals trespassing on the premises of the captor, the proceedings it authorizes have not even the mocking semblance of due process of law. The seizure may be privately made; the party making it is permitted to conceal the property on his own premises; he is protected, though the trespass was due to his own connivance or neglect; he is permitted to take what does not belong to him without notice to the owner, though the owner is near and known; he is allowed to sell through the intervention of an officer, and without even the form of judicial proceedings, an animal in which he has no interest, by way either of title, mortgage, pledge or lien; and all to the end that he may receive compensation for detaining it without the consent of the owner, and a fee of fifty cents for his services as an informer. He levies without process, condemns without proof, and sells without execution. It was affirmed in the court below, in *Rockwell v. Nearing*, 35 N. Y. 302, 308, that such a proceeding in the case of a private trespass was authorized by pre-existing laws, and the act in question is, therefore, not within the condemnation of the constitution. This view would be entirely correct if such

which it is held that such laws are valid, as coming within the police power of a State,¹ whether enacted by municipal corporations or State legislatures. A close reading of the decisions cited in the notes will show that a distinction is drawn between the applicability of the law to animals upon private premises or the public highway.

had been the state of the law antecedent to the adoption of the bill of rights. There are many examples of summary proceedings which were recognized as due process of the law at the date of the constitution, and to these the prohibition has no application, but none of them furnish any sanction to the enactment now under consideration. The process of distraining cattle *damage feasant* is referred to as an authority for the provisions embodied in this law; but it will be found, on examination, that the supposed analogy is unfounded and illusory. It is evident that the distinction between penal and remedial proceedings was overlooked in the court below as applicable to cases of mere private trespass. The right to distrain property *damage feasant* was one which existed at common law, and it was recognized and regulated by statutes as well in this State as in England. The proceeding was always purely remedial. The party distraining was authorized to detain for the payment of his damages. By seizing it at the time and on the premises where the injury was committed he was enabled to secure redress for an actual wrong against an unknown or irresponsible owner. If the animal escaped from his premises, though his right of distress was gone, the party making the seizure was required to have the damages promptly appraised by the fence-viewers, upon a view of premises and the examination of competent witnesses. They were bound to certify the amount of damages to which he was entitled, and he was required, within twenty-four hours thereafter, to put them in the nearest pound, where the owner could find and replevy them, or reclaim them, on payment of his damages and the fee of the fence-viewers and poundmaster. The party distraining was bound to give notice to the owner, if known, to enable him to replevy or redeem the property before the sale. The remedy by distress was cumulative, and satisfaction obtained in this mode was a bar to an action for damages." 3 Woodeson, 226; Bac. Abr., tit. DISTRESS, F.; 2 Bl.

Com 6; 2 Wait's Law and Pr. 778; R. S. 517; Colden v. Eldred, 15 Johns. (N. Y.) 220; Rockwell v. Nearing, 35 N. Y. 302.

1. Wilcox v. Hemming, 58 Wis. 144.

The main and important objection to the justification of the defendant under pretended legal authority, is that the ordinance under which he received, held, and sold the horses of the plaintiff is unconstitutional as authorizing the forfeit, condemnation, or confiscation of property without due process of law, and without compensation, etc. It is contended that before the property is sold there should be provision for an adjudication in court of the facts which would make such property liable to be thus taken and sold. What disposition is to be made by the ordinance of proceeds of such sale is to be made by the terms of the ordinance of the proceeds of such property. The mischief complained of ends with the sale, if the property of the owner in such animals is thereby taken away, and it would not cure the mischief and scarcely mitigate the wrong to offer the owner the remains of the proceeds of the sale after deducting the expenses of keeping, and sale, and the fine incurred, or even the proceeds without any such deduction. The provisions of the charter of the city above cited fully authorizes the receiving, and keeping and sale of animals, and by the ordinance to carry such provision into execution, so that the act of the legislature is amenable to this objection of unconstitutionality, as well as the ordinance itself. The provisions of the charter above referred to are that such animals may be "impounded and sold to discharge the penalty for the violation of the ordinance, and the expenses of impounding and sale." Here is found the authority for prescribing a fine for such offence, as well as the impounding and sale. The right of such legislation can be found and justified only by that police power of the State to provide summary and suitable methods and proceedings to protect the public health, peace, and tranquillity, and the use of the highways of travel, which transcends pri-

vate right, and the constitutional provision of their protection.

In *Commonwealth v. Alger*, 7 Cush. (Mass.) 85, SHAW, C. J., observed:

"Such powers have been conferred upon municipal bodies by legislation, time out of mind, both in this country and in England, and it is too late to question them. In respect to animals running at large in the public highways, various ordinances have received judicial investigation in many courts, and perhaps in some cases the power to authorize the forfeit of the animals themselves without judicial inquiry may have been questioned. In the very nature of things, and in common reason, if a judicial determination must be had upon proper notice to the owner, before such animals can be taken up and restrained when so running at large in the public streets of a city, the city and the public at large must wait and suffer great injury, and the street remain useless or unsafe for a considerable time without relief, or until the animals themselves shall leave the street, and thus pass beyond the power of being seized, or such animals must be kept in the public pound until their value would be less than the expense of their keeping. It follows, if such adjudication be necessary such a remedy is useless or ineffectual, and the objection goes to the very foundation of the power to prescribe an adequate remedy in such a case.

The general power is upheld by all elementary authorities. Judge Cooley, in his admirable work on Constitutional Limitations, says: "So beasts may be prohibited from running at large under the penalty of being seized and sold."

Cooley, *Lim.* 588. Judge Dillon, in his work on Municipal Corporations, fully upholds such a power, without judicial inquiry, section 345.

Before considering cases elsewhere, where this particular power has been called in question, it is necessary to notice cases in this court in which the learned counsel of the appellant contends it has been held unconstitutional. The case of *Pettit v. May*, 34 Wis. 666, was a case of *damages feasant*, and the intimation of the necessity of a judicial inquiry must be confined to such a case. There is the invasion of a private right only in such a case, and the remedy may well be within the constitutional inhibition. It is said by CHIEF JUSTICE DIXON, in that case, that "ac-

cording to the decision of the court of appeals in *Rockwell v. Nearing*, 35 N. Y. 302, it (the ordinance) would have been invalid." In *Miles v. Chamberlain*, 17 Wis. 446, the by-law of the town authorized the seizure and sale of animals running at large in the highway, but the statute then in force (section 3, ch. 15, Rev. St. 1858), only authorized the town to pass by-laws fixing a penalty for such an encroachment upon the highway which excluded the power to declare a forfeiture of the property by seizure, impounding and sale. It is said, in the opinion of MR. JUSTICE PAINE in that case, that "it is therefore not necessary to determine whether the power could be conferred on the town to pass a by-law like the one in question, by which the title of the owner of animals may be divested without any judicial proceedings against them whatever. The question whether the power could be constitutionally conferred upon a city to pass an ordinance for impounding animals and selling them to pay charges and expenses, upon notice published or posted without any judicial determination of the right—the real question in this case—has never been determined by this court. We shall, therefore, have to look elsewhere for cases in which this question was involved."

In *Rockwell v. Nearing*, 35 N. Y. 302, the impounding and sale were authorized either when the animal may be in any public highway opposite the land of the person who "takes it up," or when it may be trespassing upon his lands. It was provided in the case that the animal was taken up while it was in the door-yard of such person, and not on the highway, so that the case was within the last clause of the act. It was said, in one of the opinions: "The question whether the act is valid, so far as it relates to the seizure and sale of animals at large in a public highway, is not involved in the present appeal," and it is clear from the whole case that only that part of the act was deemed or held invalid which allowed such a seizure and sale of the animal trespassing upon the land of another without an adjudication. In another's opinion in the same case, concurring in the first one, and in the judgment, the constitutionality of the first clause of the act authorizing the seizure and sale of an animal running at large in the highway without any adjudication, was ably discussed, and the proceedings

justified as the proper exercise of the police power for the protection of the public interest, and the act so far *held* constitutional. In *Campbell v. Evans*, 45 N. Y. 356, the same act, amended so as to require certain judicial proceedings, was *held* valid; and *Cook v. Gregg*, 46 N. Y. 439, is to the same effect. In *Com. v. Alger*, 7 Cush. (Mass.) 85, the law made it an offence to build any constructions whatever in the Boston Harbor, beyond a certain line in tide water, and provided for the destruction and abatement of such erections as nuisances. In that case the construction was a large wharf, 120 by 451 feet in dimensions. The law was attacked as unconstitutional, because it provided for the utter destruction of the property without the trial by jury. C. J. SHAW says, in his opinion: "We think it a settled principle, growing out of the nature of well ordered society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that this use may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, or injurious to the rights of the community;" and that such rights of property "are subject to such reasonable restraints and regulations established by law as the legislature under the governing and controlling power vested in them by the constitution, may think necessary and expedient." In *Roberts v. Ogle*, 30 Ill. 459, under a charter giving the town or villages authority to make ordinances to declare what should be nuisances, and to provide for their abatement, an ordinance was passed prohibiting swine from running at large within the corporate limits, and authorizing a constable to take up and safely keep, and on notice sell, any such swine for the payment of fifty cents per head, and the constable's charges and expenses. The ordinance was *held* to be valid, although it did not provide for an adjudication. In *Clark v. Lewis*, 35 Ill. 417, the ordinance was similar to the one in question here, excepting that the animals impounded were not sold to pay any fine imposed, and the horse was sold to pay the charges only. The validity of the ordinance was conceded, but it was *held* the sale was invalid, because its provisions were not strictly complied with. In *Case v. Hall*, 21 Ill. 632, the animal was impounded and sold under

a by-law of a town of similar provisions, and it was *held* constitutional. In *Friday v. Floyd*, 63 Ill. 50, a similar ordinance was sustained. In *Kennedy v. Sowden*, 1 McMull. (S. Car.) 323, the ordinance, with very similar provisions and authorizing the impounded animals to be sold for the fine as well as the charges, was *held* valid, upon a very full examination of the authorities, and in a very elaborate opinion. In *Crosby v. Warren*, 1 Rich. (S. Car.) 385, this decision is followed and reaffirmed, but there was a dissenting opinion as to the constitutionality of the sale to pay the fine as such without an adjudication of the offence. In *Shaw v. Kennedy*, Term (N. Car.) 591, the decision of the majority of the court was the other way, but by an elaborate opinion of C. J. TAYLOR, the power was upheld. In *Hellen v. Noe*, 3 Ired. (N. Car.) 495, and *Whitfield v. Longest*, 6 Ired. (N. Car.) 268, long afterwards, ordinances more stringent in their provision than the one under consideration, were sustained as constitutional. In *Spitler v. Young*, 63 Mo. 42, a similar ordinance was sustained, both as to the charges and expenses of impounding, keeping, selling etc., and the fine, without any provisions for adjudication, the court using the following language: "No doubt is entertained but that the legislature, as a sanitary or police regulation, may confer upon towns power to adopt such measures as the one resorted to." In *Gilchrist v. Schmidling*, 12 Kan. 263, an ordinance of the city of Emporia of a similar nature and provisions, except that as to the fine, was sustained after a very full examination of the authorities by counsel and the court. In *White v. Tallman*, 2 Dutch. (N. J.) 67, it is *held* that such an ordinance, without authority of law to sustain it, is void, and that the establishment of pounds, and their regulation by law are very fully examined, historically as well as by judicial decisions, as a summary and necessary remedy for the protection of highways. In *Vanden v. Mount*, 78 Ky. 86, it is *held* that the authority to pass such an ordinance must be conferred by law; and *Cotter v. Doty*, 5 Ohio 393, is to the same effect.

There are many other cases which might be cited to sustain this power given in the charter to the common council to make ordinances to restrain animals from running at large in the

(c) *Municipal Corporations*.—Statutes passed providing for the establishment and maintenance of pounds, the confinement of animals therein, the disposition to be made of such animals, and the means of redress to be exercised by persons whose animals are unlawfully impounded, usually apply to the impounding of animals under the authority of by-laws of towns as well as impounding under the general statute.¹ Town ordinances authorizing the impounding of stock must be strictly pursued, or the proceedings will be void.²

4. **When Stock May Be Impounded**.—Animals cannot be impounded unless the owner suffers them to run at large within the strict construction of the statute in such case made and provided.³ And it has been held that they can be taken up when at large whether they are there with or without the knowl-

public streets, and to impound them and sell them to pay the expenses, etc. So far the ordinance itself has not been examined. There are some decisions, it must be admitted, which hold that such legislation as well as ordinances under it, are void as being in conflict with the constitutional provision for the protection of property; but it is observable that in such cases this power, the exercise of which, in a summary manner, is absolutely necessary for the benefit of the public in the use of the highways, is scarcely alluded to. The question is of great importance, and one not without difficulty. To seize and sell, upon necessarily short notice, animals of great value, because permitted by the owner to run at large in the street, without an adjudication of the offence in the courts, appears to be a harsh remedy. But how this summary mode of proceeding can be avoided, without surrendering the whole police power to protect the public highways from such an encroachment, which destroys their use for the time being, we fail to perceive. The owner will not restrain his animals from running upon the streets. The city authorities must do so at once. Then such animals must be fed and cared for until the owner shall pay the expenses and take them away. If he fails or refuses to do so, they must be sold. But we have already taken this view of the case. *Wilcox v. Hemming*, 58 Wis. 144.

1. *Whitlock v. West*, 26 Conn. 406. See also authorities cited in preceding notes.

2. *Clark v. Lewis*, 35 Ill. 417; *Bullock v. Geomble*, 45 Ill. 218.

An ordinance affixed a penalty against the owners of horses suffering them to run at large in the streets, and empowered the poundmaster to give notice that unless the animals were claimed by the owners, and the penalty and costs of keeping paid within five days thereafter, the animals to be sold, to satisfy the same. *Held*, that the provision giving such authority to the poundmaster was void. *Willis v. Legris*, 45 Ill. 289.

An ordinance provided that the city marshal should seize and sell all swine found running at large in the city, and pay over half the proceeds to the use of the city hospital, and retain the other half for his services. *Held*, that this ordinance was void, being in violation of the constitution, which declares that no person "can be deprived of his life, liberty, or property but by due course of law," and the provision "that the right of trial by jury shall remain inviolate."

Donovan v. Vickburgh, 29 Miss. 247.

A village ordinance authorizing the street inspector to drive to the village pound all hogs found running at large in the street; and to hire at the expense of the village, as much assistance as he shall deem necessary, does not authorize any person except the inspector and his assistants acting under his immediate direction, to drive such animals to pound, though the inspector had given public notice that any person who should so drive them to the pound would be paid therefor. *Jackson v. Morris*, 1 Den. (N. Y.) 199.

3. *Adams v. Nichols*, 1 Aik. (Vt.) 316. When cattle are in the highway, in charge of a person directing and con-

edge of the owner.¹ The animals must be on the high-

trolling them, they are not running at large, within the meaning of the statute. *Bertwistle v. Goodrich*, 53 Mich. 457.

1. *Sloan v. Hubbard*, 34 Ohio St. 587. Whether there was error in the refusal of the court to charge the jury as requested, depends upon the construction of § 6 of the act of 1865, entitled: "An Act to restrain from running at large certain animals therein named." S. & S. 7.

The section is as follows: "That any person finding any animals mentioned in this act at large, contrary to its provisions, may, and any constable or marshal of any city or incorporated village, on view or information, shall take up and confine the same forthwith, giving notice thereof to the owner, if known, by posting notice describing such animals therein, in at least three public places within the township, and if the owner does not appear and claim his property and pay all charges for taking up, advertising and keeping the same, within ten days from the date of said notice, the said animals may be proceeded with under the laws of estrays then in force."

Prior to the passage of this act, the owner of domestic animals, not breachy or unruly, had the right in this State to allow them to run at large. The rule of the English common law on the subject was declared to be inapplicable to our circumstances, as well as inconsistent with our legislation on the subject of fences. *Kerwhacker v. Cleveland etc. R. Co.*, 3 Ohio St. 172; *Cincinnati etc. R. Co. v. Waterson*, 4 Ohio St. 432; *Marietta etc. R. Co. v. Stevenson*, 24 Ohio St. 48. By the statute in question a new policy is introduced in the State in regard to the restraint of the classes of domestic animals mentioned in the statute. The object of the statute was, in view doubtless of the improved condition of the lands of the State, to abolish the former laws and take from the owner of such animals the right previously existing of allowing them to run at large.

The first section of the act declares: "That it shall be unlawful for any person . . . being the owner or having the charge of any . . . cattle to suffer the same to run at large in any public road or highway . . . or upon any unenclosed land, . . . or cause such animals to be herded, kept

or detained for the purpose of grazing the same on the premises other than those owned or occupied by the owner or keeper of such animals, except as hereinafter provided. And every person violating the provisions of this act shall forfeit and pay for every such violation, as penalty therefor, not less than one dollar nor more than five dollars."

The exception provided for in the act is found in the second section. That section provides that general permission may be granted by the commissioners of any county for any animal named in the first section of this act, to run at large in their respective counties; and, in counties where there is no general permission, township trustees may grant special permits, and such permission, whether general or special, shall terminate on the first Monday of March in each and every year, and such special permits shall be revocable at the discretion of the township trustees; and such permits shall be directed to individuals, and for particular animals described therein.

By section 4 it is declared that it shall be a defence to a prosecution for the penalty prescribed by the first section to show that the "animal was at large without the knowledge of the owner or without his fault."

Section 5 declares that the owner or person having the animal in charge, "allowing the same to run at large in violation of this act, shall be liable to all damages done by said animal upon the premises of another without reference to the fence which may enclose said premises."

"Under the statute, cattle can be at large, as of right only by the permission of the public authorities, as provided in the second section. Except as authorized by that section, the owners of cattle have no right to have them at large; and the public have the right to be protected against their being at large with or without the fault of the owner.

"The object of the sixth section is to invest the public with power to protect itself in the enjoyment of this right by operating directly against the animal. The section authorizes any person, and requires the officers therein named, either upon view or information, and whether the owner is known or unknown, to take up and confine any animal mentioned in the act found

way¹ or unenclosed commons,² or upon the premises of the person who impounds them.³

5. Rights of Owner of Live Stock.—When the statute has not been literally complied with, the impounding is illegal, and the animals can be recovered by an action of replevin or their value by an action of trover.⁴ Or if the impounder misuses them.⁵

When they are legally impounded, however, the owner must pay the costs imposed or he will not be entitled to receive them.⁶

at large contrary to its provisions.

"It is said the authority to take up applies only to such animals as are at large with the consent of or by the fault of the owner. We do not think so. The danger to the public of mischief from the intrusions of the animals is the same whether they are at large with or without the fault of the owner.

"And the object of this section is to protect the public against the mischief likely to result from the animals being at large, irrespective of the cause.

This being the clear intent of the section, it should be construed so as to effect its object and repress the mischief. Moreover, it is not reasonable to suppose that the legislature, in requiring a public officer to take up animals 'on view,' whether the owner is known or unknown, intended to devolve upon him the right of being mulcted in damages if it should finally turn out that they were at large without the fault of the owner. If the officer should be unable to justify, it would be at the election of the owner whether he would hold the officer liable for the value of the animals or only in damages resulting from his temporary interference with them. In the opinion of a majority of the court, therefore, the animals named in the act are within the meaning of the sixth section—at large 'contrary to its provisions'—when they are at large contrary to or not in accordance with the second section of the act. If the animals are at large under permission granted by the commissioners or trustees, as provided in the second section, the record of these bodies will show." WHITE, J., in *Sloan v. Hubbard*, 34 Ohio St. 585.

1. *Wild v. Skinner*, 23 Pick. (Mass.) 251.

A turnpike is a public highway. *Pickard v. Howe*, 12 Met. (Mass.) 198; *Gilmore v. Holt*, 4 Pick. (Mass.) 258.

The owner of land adjoining a public highway, and who owns the fee to the center thereof, may depasture his cattle

in the highway; but he is bound, like all other persons, to prevent the animals from going at large therein without being under the care of a keeper. *Parker v. Jones*, 1 Allen (Mass.) 270.

One cannot rightfully impound animals for damage done to his land on any other occasion than that at which they were taken. *Holden v. Torrey*, 31 Vt. 690.

2. *Sloan v. Hubbard*, 34 Ohio St. 587.

The owner of unenclosed land may not seize cattle found trespassing thereon for the purpose of enforcing payment of damages and costs where they are not strictly astray, but have merely escaped temporarily from a known owner. *Anderson v. Worley*, 104 Ind. 165. See *Cutts v. Hussey*, 15 Me. 237.

3. *Eastman v. Rice*, 14 Me. 419.

The owner of an enclosure may lawfully impound cattle which have broken into it from an adjoining enclosure through the insufficient fence of the owner of the cattle, although his own part of the divisional fence was also insufficient. *Hine v. Munson*, 32 Conn. 219.

And it is not indispensable to the right of the landowner to impound cattle which are doing damage in his enclosure that the fence adjoining the highway, over which the cattle entered, should have been legally sufficient for a fence between enclosures not upon the highway. *Davis v. Campbell*, 23 Vt. 236.

The taking must be before the animals leave the land. *Holden v. Torrey*, 31 Vt. 690; *Goodsell v. Dunning*, 34 Conn. 251.

4. *Morse v. Reed*, 28 Me. 481; *Field v. Jacobs*, 12 Met. (Mass.) 118; *Field v. Coleman*, 5 Cush. (Mass.) 267; *Coffin v. Vincent*, 12 Cush. (Mass.) 98; *Merrick v. Work*, 10 Allen (Mass.) 544; *McIntire v. Marden*, 9 N. H. 288; *Bills v. Kinson*, 21 N. H. 448; *Mellen v. Moody*, 23 Vt. 674.

5. *Adams v. Adams*, 13 Pick. (Mass.) 384; *Drew v. Spaulding*, 45 N. H. 472; *Goodsell v. Dunning*, 34 Conn. 251.

6. *Mahler v. Holden*, 20 Ill. 363.

The fact that the owner is a non-resident will not affect his rights one way or the other.¹

6. Rights of Impounders.—A pound-keeper need not deliver over the animals impounded until all legal charges are paid.²

An impounder of cattle has a right to use the same force to maintain his possession of them as a sheriff has to protect his possession of property taken under legal process.³

If a man finds stray cattle in his field he is not bound to impound them or retain them for the owner, but may drive them off into the highway.⁴

When there is no public pound the impounder may confine the animals at any suitable place.⁵

Where the proper officer finds cattle running at large in the public streets he may pursue them upon private property open as a common.⁶

7. Liabilities of Impounders.—The person taking and impounding cattle without justifiable cause is liable to an action therefor,⁷ even though he is merely acting as a servant.⁸ A party impounding cattle must feed and water them properly, according to the usage of the country and good husbandry.⁹ Trespass will lie where a pound-keeper allows impounded cattle to be driven for pasturage into a neighboring town, or where a party delays unreasonably to comply with the statute.¹⁰ The impounder must

1. *Rose v. Hardie*, 98 N. Car. 44.

Where a horse was taken *damage feasant*, and before twenty-four hours had expired the owner came to the person impounding such animal and demanded possession, but refused to pay the damages, *held*, that such owner had waived the statutory notice, and could not maintain trover for the original impounding. *Norton v. Rockey*, 46 Mich. 460.

2. *Folger v. Hinckley*, 5 Cush. (Mass.) 263; *Rice v. Underwood*, 27 Mo. 557; *Keith v. Bradford*, 39 Vt. 34; *Garabrant v. Vaughn*, 2 B. Mon. (Ky.) 327.

3. *Barrows v. Fassett*, 36 Vt. 625.

A town ordinance authorizing a marshal to seize sheep running at large does not justify the marshal in seizing sheep that are being herded. *Spect v. Arnold*, 52 Cal. 455. See *Thompson v. Corpstein*, 52 Cal. 653.

4. *Stevens v. Curtis*, 18 Pick. (Mass.) 227.

A private individual impounding a beast taken *damage feasant* in a town pound is not liable for injuries which such beast may receive from cattle confined in such pound. *Brightman v. Grinnell*, 9 Pick. (Mass.) 14.

5. *Mosher v. Jewett*, 63 Me. 84.

6. *O'Mally v. McGinn*, 53 Wis. 353.

7. *Eastman v. Rice*, 14 Me. 419.

He must proceed strictly according to statute. *Fitzwater v. Stout*, 16 Pa. St. 22; *Sutton v. Beach*, 2 Vt. 42.

8. *Eastman v. Rice*, 14 Me. 419.

9. *Adams v. Adams*, 13 Pick. (Mass.) 384.

In this case a drove of milch cows were impounded during hot weather from 7 a. m. until 5 p. m. without food or water, and it was *held* that the impounder was liable.

10. *Cate v. Cate*, 44 N. H. 211; *Drew v. Spaulding*, 45 N. H. 472.

In New York it has been *held* that if a person impounds beasts taken *damage feasant*, before damages have been ascertained he is liable to an action of trespass by the owner, and it is no defence to such action that the owner of the beast is himself the pound master, if the distrainer has actually put them into his hands or custody, as pound master. *Merritt v. O'Neil*, 13 Johns. (N. Y.) 477.

A person who has lawfully seized a cow running at large, and afterwards lost her without fault on his part, is not made liable to an action by the owner by subsequently buying the cow at a sale made in her absence by the

proceed strictly according to statute or he will be a trespasser.¹ Riding a horse to find the owner is not a misuse of the animal.²

8. Notice.—Almost all the statutes provide that some kind of notice shall be given before the impounded animal can be sold. One who retains estrays without giving the required notice is a tort-feasor.³ The pound-keeper must state in his notice what the legal charges are.⁴ Proof that notice was left in the hands of one of the family is sufficient.⁵ Notice given to the owner before they are impounded of the fact and cause of their being taken is sufficient.⁶ But it has been held that actual notice will not dispense with the notice required by statute.⁷

9. Purchaser of Stock at Sale.—In order for a purchaser of stock impounded to acquire a good title the statute under which it is made must be strictly followed and complied with.⁸ Stolen animals may be impounded and sold and a legal title given the purchaser.⁹

It is incumbent upon a party claiming title to an animal under a poundmaster's sale to show that it was liable to be impounded, and that the proceedings are authorized by law, in order to divest the owner's title.¹⁰

10. Stock Exempt from Execution, etc.—Animals which are by law exempt from seizure or sale on execution may be taken up, impounded and sold.¹¹

proper officer. *Hard v. Nearing*, 44 Barb. (N. Y.) 472.

1. *Fitzwater v. Stout*, 16 Pa. St. 22.

2. *Henry v. Richardson*, 7 Watts (Pa.) 557.

3. *Hyde v. Pryor*, 13 Ill. 64; *Nerhouse v. Hatch*, 126 Mass. 364; *Hardy v. Nye*, 63 N. H. 612.

4. *Palmer v. Spaulding*, 17 Me. 239. A notice given by a field driver to the owner of cattle that they are impounded for going at large upon the public highway is *prima facie* evidence that they were so at large and puts the burden on the owner of proving the contrary. *Pickard v. Howe*, 12 Met. (Mass.) 198.

5. *Pickard v. Howe*, 12 Met. (Mass.) 198. See *Sanderson v. Laurence*, 2 Gray (Mass.) 178.

6. *Com. v. Beale*, 5 Pick. (Mass.) 514. See *Hooper v. Kittredge*, 16 Vt. 677.

7. *Coffin v. Field*, 7 Cush. (Mass.) 355. An omission to give the notice required by the impounder will not make him a trespasser *ab initio*. *Young v. Rand*, 18 N. H. 569.

8. *Coffin v. Field*, 7 Cush. (Mass.) 358.

It is well settled that a party who justifies the taking of another's property under legal authority or process must

show that he has acted strictly in conformity with the requirements of the law, otherwise he will be considered a trespasser *ab initio*, and liable to an action of trespass at common law. The defendants in this case, having either failed to show that the beasts were liable to distress and impounding, or omitted in some essential particular to comply with the requisitions of the statute, are trespassers from the beginning. *Purinton v. Loring*, 7 Mass. 388; *Gilmore v. Hall*, 4 Pick. (Mass.) 258; *Adams v. Adams*, 13 Pick. (Mass.) 387; *Smith v. Gates*, 21 Pick. (Mass.) 55; *Coffin v. Field*, 7 Cush. (Mass.) 358. 9. *Patterson v. McVay*, 7 Watts (Pa.) 482.

10. *Johnston v. Kuchoff*, 31 Minn. 451; *Coffin v. Field*, 7 Cush. (Mass.) 358; *Gilmore v. Hall*, 4 Pick. (Mass.) 260.

11. It is claimed that the horses were the exempt property of the plaintiff, and could not therefore be taken and sold. The statute of exemption is not broad enough in terms to embrace such a proceeding. The exemption is only from "seizure and sale on execution, or provisional or final process issued from any court, or proceedings in aid thereof." *Wilcox v. Hemming*, 58 Wis. 144.

11. Rescue and Pound Breach.—If a person take cattle from the lawful custody of a field-driver when driving them to the pound, it is a rescue, although they are never out of his sight, and are finally impounded by him.¹

IMPRESSING.—The power of compelling seafaring men to enter the naval service.²

IMPRISONMENT.—(See ARRESTS; BAIL; EXECUTION; EXTRADITION; HABEAS CORPUS; HOUSES OF CORRECTION; JAILS AND JAILERS. As to discharge from imprisonment, see BANKRUPTCY; INSOLVENCY AND POOR DEBTORS. As to illegal arrests, see FALSE IMPRISONMENT.)

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I. Definition.—Imprisonment is the restraint of a person contrary to his will.³

II. What Constitutes Imprisonment.—Confinement of a person in a common prison, a private house, or by a forcible detainer in the public streets,⁴ and compelling one to go in a given direction against his will, may constitute imprisonment.⁵ Actual manual touch of

1. *Vinton v. Vinton*, 17 Mass. 342.

See *Melody v. Reab*, 4 Mass. 471, *Berry v. Ripley*, 1 Mass. 167; *Pierce v. Josselyn*, 17 Pick. (Mass.) 415; *Com. v. Beale*, 5 Pick. (Mass.) 514; *Com. v. Hubbard*, 24 Pick. (Mass.) 98.

The conveying away or setting at large cattle impounded is an essential part of the offence of poundbreach. *State v. Young*, 18 N. H. 543.

2. This right had its foundation in the common law, and resided in the crown alone. 1 Bl. Com. 419; *King v. Jubbs*, Cowp. 517. *Ex parte Fox*, 5 T. R. 276. It extends to all seafaring men, and any exemption must depend upon the positive provisions of statutes. *Ex parte Fox*, 5 T. R. 276.

3. *Johnson v. Tompkins*, Baldw. C. C. 527, 600; *Anderson's L. Dict.* 527; 1 Bouv. L. Dict. (15th ed.) 777; *Co. Inst.* 589.

4. 3 Bl. Com. 127; *Com. Dig. tit. IMPRISONMENT (G.)*; 1 Russ. Cr. (5th Eng. ed.) 961.

5. *Floyd v. State*, 12 Ark. 43; *Lawson v. Buzines*, 3 Harr. (Del.) 416;

Pike v. Hanson, 9 N. H. 491; *Coman v. Storm*, 26 How. (N. Y.) Pr. 84; *Smith v. State*, 7 Humph. (Tenn.) 43; *Warner v. Biddiford*, 4 C. B., N. S. 180; *Sate v. Thomas*, 3 Bos. & P. 188; *Bird v. Jones*, 7 Ad. & El., N. S. 742; s. c., 53 Eng. C. L. 741; *Russen v. Lucas*, 1 Car. & P. 153; s. c., 11 Eng. C. L. 351; *Bacon's Abr. Tress. (D. 3)*; 1 Esp. 481, 526; 1 Chitty's Pr. 48; 1 Russ. Cr. (5th Eng. ed.) 753; 1 W. Bl. Sd. 19.

Confinement within jail limits constitutes imprisonment. *Comstock's Case*, 16 Abb. (N. Y.) Pr. 233; *Buttles v. Carlton*, 1 Ohio 32. *Matter of More*, 1 Am. Insol. R. 95; *N. Y. Code Civ. Pro.*, § 2200.

When Person Arrested Not Deemed in Custody.—Where defendant being arrested gives bail and is allowed to go at large, his sureties having neglected to justify, he is not deemed in actual custody. *Bostwick v. Goetzel*, 57 N. Y. 585 586; *Watt v. Healy*, 22 Hun (N. Y.) 491.

A prisoner on jail limits when sheriff's term expires, who is not assigned

the body is not necessary.¹

III. Place of Imprisonment.—The records of the court showing the apartments appropriated for a prison are the best evidence of place of confinement,² but when the records cannot be found parol evidence of ancient usage is sufficient.³ Jails built by cities and towns pursuant to statute, unless restricted thereby, become public prisons of the state.⁴ A jail established by the court of sessions may be used as a house of correction where no other has been provided.⁵ The state has a right to regulate the custody of its prisoners, including their removal from one jail to another.⁶ The United States attorney-general may designate a penitentiary in a state or territory other than that in which the court convicting the prisoner is held;⁷ and it is no objection that the state has not given its consent, so long as it suffers the prisoner to be detained where he is in rightful custody.⁸ Unless congress

to the newly elected sheriff within the time prescribed for the service of the latter's certificate or qualification, is no longer in custody, and his petition for discharge cannot be considered by the court. *French v. Willet*, 10 Abb. (N. Y.) Pr. 99; *Matter of Irving*, 3 How. (N. Y.) Pr., N. S. 236; *Hinds v. Doubleday*, 21 Wend. (N. Y.) 223; N. Y. Code Civ. Pro., §§ 183, 184, 2201.

1. *Mowry v. Chase*, 100 Mass. 79; *Searls v. Viets*, 2 T. & C. (N. Y.) 224; *Gold v. Bissell*, 1 Wend. (N. Y.) 210; *Arrowsmith v. Le Mesurier*, 2 Bos. & Pul. N. P. 211; *Pocock v. Moore, Ryan & Moo.* C. C. 321; 4 Bull. N. P. 62.

Effect of Imprisonment.—Under 2 New York Revised Statute 70, §§ 19, 20, a person sentenced to a state prison for life or a term of years is deprived of all rights as a plaintiff in an action, but is not relieved of any liability as a defendant. *Davis v. Duffie*, 8 Bosw. (N. Y.) 619; s. c., affirmed 3 Keyes (N. Y.) 606; 14 Abb. (N. Y.) Pr. 387; *Bonnell v. Rome, Watertown & O. R. Co.*, 12 Hun (N. Y.) 218.

Same—Mississippi Code 982, § 15, suspends all civil rights during imprisonment in the penitentiary; an escape does not remove the disability. *Beck v. Beck*, 36 Miss. 72.

Same—Civil Process.—A convict in the state prison is not exempt from ordinary proceedings by action. *Davis v. Duffie*, 1 Abb. App. Dec. (N. Y.) 486.

2. *Burroughs v. Lowder*, 8 Mass. 373.

3. *Clap v. Cofran*, 7 Mass. 98.

4. *Felts v. Memphis*, 2 Head (Tenn.) 650.

5. *Taunton v. Westport*, 12 Mass. 355. See *Com. v. Hampden*, 19 Mass. (2 Pick.) 414.

6. *Re Hartwell*, 1 Low. C. C. 536.

7. *Ex parte Karstendick*, 93 U. S. (3 Otto) 396; bk. 23, L. ed. 889.

8. *Ex parte Karstendick*, 93 U. S. (3 Otto) 396; bk. 23, L. ed. 889; *Ex parte Geary*, 2 Biss. C. C. 485.

Convicts of United States Courts—Place of Imprisonment.—The judges of the United States courts, sitting in Massachusetts, may sentence offenders to imprisonment in the Charleston prison, under Rev. Stat., §§ 5541, 5542, Circ. Ct. (Mass.) 1886, *Ex parte Brooks*, 29 Fed. Rep. 83. The court say: "It is argued in behalf of the prisoner that these sections did not extend to the prison at Boston, the law which permitted the confinement of United States convicts in the prison at Concord, but only such laws as related to the management of the prison, and the discipline and employment of prisoners confined in it. But no reason that is even plausible is suggested for any such limited construction of this section. The words, all 'laws relating to the state prison at Concord, and to prisoners confined therein,' are certainly broad enough to include the provision in relation to United States convicts. It is impossible to infer from this language that the legislature intended by it to prohibit the use for this purpose of the principal penitentiary of the state. This view is made still clearer, if possible, by section 23, which allows the use, for the same purpose, of the new reformatory established by the act. The manifest intent of the legislature

has designated a particular place of punishment of an offence, the district court has power to designate any place within its jurisdiction.¹

IV. Term of Imprisonment.—The day on which a prisoner is sentenced will be reckoned as part of his term,² except where a stay has been taken on appeal from the judgment.³

V. Recapture.—A prisoner who escapes before his term of imprisonment is ended, should, on his recapture, be imprisoned for a time equal to the remainder of the term.⁴

was to have the new prison take the place of the old one in all respects, including the class of prisoners to be confined there; and to effect this purpose, instead of reacting in detail all the laws relating to the old prison, it made them all, by one sweeping clause, applicable to the new one. This must be held to include the provision as to United States convicts. If, however, the petitioner's contention could be supported, it would by no means follow that his imprisonment would be illegal, so long as the state permits him to be detained in its penitentiary under the sentence. *Ex parte* Karstendick, 93 U. S. (3 Otto) 396; bk. 23, L. ed. 889; *Ex parte* Geary, 2 Biss. C. C. 485. See also *Re* Hartwell, 1 Low. C. C. 536; *In re* Wilson, 18 Fed. Rep. 33; *In re* Deputy, 10 Int. Rev. Rec. 34."

1. *Ex parte* Geary, 2 Biss. C. C. 485.

Laws Governing.—An act of the legislature designating a new prison which makes all laws relating to the former prison applicable to the new one, includes the provision allowing the confinement of United States convicts. *Ex parte* Brooks, 29 Fed. Rep. 83.

A prisoner sentenced to the jail in L, in the county of B, under conviction for crime against the United States, may be held in P, in the same county, the jail at L having, at the time of sentence, been lawfully removed to P. *Re* Hartwell, 1 Low. C. C. 536.

2. *Miller v. State*, 15 Fla. 575; *People v. Lincoln*, 62 How. (N. Y.) Pr. 412; distinguishing 66 N. Y. 342; *Ex parte* Meyers, 44 Mo. 279.

3. *People ex rel. Reavey v. Walsh*, 8 N. Y. St. Rep. 895.

Sentence—Validity of.—A sentence that defendant be imprisoned in the state prison for one year, and that in the meantime, and until he is carried there, he be imprisoned in the county jail, is valid under the statute by which the term shall begin to run upon

and including the day of conviction. *State v. Gaskins*, 65 N. C. 320.

Same—Conviction for Two Crimes—When Second Sentence Commences.—Where, under a statute a prisoner is convicted on the same day of two crimes for which he is sentenced to two terms of imprisonment, but the day when they are to begin is not specified, the second term begins on expiration of the first. *Ex parte* Turner, 45 Mo. 331.

Such statute applies only where both convictions take place before sentence is pronounced in either case. *Ex parte* Meyers, 44 Mo. 279.

4. Opin. of Attys. Gen. (1868) 384.

An escaped prisoner can be retaken at any time, and confined under the authority of the original judgment until his term of imprisonment has been accomplished. *Haggerty v. People*, 53 N. Y. 476.

Recapture After Expiration of Time for Which Imprisoned.—A prisoner, escaping during his term of imprisonment, and retaken after the time for which he was imprisoned has expired, may be returned to state prison, for a time equal to the remainder of his term unserved, by the court which sentenced him, upon information or suggestion on behalf of the people and trial of the question of his identity and escape. The provision of N. Y. Const., art. 1, § 6, that "no person shall be held to answer for a capital or other infamous crime . . . unless on presentment or indictment of a grand jury," does not affect the remedy by "information" to enforce punishment already due under sentence. *Haggerty v. People*, 6 Lans. (N. Y.) 332, 347; *Cleek v. Com.*, 21 Gratt. (Va.) 777.

Under a statute which requires that when imprisonment is a part of the sentence of the accused the term shall be fixed, and the time of its commencement and ending specified, the court in

VI. Discharge from Imprisonment—1. *By Expiration of Term of Sentence*.—A person who has been convicted of a misdemeanor or a felony and sentenced to be imprisoned for a designated time, on the expiration of that time is entitled to be discharged from his imprisonment; and when the law provided that certain deductions shall be made for good conduct from the length of time a person is sentenced to be imprisoned, he is entitled to have such deductions made from the term of his imprisonment and to be discharged at the expiration of his term as thus shortened.

A prisoner convicted and sentenced for two offences is entitled to a discharge at the end of the entire period included in both sentences, and any deduction for which he may be entitled for good behavior is to be taken from the end of the entire term.¹

McCoy v. Sheriff of Newcastle Co. (Del. 1887) 6 Cent. Rep. 872, *citing* and following *Haggerty v. People*, 53 N. Y. 476; *Rev'g 6 Lans. (N. Y.) 332, held* that where a prisoner escapes and remains at large until after the time fixed in his sentence for the ending of his term of imprisonment has expired, he may be retaken and confined under the authority of the original sentence, until the term of imprisonment fixed by the first part thereof has been accomplished.

Recommitting Without Warrant of Adjudication.—*People v. Potter*, 1 Park. Cr. Cas. (N. Y.) 47, disapproving the practice of recommitting to the state prison without any warrant or adjudication, is upheld in *People v. Moore*, 62 Mich. 496, holding that the law of Michigan (Hot. Stat., §§ 9630-9633) authorizing reception of one violating condition of his pardon, is unconstitutional and void.

Prison Breach.—A person imprisoned upon a regular commitment, issued by a justice of the peace, charging him with a felony, who breaks prison, is guilty of the offence of prison breaking, and may be convicted thereof without being indicted, tried or convicted of the principal felony. *Ex parte AhBau*, 10 Nev. 264.

1. *Ex parte Dalton*, 49 Cal. 463.

Record of Good Conduct.—At the expiration of a term of imprisonment as reduced by good conduct, the convict is entitled to his discharge without a pardon. Opinion of Judges, 79 Mass. (13 Gray) 618.

Whether the courts can award an allowance of statute for good behavior, or whether it is a matter for the executive alone, is queried. *People ex rel.*

Stokes v. Warden of Sing Sing Prison, 66 N. Y. 342.

Commutation of Sentence.—N. Y. Code of Civ. Pro., §§ 122, 144, 3347, subd. 1, laws of 1863, ch. 415, and laws of 1864, ch. 321, commuting term of imprisonment for good behavior supersede the United States statutes as to commutation in case of prisoners confined in this state. *United States v. Schroeder*, 14 Blatchf. C. C. 344.

When Not Entitled to Discharge on Expiration of Time.—A person sentenced to imprisonment in the county jail for ninety days, and until a fine of \$1 and the costs of the prosecution are paid or secured, is not entitled to his discharge on completion of the ninety days, nor to a credit of fifty cents per day upon the fine and costs under the Indiana statute, 2 Gav. & H. 421, § 130, from the date when his imprisonment commenced. *Ex parte Tongate*, 31 Ind. 370.

Same—Sentencing to Work House.—Where a statute provides that the party taxed with costs in prosecutions of presentment or indictment shall pay to the state a specific tax on mitigation, it is error to sentence one convicted of misdemeanor to the work house until the tax is paid, worked out, or secured. *Johnson v. State*, 85 Tenn. 325.

A person adjudged to be in contempt, and taken to jail under an invalid commitment and discharged on the ground of the illegality of the first commitment, cannot be detained until a new and valid commitment is procured. *Shank's Case*, 15 Abb. (N. Y.) Pr., N. S. 38; *Rev'd as People ex rel. Phelps v. Fancher*, 2 Hun (N. Y.) 226; s. c., 4 T. & C. (N. Y.) 467.

2. *By Compliance with Statute.*—Voluntary assignments by insolvents are provided for, and these provisions extend to judgments, whether in tort or contract.¹ The fact that the debtor caused property to be conveyed to his wife long before the existence of the debt owned by the opposing creditor, will not prevent a discharge.² The fraud which will bar a debtor's discharge

1. *Ex parte* Thayer, 4 Cow. (N. Y.) 66; *Luther v. Deyo*, 19 Wend. (N. Y.) 629; *Hayden v. Palmer*, 24 Wend. (N. Y.) 364; *Matter of Brady*, 69 N. Y. 215.

An infant imprisoned on civil process will be discharged on assigning his property according to statute. *People v. Mullin*, 25 Wend. (N. Y.) 698.

Discharge of Party Imprisoned for Non-payment of Fine.—A statute authorizing the discharge of parties imprisoned for non-payment of fines is not an attempt to take the pardoning from the governor of the state. *Ex parte* Scott, 19 Ohio St. 581.

2. *Matter of Haight*, 11 N. Y. Civ. Pro. Rep. 227.

In a proceeding for the discharge of an imprisoned debtor, under N. Y. Code Civ. Pro., § 2200, *et seq.*, the only inquiry is whether or not in the eye of the law the proceedings of the petitioner are just and fair and his petition and schedules correct, and unless the opposing creditor satisfies the court to the contrary, an assignment must be directed and a discharge granted. *Matter of Haight*, 11 N. Y. Civ. Proc. Rep. 227.

Appeal Without Stay of Proceedings.—The taking of an appeal by defendant from the judgment in the action, without staying the proceedings therein, will not operate to enlarge the time within which, under section 572 as amended, the execution must be issued against the body to prevent the defendant from obtaining his discharge from liability to imprisonment thereon. *Havemyer S. Refining Co. v. Taussig*, 19 Abb. (N. Y.) N. C. 57.

Discharge in Bankruptcy.—The debtor's procuring a discharge in bankruptcy is not a disposition in fraud of the state law, such as will preclude his discharge from imprisonment under 2 Rev. Stat., 31 N. Y. Sup. Ct., Sp. T. 1868, *Roswog v. Seymour*, 7 Robt. (N. Y.) 427. But see *People ex rel. Galsten*, v. Brooks, 40 How. (N. Y.) Pr. 165.

Assignment and Delivery of Property.—It was shown that the petitioner converted moneys to his own use while acting in a fiduciary capacity, but there was no evidence that he had disposed

of his own property or the converted moneys for the future benefit of himself or members of his family, or with intent to defraud his creditors. *Held*, that he must be discharged from imprisonment upon complying with the provisions of the code relating to the assignment and delivery of his property. *Citing* *Suydam v. Belknap*, 20 Hun (N. Y.) 87; *Matter of Fowler*, 8 Daly (N. Y.) 548; *Matter of Brady*, 69 N. Y. 215, 216; and disapproving *Matter of Roberts*, 59 How. (N. Y.) Pr. 136; *Supr. Ct., Sp. T. 1885*, *Matter of Caamano*, 2 How. (N. Y.) Pr., N. S. 240.

After being superseded, the prisoner may depart at once from the limits, for the supersedeas affects the bond as well as the *ca. sa.*; and the sheriff is not liable for false imprisonment for merely having refused to give him an unnecessary discharge. *Warne v. Constant*, 4 Johns. (N. Y.) 32.

One held in a precept issued to enforce an order for payment of alimony is entitled to such discharge on assigning his property. *Van Wezel v. Van Wezel*, 3 Paige Ch. (N. Y.) 38. So is an infant. His assignment under the act would be valid. *People v. Mulen*, 25 Wend. (N. Y.) 698.

Surrender of Debtor—Subsequent Discharge.—A defendant who had been arrested in mesne process and released upon the usual undertaking, surrendered himself in exoneration of the sureties, after a body execution upon the judgment subsequently recovered had been returned endorsed "defendant not found." *Held*, that he was entitled to his discharge under N. Y. Code Civ. Proc., § 111, as amended by L. 1886, ch. 672, after the lapse of six months from the time he surrendered himself to the sheriff. *Downey v. Clute*, 18 Abb. (N. Y.) N. C. 235. The court cited *People ex rel. Lust v. Grant*, 18 Abb. (N. Y.) N. C. 220. It seems, however, that the reversal of that decision in 19 Abb. (N. Y.) N. C. 52, does not impair the soundness of the decision in *Downey v. Clute*, 18 Abb. (N. Y.) N. C. 235.

Inability to Perform Act or Endure

is not that of which he may have been guilty in contracting the debt, but fraud in the subsequent disposition of his property to evade the liability.¹

A discharge will not be withheld because the action was for the conversion by defendant to his own use of moneys of plaintiff, while acting in a fiduciary capacity.² Nor merely because the debt on which the judgment was recovered was fraudulently contracted.³ Nor because the judgment on which he is imprisoned was for fraudulent representations as to the solvency of one obtaining credit, when no pecuniary benefit resulted therefrom to the debtor.⁴ Nor because he conveyed his house to his son after commission of a tort (slander), and six weeks before suit brought; it not appearing that he knew he was to be sued.⁵

Imprisonment.—Section 302 of the New York Code of Procedure, as amended in 1851, providing that a debtor committed to prison in supplementary proceedings, or under the act to abolish imprisonment for debt (L., 1831, 397), may be discharged by the court in case of inability to perform the act required, or to endure the imprisonment, must be construed as applicable, in the discretion of the court, to cases of imprisonment under the act of 1831, notwithstanding the commitment in general, not specifying anything to be done. N. Y. Com. Pl., Sp. T. 1869, *Maass v. LaTorre*, 6 Abb. (N. Y.) Pr., N. S. 219.

Creditor's Authorizing Discharge.—Creditor may, by parol, authorize jailer to discharge debtor. *Bridge v. McLane*, 2 Mass. 520.

Judgment Before Justice—Discharged, When.—A defendant in a judgment rendered before a justice is entitled to his discharge after an imprisonment of thirty days, if he has a family and is not a freeholder, although the execution was issued on a transcript of the judgment filed in the county clerk's office. *Brooks v. French*, 5 Wend. (N. Y.) 568.

Denial of Motion to Vacate Arrest.—The facts that a prisoner was arrested on an allegation of fraudulently contracting a debt, and that a motion to vacate the order of arrest was denied on the merits, do not prevent his discharge under the fourteen day act. Citing *Matter of Brady*, 8 Hun (N. Y.) 437; s. c., 69 N. Y. 215, Sp. T. 1878; *Sparks v. Andrews*, 1 City Ct. 76.

Inability to Perform Act.—Although a warrant of commitment under L. 1831, ch. 300, does not require the performance of any particular act, yet if the person

committed is unable to perform any of the acts specified in the statute to procure his discharge, he may be discharged under the provisions of N. Y. Code Civ. Proc., § 302. Following *Maass v. LaTorre*, 6 Abb. (N. Y.) Pr., N. S. 219; *Russak v. Sabey*, 29 Hun (N. Y.) 491.

Transfer of Property—Who May Object.—An objection that the transfer by a debtor of all his property is fraudulent can be raised only by creditors that were such at the time of the transfer.

Citing *Matter of Brady*, 69 N. Y. 215; *Matter of Pearce*, 29 Hun (N. Y.) 270.

1. *Matter of Pearce*, 29 Hun (N. Y.) 270.

2. *Suydam v. Belknap*, 20 Hun (N. Y.) 87, distinguishing *Matter of Brady*, 69 N. Y. 215.

3. *Sparks v. Andrews*, 7 N. Y. Week. Dig. 276.

4. *Matter of Fowler*, 8 Daly (N. Y.) 548; overruling *Matter of Roberts*, 8 Daly (N. Y.) 95.

5. *Hughes v. Taylor*, 1 Month. L. Bul. 23.

A discharge should not be refused merely because all the property which he had when arrested under execution for debt had been taken away from him without his fault, and against his will. Com. Pl., Sp. T. 1878, *Matter of Fitzgerald*, 8 Daly (N. Y.) 188; s. c., 5 Abb. (N. Y.) N. C. 357. Nor (under N. Y. Code Civ. Pro., § 2200) merely because he has made a general assignment of all his property for the benefit of creditors. N. Y. Com. Pl., Sp. T. 1880, *Matter of King*, 1 Am. Insolv. R. 351. Nor because, after the action was brought and before judgment (not after it) he went into voluntary bankruptcy, where it appears that no assets came into the hands of the assignee. Limiting and explaining, *Matter of Fitzgerald*, 8 Daly

The burden is upon the creditors opposing a discharge from imprisonment, to show that the prisoner's proceedings are not just and fair. Fraud on the part of prisoner's firm will not suffice unless he was personally cognizant of it.¹

3. *By Pardon*.—A pardon granted to one imprisoned for a crime, works his discharge the same as expiry of time or compliance with statute.²

VII. Discharge—When Denied.—A prisoner sentenced to a term of imprisonment, to pay costs, and to stand committed until the sentence is complied with, is not entitled to a discharge on delivery of a pardon from the governor without payment of costs.³ And the fact that no indictment is found against a pris-

(N. Y.) 188, N. Y. Com. Pl. 1880; Matter of Fowler, 8 Daly (N. Y.) 548.

1. N. Y. Com. Pl., Sp. T. 1881, Matter of Benson, in 23 Alb. L. J. 216; s. c., 60 How. (N. Y.) Pr. 314. Compare 1 Am. Insolv. R. 301.

Discharge by Sheriff—Demand on Creditor.—Under 1 Swan & C. (Ohio) Stat. 799, permitting a sheriff to discharge a prisoner for debt "at any time when there is no money in his hands," no demand upon the creditor is necessary to justify the discharge. Newcomb v. Weber, 1 Cinc. (Ohio) 12.

The parties to an action in which the defendant has been arrested may agree to the terms of his discharge without regard to the statute providing for bail. Toler v. Adee, 84 N. Y. 222; rev'g Toler v. Adee, 9 N. Y. Week. Dig. 211.

Application for Discharge—Answer to.—It is not an answer to an application by one of several judgment debtors imprisoned upon an order of arrest, for his discharge because of neglect to issue an execution against his person within three months after judgment, that there is a good reason for not returning the execution against the property, owing to circumstances affecting only his co-defendants. New York Guaranty etc. Co. v. Rogers, 71 N. Y. 377.

Investment of Money in Wife's Name.—A debtor who, having obtained money by false pretences, has spent it knowing that the person from whom he so obtained it must lose it, and who, having acquired money subsequent to incurring the liability on a judgment for which he is imprisoned, has invested such money in real property in the name of his wife, to reimburse her for money of hers used in supporting her and himself, is not entitled to discharge under the provisions above mentioned,

requiring such discharge where the court is satisfied "that the petitioner's proceedings are just and fair." (§ 2208). Matter of Lowell, 13 Daly (N. Y.) 306. And see N. Y. County Ct., *In re* Haight, 11 N. Y. Civ. Pro. Rep. 227.

Discharge Under Insolvency Laws.—The similar provision of the act of June 13, 1883, providing for the discharge by county commissioners of "all persons confined in jail, without proceedings under the insolvent laws," upon order of court or of a judge, applies only to such prisoners as were previously required to take the benefit of the insolvent laws to obtain their discharge. Com. v. Carey, 2 Pa. County Ct. 293.

Relieved from Imprisonment, When.—Where a defendant has been arrested under an order of arrest granted by a judge, and discharged upon giving an undertaking to render himself at all times amenable to any mandate which may be issued to enforce final judgment in the action, he is entitled, under N. Y. Code Civ. Proc., § 572, as amended by L. 1886, ch. 672, § 6, to be relieved from liability to imprisonment upon execution against his person, where the plaintiff has neglected to issue the same within three months after entry of final judgment in the action. Havemeyer Sugar Refining Co. v. Taussig, 19 Abb. (N. Y.) N. C. 57. See Wright v. Grant, 18 Abb. (N. Y.) N. C. 451, where this point was raised but not decided, except to hold that the granting of the application for relief in such case rested in the discretion of the court.

2. See *post*, this series, tit. PARDON.

3. *Ex parte* Tongate, 31 Ind. 370; Schuyllkill v. Reifsnnyder, 46 Pa. St. 446.

Reversal of Conviction.—Upon the reversal of a conviction of the plaintiff

oner at the term at which the recognizance bound him to appear, does not entitle him, as matter of course, to a discharge, but an order of court is necessary, and until this is granted, his surety remains liable.¹

To prevent one imprisoned on civil process from obtaining a discharge, it must be shown that the prisoner has committed some of the acts which he is required to swear, in the oath accompanying his petition, he has not done.²

in error of larceny on the ground that the evidence showed him to be guilty of obtaining money under false pretences, and not of larceny, *held*, that he was not thereupon entitled to be discharged from custody, but he should be detained for a new trial, or until the matter could be presented before another grand jury. *Kelly v. People*, 6 Hun (N. Y.) 509.

1. *People v. Cary*, 6 Daly (N. Y.) 406.

Imperfection in Mittimus—Release Because of.—A prisoner who has been legally and properly sentenced to prison cannot be released simply because there is an imperfection in the mittimus. (Following *People ex rel. Trainor v. Baker*, 89 N. Y. 460). Hence, in *habeas corpus* proceedings, instituted to obtain the discharge of a prisoner from a penitentiary, it having claimed in his behalf that, whereas N. Y. Code Cr. Proc., § 725, directs that judgment shall be executed, upon the sheriff, etc., receiving a copy of the certificate of conviction, the warrant under which the prisoner was held was not a copy of the certificate. *Held*, not a sufficient ground for his discharge. *Citing* L. 1867, ch. 291, tit. 5, § 7; N. Y. Code Cr. Proc., § 724. *People ex rel. Evans v. McEwen*, 67 How. (N. Y.) Pr. 105.

The right to imprison, to enforce the orders of the court, depends in this state altogether on statute. *Randall v. Carpenter*, 47 N. Y. Super. Ct. (15 J. & S.) 205.

Officer's Return—What It Should Show.—The officer's return to the precept should show that such copy was left with the jailer. Where, however, the officer returns that he has committed a prisoner to jail, it will be presumed that the commitment is in conformity to law, and the return will be conclusive on that point, or, at least, *prima facie* evidence, until contradicted. *Atherton v. Gilmore*, 9 N. H. 185.

Warrant for Detention of Prisoner.—No other authority or warrant for the

detention of a prisoner is required by law than a certified copy of the judgment rendered against him. *Matter of Brown*, 32 Cal. 48.

Same—In New Hampshire, in cases of the commitment of a prisoner to jail a true and attested copy of the precept on which the arrest was made should be delivered to the jailer, to show the authority by which the prisoner is detained in custody. *Atherton v. Gilmore*, 9 N. H. 185.

Same—Certified Copy of Judgment.—Since one confined in a penitentiary is detained by virtue of the judgment of the court, and the warrant of commitment is simply a direction to the sheriff or other officer to convey him to the penitentiary, it seems that if the officer furnishes the keeper with a certified copy of the judgment, that is sufficient evidence of his authority, and he needs not to have the warrant of commitment left with him. *People ex rel. Trainor v. Baker*, 89 N. Y. 460.

2. *Sp. T. 1878*, *Sparks v. Andrews*, 1 City Ct. 76. The provision of L. 1886, ch. 672, that no person shall be imprisoned for a longer period than six months under an execution or other mandate against the person, does not apply to an order of arrest. *Citing* *Brick v. Ganner*, 36 Hun (N. Y.) 52, 55, Supr. Ct., Sp. T. 1886; *New York Cent. & H. R.R. Co. v. Shepherd*, 10 Civ. Pro. Rep. (Browne) 153. To same effect, see *N. Y. City Ct., Sp. T. 1886*, *Warschauer v. Webb*, 10 N. Y. Civ. Pro. R. (Browne) 169; Supr. Ct., Sp. T. 1886, *People ex rel. Rodding v. Grant*, 10 N. Y. Civ. Pro. R. (Browne) 174.

Compare *People ex rel. Lust v. Grant*, 10 N. Y. Civ. Pro. R. (Browne) 158. *Citing* *Peters v. Henry*, 6 Johns. (N. Y.) 278; *Brown v. People*, 75 N. Y. 437, 440. The decision of *POTTER, J.*, in *Levy v. Salomon*, decided with the case of *People ex rel. Lust v. Grant*, was affirmed by the general term decision to appear in 18 Abb. (N. Y.) N. C., with note.

The account of the prisoner's estate must contain all the statements required by statute, otherwise it is ineffectual to discharge the imprisoned person.¹ The statute requiring an assignment of prisoners, etc., has no application to a prisoner who escaped.²

So *held*, also, as to an order of arrest granted against a non-resident in an action to procure a limited divorce. *People ex rel. Cohen v. Grant*, 11 N. Y. Civ. Pro. Rep. 55.

Order of Arrest in Replevin.—So *held*, also, in case of a defendant held under an order of arrest issued in an action of replevin, on the ground that he had intentionally disposed of the chattels to be recovered in such a way that they could not be found or taken by the sheriff. (*Citing Hickey v. Taaffe*, 99 N. Y. 204.) New York Sup. Ct., Sp. T. 1886; *Dalon v. Kapp*, 11 N. Y. Civ. Pro. Rep. (Browne) 58.

Intent to Defraud Creditors.—When the court is satisfied that the petitioner has disposed of property with intent to injure and defraud an existing creditor, and that the petition and schedules in that regard are not correct, and that the petitioner's proceedings are, therefore, not just and fair, his prayer for a discharge should be denied. So *held*, denying discharge in a case where the petitioner failed satisfactorily to account for the disposition of a sum of money shown to have been received by him. *Matter of Haight*, 11 N. Y. Civ. Proc. Rep. 227. The judge cited, as to the rule of governing such applications, *People v. White*, 14 How. (N. Y.) Pr. 501; *Matter of Brady*, 69 N. Y. 215; *Coffin v. Gourlay*, 20 Hun (N. Y.) 308; *Matter of Watson*, 2 E. D. Smith (N. Y.) 429; *Gaul v. Clark*, 1 N. Y. Week. Dig. 209; *Matter of Finck*, 59 How. (N. Y.) Pr. 145.

Same—Arrest on False and Fraudulent Ground.—On an application by an imprisoned debtor for a discharge under the provisions of N. Y. Code Civ. Pro., §§ 2200–2218, if it appear that the ground upon which he was originally arrested was false and fraudulent representations, which were alleged in the complaint and proved upon the trial, it is a valid objection to his discharge that his proceedings have not been just and fair. (*Following Sparks v. Andrews*, 7 N. Y. Week. Dig. 276; s. c., 1 City Ct. 76; N. Y. City Ct., Chamb. 1884, *Price v. Orcutt*, N. Y. Daily Reg., May 26, 1884.

And if it appears that he has been imprisoned on the ground that he had

removed and disposed of his property with intent to defraud his creditors, and that it has been judicially declared in the action that he had made a fraudulent disposition of his property, his proceedings have not been just and fair so as to entitle him to a discharge. (*Citing Matter of Roberts*, 59 How. (N. Y.) Pr. 136; *Matter of Brady*, 69 N. Y. 215; N. Y. City Ct., Sp. T., *Zung v. Van Minden*, N. Y. Daily Reg., Dec. 6, 1883.

1. *People ex rel. Galsten v. Brooks*, 40 How. (N. Y.) Pr. 165.

Using Money for Support Obtained by Fraud.—A judgment debtor who has knowingly expended for the support of himself and family money obtained by fraud is not entitled to a discharge; so also if he has invested in his wife's name and in fraud of his creditors, moneys subsequently acquired. N. Y. Com. Pl., Sp. T. 1885, *Matter of Lowell*, 2 How. (N. Y.) Pr., N. S. 285.

One taken on attachment to answer interrogatories, on a charge of contempt, cannot be discharged under the act. *Jackson v. Smith*, 5 Johns. (N. Y.) 115.

Bond for Jail Limits—Right to Discharge.—A defendant who has been arrested on a mesne process and given bond for the jail limits, is not entitled, at the expiration of six months, to be discharged from arrest and imprisonment within the limits. *Levy v. Salomon*, 19 Abb. (N. Y.) N. C. 52; rev'g 18 Abb. (N. Y.) N. C. 220. To the same effect, *Matter of Shephard*, 43 Hun (N. Y.) 287, in which the court referred to the cases of N. Y. Cent. & H. R. Co. v. *Shepherd*, 10 N. Y. Civ. Proc. Rep. 153; *People ex rel. Rodding v. Grant*, 10 N. Y. Civ. Pro. Rep. 174 n; *People ex rel. Lust v. Grant*, 10 N. Y. Civ. Pro. Rep. 158; s. c., 1 N. Y. St. Rep. 537.

But in such case he should not be discharged on account of inability to pay the debt, or give security or make the assignment provided for in the statute, where his proceedings have not been fair and his inability is not clearly made out. N. Y. Com. Pl., Sp. T. 1869, *Maass v. LaTorre*, 6 Abb. (N. Y.) Pr., N. S. 219.

2. N. Y. Sup. Ct., Sp. T. 1859, *McGregory v. Willett*, 17 How. (N.

The debtor is not to be discharged from imprisonment on account of his inability to pay the debt, or give security, to make the assignment provided for by statute if his proceedings have not been fair, and his inability not clearly made out.¹

A discharge cannot be granted to an imprisoned debtor who has fraudulently disposed of some of his property with intent to defraud the creditors who oppose his discharge.² A debtor is not to be discharged from imprisonment if the judge is satisfied that the

Y.) Pr. 439; 23 How. Pr. (N. Y.) 129; aff'g 4 Bosw. (N. Y.) 643.

Grounds of Discharge.—The sheriff's violation of the statute directions as to mode of imprisonment is not a ground of discharge on motion. N. Y. Sup. Ct., Chamb. 1858, Lockwood v. Mercereau, 6 Abb. (N. Y.) Pr. 206.

When a debtor was committed to jail upon an execution actually in force, and an incorrect copy was left with the jailer, but a correct one immediately afterwards, the debtor was not discharged on account of the error. Com. v. Waite, (9 Mass.) 2 Pick. 445.

One imprisoned on a precept in the nature of a civil execution, for contempt in non-payment of costs merely, is entitled to the jail liberties but not to his discharge, under the act to abolish imprisonment for debt. People v. Bennett, 4 Paige Ch. (N. Y.) Ch. 282; Patrick v. Warner, 4 Paige Ch. (N. Y.) 397.

Discharge—When Void.—An imprisonment debtor procured a discharge for the execution, designedly concealing that his father, a man of property, had died and that he himself had committed an escape. *Held*, that the discharge was void. Lewis v. Gamage (18 Mass.), 1 Pick. 347.

1. Maass v. LaTorre, 6 Abb. (N. Y.) Pr., N. S. 219.

Under Pa. Stat. 1789, March 27, § 4, one sentenced to be imprisoned to pay a fine not more than \$5 and costs, is entitled to a release from imprisonment, having been confined for the fine thirty days beyond the time for which he was sentenced. Though released he is still liable for the fine and costs. Com. v. Long, 5 Binn. (Pa.) 489.

4. Matter of Brady, 69 N. Y. 215; aff'g 8 Hun (N. Y.) 437; applied in Matter of Fowler, 8 Daly (N. Y.) 548, 557. Compare Code Civ. Pro., § 2208.

Fraudulent Conduct—What Amounts to.—Where it appeared that a petitioner for discharge from imprisonment had, on the eve of the assignment

of his firm, collected a sum of money due it which he retained individually, and had not accounted for, and that he allowed his wife, as a creditor of the firm, to draw all the ready money of the firm just before such failure, on account of an old indebtedness due her, and caused the transfer of an indebtedness due the firm from his daughter to his wife's credit in such manner as to extinguish the debt, *held*, that such proceedings had not been just or fair, and that he should not be relieved from imprisonment. Matter of Howes, 9 N. Y. Civ. Pro. Rep. (Browne) 17.

A judgment debtor imprisoned on execution is not entitled to his discharge under the statute, if it appears that he has been in the enjoyment of an income, and expended it in the support of his family—in this case his father and mother—without any effort to pay the judgment, and the circumstances are such that he might have set apart a portion of his income to apply on the judgment; for omitting to do so is not "just and fair." So *held*, where the debtor was on the limits, receiving a salary of \$1,200 per annum as a policeman, and the judgment was for damages to a poor person for physical injuries inflicted by him. *Citing* Miller v. Hooper, 19 Hun (N. Y.) 394. N. Y. Com. Pl., Sp. T. 1886, Matter of Donoghue, 17 Abb. (N. Y.) N. C. 277.

Discharge—When Improperly Granted.—The discharge of an attorney after three months' imprisonment for non-payment of a fine of \$1,100 imposed by way of punishment for contempt, upon his affidavit that he had no means to pay it, and that his relatives were pecuniarily unable to pay it for him, without any detail or any corroboration whatever, *held*, under the circumstances, improperly granted. Matter of Steinert, 9 Hun (N. Y.) 301.

The bond required as a condition of discharge of a debtor imprisoned under that act (N. Y. L. 1831, ch. 300, § 10, subd. 3), conditioned that he will

proceedings have not been just and fair.¹ And it is said that a debtor imprisoned on proceedings under the New York act of 1831 to abolish imprisonment for debt, cannot be discharged from imprisonment under the provisions of the Revised Statutes, relative to proceedings by creditors to compel assignments by imprisoned debtors.²

apply for an assignment of his property and a discharge, will not avail a debtor committed on the ground that he has made a fraudulent disposition of his property (following *Matter of Brady*, 8 Hun (N. Y.) 437; s. c., 69 N. Y. 215); nor can he avail himself of the bond provided for by subd. 4 of that section, as it applies only to a debtor committed on the ground that he is about to remove his property with intent to defraud (L. 1837, ch. 418, § 1). *Russak v. Sabey*, 29 Hun (N. Y.) 491.

Limitation of Imprisonment.—The limitations of time prescribed in the N. Y. Code Civ. Proc., § 572, as amended by L. 1886, ch. 672, are to prevent a plaintiff, having a defendant in actual or constructive imprisonment under an order of arrest, from continuing his imprisonment indefinitely by delaying to issue his execution; and this section does not apply to an action in which no order of arrest was issued. *Sweet v. Norris*, 19 Abb. (N. Y.) N. C. 150.

Drawing Entire Bank Account.—An application for discharge, denied because it appeared that immediately after the verdict against him he had drawn his entire bank account, for the application of the greater part of which he was unable to account. *Barck v. Senn*, N. Y. Daily Reg. May 31, 1883.

1. N. Y. Com. Pl. 1880, *Matter of Fowler*, 8 Daly (N. Y.) 548.

Hence, where the defendant has been arrested on execution against his person, in an action in which no order of arrest was issued, he is not entitled to have such execution set aside merely because it was not issued within ten days after the return of an execution against his property, nor within three months after entry of the final judgment. *Sweet v. Norris*, 19 Abb. (N. Y.) N. C. 150.

A person committed for fraudulently disposing of property will not be discharged from imprisonment upon his making an assignment of his property pursuant to section 16 of the act. This provision for a discharge applies only to cases where there has been no dis-

posal of property with intent to defraud creditors. *Matter of Andriot*, 2 Daly (N. Y.) 28.

Committed for Contempt.—N. Y. Code Civ. Pro., § 302, authorizing the release of a person committed for contempt, in case of his inability "to endure the imprisonment," is not applicable to one who is suffering from malarial fever. *Moore v. McMahon*, 20 Hun (N. Y.) 44.

Discharge of Imprisoned Debtors—Limitations.—Under the New York statute limiting the time of imprisonment of any person "upon any execution or other mandate against the person" to six months (L. 1886, ch. 672, § 11) a defendant imprisoned under an order of arrest issued on the ground that he had concealed a part of the chattels to recover which the action was brought, and before trial or judgment rendered against him, is not entitled, at the expiration of six months, to be discharged; the statute applying only to debtors against whom final process or mandate has issued after adjudication fixing the amount due. *Levy v. Salomon*, 105 N. Y. 529; s. c., 19 Abb. (N. Y.) N. C. 52; 12 N. Y. Civ. Pro. 125; 8 N. Y. St. Rep. 16. To same effect, *Dalon v. Kapp*, 11 N. Y. Civ. Pro. Rep. 58. And see *Matter of Shepard*, 43 Hun 287; 5 N. Y. St. Rep. 480.

Under the provisions of the N. Y. Code Civ. Proc. for the discharge of an imprisoned debtor on his petition, with a schedule of his property, etc., annexed, accompanied by an affidavit "subscribed and taken by the petitioner, on the day of the presentation of the petition" (§ 2204), the judge has no jurisdiction to make an order of discharge where such affidavit is made before the presentation of the petition; and an order so made, containing no recital of an affidavit, cannot protect the sheriff from liability for discharging the prisoner under it. *Schaffer v. Riseley*, 44 Hun 6; s. c., 6 N. Y. St. Rep. 417.

2. *People v. O'Brien*, 54 Barb. (N. Y.) 38.

A debtor will not be discharged if, in voluntary proceedings in bankruptcy,

VIII. Proceedings for Discharge from Imprisonment Under Civil Process—(1). *The Jurisdiction*.—An application for the discharge of a judgment debtor from imprisonment on execution against the person,¹ must be made to the court from which process issued. A judge out of court has no jurisdiction.²

he had assigned all his non-exempt property at the time of his arrest, since he has placed it out of his power to assign under the state statute. *Matter of Fitzgerald*, 8 Daly (N. Y.) 188; s. c., 5 Abb. (N. Y.) N. C. 357. See 4 How. (N. Y.) Pr. 185; s. c., 14 Hun (N. Y.) 95. Nor if, when conscious of insolvency, he gave a chattel mortgage to secure an antecedent debt. N. Y. Com. Pl., Sp. T. 1879, *Matter of Mower*, 1 Month. L. Bul. 39. Nor if imprisoned for disposing of his property with intent to defraud his creditors (69 N. Y. 215). *Coffin v. Gourlay*, 20 Hun (N. Y.) 308. Nor from execution on judgment for money received in fiduciary capacity, if he does not explain non-payment, nor show inability (8 Daly (N. Y.) 543; 14 How. (N. Y.) Pr. 498; 8 Hun (N. Y.) 437). N. Y. Com. Pl., Sp. T. 1880, *Matter of Tompkins*, 3 Month. L. Bul. 8.

Detention in Trover—Inability to Produce the Property.—Proof by defendant in an action of trover, held in custody, of his inability to produce the property, is not made, by the Georgia statute, one of the grounds of his discharge; he may have sold the property and put the money in his pocket, and thus have placed it out of his power to produce it. The production of the property, or entering into bond with good security, for the eventual condemnation money, are the only terms prescribed by the statute upon which the court is authorized to discharge the defendant from custody. *Harris v. Bridges*, 57 Ga. 407.

1. Under 2 N. Y. Rev. Stat. 31, § 1, amended laws of 1847, ch. 390, § 1.

2. *Mather's Case*, 14 Abb. (N. Y.) Pr. 45.

Proceedings in Neighboring County.—The supreme court allowed a defendant to be brought up from a different county from that in which the court sat, in order to be discharged under the act of 1801. *Nichols v. Gregory*, 5 Johns. (N. Y.) 359.

Under a bond given by a debtor, arrested under the act to abolish imprisonment for debt, conditioned that he would "within thirty days apply for an assignment of all his property, and for a

discharge as provided by the statute, and diligently prosecute the same," until he should obtain his discharge,—the fact that the county judge was sick and out of the county, and there was no other officer in the county authorized to hear the application, is no excuse for its not being made within the thirty days. The debtor should continue the proceedings before the county judge of a neighboring county (2 Rev. Stat. (3rd ed.) 284, § 58). *Cobb v. Harmon*, 23 N. Y. 148; aff'g 92 Barb. (N. Y.) 472.

Proceedings in a county court, under 2 N. Y. Rev. Stat. 31, must be had at a regular term of the court. Where the regular term adjourned without day, pending the proceedings, subsequent proceedings had before the county judge are without jurisdiction. Although the judge may decide a matter in court after the adjournment of the term, the order must be entered as of the term when the matter was submitted. *People ex rel. Galsten v. Brooks*, 40 How. (N. Y.) Pr. 165.

Petition for Discharge—When to be Presented.—A petition for the discharge of a debtor, imprisoned upon execution, must be first presented to the court at a regular special term. It cannot be heard at chambers, nor in the first instance at general term. *Matter of Walker*, 2 Duer (N. Y.) 655; to similar effect, Sup. Ct. Chambers 1862; *Mather's Case*, 14 Abb. (N. Y.) Pr. 45.

A petition to be discharged from imprisonment, pursuant to R. S., pt. 2, ch. 5, tit. 1, art. 6, should be addressed to the court; should show the cause of imprisonment; and with an account of the applicant's property must be served as required by the statute. *Matter of Moore*, 1 Am. Insol. R. 95. To same effect N. Y. Code Civ. Pro., § 2200.

Same—Proceedings commenced before a judge of the court of common pleas for the discharge of a debtor from imprisonment, under 2 N. Y. R. S., tit. 1, art. 6, ch. 5, may be continued and terminated before another judge of that court; and the fact that the order to show cause by which such proceedings were instituted was made returnable before the judge who signed it, "or, in

2. *The Application*.—A petition for the discharge of an imprisoned judgment debtor must allege that he has been imprisoned three months; such fact is jurisdictional.¹ The schedule which the New York act, to abolish imprisonment for debt, requires an applicant for a discharge from imprisonment to give, must contain an account of his creditors and an inventory of his estate as they existed at the time of his arrest.² The omission of uncollectible debts, if not in bad faith, may be supplied on the hearing.³

his absence, before one of the other judges of the court, as such direction is to be regarded as superfluous, and not as an attempt to confine the jurisdiction of the matter to that court." N. Y. Com. Pl., Sp. T. 1878, *Matter of Robert*, 8 Daly (N. Y.) 95. On other points overruled in *Matter of Fowler*, 8 Daly (N. Y.) 548, 552, 557.

Same—Irrregularity.—The fact that the petition is addressed to the county judge, instead of the court, is a mere irregularity and not jurisdictional, and does not affect the validity of the discharge (*Distinguishing Matter of Roberts*, 70 N. Y. 5). *Borthwick v. Howe*, 27 Hun (N. Y.) 505.

Application by an insolvent debtor for a discharge from imprisonment must be made to one of the officers specified in 2 Rev. Stat. 34, §1, not to a court. The proceedings cannot be continued, in case of the absence of the officer on the return day, by a justice of the supreme court not residing in the county wherein the debtor resides or is imprisoned; and in case they are so continued all subsequent proceedings are void. *Matter of Roberts*, 70 N. Y. 5.

1. (*Citing N. Y. Code Civ. Proc.*, § 3202). N. Y. City Ct., Sp. T. 1883, *Kappel v. Yotz*, N. Y. Daily Reg. Dec. 26, 1883.

Giving Notice of Application.—It is a fatal defect, upon *certiorari*, in proceedings to discharge an insolvent and imprisoned debtor, that the notice required by the statute (2 Edm. Stat. at L. 29, § 4) to be published, of the hearing of the application, was directed to be given for one day, but was in fact published, by mistake, for another. Until proof is made before the magistrate of correct publication of the notice as directed to be given, he has no jurisdiction to entertain the application. *People v. Daly*, 67 Barb. (N. Y.) 325.

The cases of *Dusart v. Delacroix*, 1 Abb. (N. Y.) Pr. N. S. 409, note; and

In re Rosenberg, 10 Abb. (N. Y.) Pr. 450, are cited and followed in *Morgan v. Second*, 15 Rep. 355, in support of the rule that under N. Y. Code Civ. Proc., § 2202, any petition for a discharge of the judgment debtor is premature until there has been an actual imprisonment of three months.

2. *Matter of Andriot*, 2 Daly (N. Y.) 28.

Assignment of Imprisoned Debtor.—What Must Include.—An assignment made by an imprisoned debtor, under the direction of the county court, to procure his discharge, must include all the property which the debtor has at the time the order for the assignment is made, and not such property only as he had at the time of signing his petition; and the court must have satisfactory evidence that the assignment has been actually made, and any property covered thereby actually delivered. *Borthwick v. Howe*, 27 Hun (N. Y.) 505.

A defendant was discharged from imprisonment on execution by an order of a county judge upon a petition asking for his discharge in an action "in which one Goodwin was plaintiff, and Munger and others defendants." *Held*, in an action against the sheriff for an escape, that the naming of but one of the two plaintiffs in the action, and but one defendant (the one arrested) did not vitiate the discharge. *Goodwin v. Griffis*, 88 N. Y. 629.

Nor was the order of discharge void, because the notice served on the plaintiff was of an application at a term held at the court house, while the order showed that it was granted at a term held at the office of the county judge, as it will be presumed that his office was at the court house, and that the order was made at a regular term of the county court. *Goodwin v. Griffis*, 88 N. Y. 629.

3. *Brodie v. Stephens*, 2 Johns. (N. Y.) 289.

a. New York Practice.—The affidavit required by the New York Revised Statutes¹ to be annexed to the petition, need not be sworn to until the prisoner is brought before the court to be heard on his petition.² Under the New York Code of Civil Procedure³ as amended, it is not requisite that he shall be in fact imprisoned within the walls of a jail, or that he should have been discharged from arrest, by giving a bond or undertaking from the jail liberties.⁴

Objection to Petition.—It is no objection to the petition that the sum for which he is charged in execution is not mentioned, nor that the inventory purports to be of real and personal estate, when no real estate is mentioned. *Matter of Williams*, 1 Johns. (N. Y.) Cas. 416; s. c., Col. & C. Cas. 114.

Same—Notice.—A non-resident is, as to the service of notice, to be considered as not found. *Matter of Williams*, 1 Johns. (N. Y.) Cas. 416; s. c., Col. & C. Cas. 114.

Under the act for the relief of imprisoned debtors, where plaintiff, the creditor, resides out of the state, service of the notice of a petition on the attorney in the suit is sufficient. *Bates v. Williams*, 1 Johns. (N. Y.) Cas. 30; s. c., Col. & C. Cas. 70.

Petition for Discharge—Setting Forth Cause of Imprisonment—Sufficiency.—A petition for the discharge of an imprisoned debtor sufficiently sets forth the cause of his imprisonment when it alleges that he is confined by virtue of an execution against his person for a specified amount, issued in a civil action brought by a person named. *Matter of Chappell*, 23 Hun (N. Y.) 179.

The omission to state, in the papers submitted to the judge by the petitioning debtor, in proceedings for his discharge from imprisonment under 2 R. S., tit. 1, art. 6, ch. 5, the residence of one of his creditors is not a judicial defect. N. Y. Com. Pl., Sp. T. 1878, *Matter of Roberts*, 8 Daly (N. Y.) 95. On other points overruled, in *Matter of Fowler*, 8 Daly (N. Y.) 548, 552, 557.

The debtor's omission of property from his schedule is not excused by alleging forgetfulness, or that he did not read the printed part in the petition. Supr. Ct., Sp. T. 1877, *Dieckerhoff v. Ahlborn*, 2 Abb. (N. Y.) N. C. 372, 378.

1. 2 N. Y. Rev. Stat. 32, § 5.

2. N. Y. Com. Pl., Sp. T. 1871, *Hillyer v. Rosenberg*, 11 Abb. (N. Y.) Pr., N. S. 402.

Affidavit to Petition.—N. Y. Code Civ. Proc., § 2204, requires that the affidavit should be subscribed and taken by the petitioner on the day of the presentation of the petition, and affidavit taken previously confers no jurisdiction upon the county judge, and where his order for discharge contains no recital as to the making of the affidavit it will not protect the sheriff. *Distinguishing Richmond v. Prait*, 24 Hun (N. Y.) 578; *Bennett v. Burch*, 1 Den. (N. Y.) 141; *Goodwin v. Griffiths*, 88 N. Y. 629; *Schaffer v. Riseley*, 44 Hun (N. Y.) 6.

It is immaterial that the affidavit is annexed to the petition instead of being endorsed thereon. *Richmond v. Prait*, 24 Hun (N. Y.) 578.

An affidavit verified on the day of presenting the petition is sufficient, without the appearance of the debtor in person in court. Supr. Ct., Sp. T. 1880, *Matter of Finch*, 2 Month. L. Bul. 69.

It does not matter that the affidavit speaks of the "above" petition and account, instead of "within" petition and account, if the meaning of the affidavit is not changed thereby. *Richmond v. Prait*, 24 Hun (N. Y.) 578.

Indorsement of Application for Discharge.—The provision of 2 N. Y. Rev. Stat. 32, § 5, that an application for discharge of an imprisoned debtor shall be endorsed at the time of its presentation, with an affidavit of the applicant, does not require the affidavit to be endorsed and sworn to in presence of the court; it is sufficient if the affidavit is upon the petition at its first presentation. *Richmond v. Prait*, 24 Hun (N. Y.) 578.

The statute requirement of a certificate by the assignee, that the property of the debtor has been delivered to him, is satisfied by an affidavit instead of a certificate. Supr. Ct., Sp. T. 1878, *Matter of VonSchoening*, 1 Month. L. Bul. 4.

3. N. Y. Code Civ. Pro., § 572.

4. *Havemeyer Sugar Refining Co. v.*

Taussig, 19 Abb. (N. Y.) N. C. 57.

Under the act of 1819, requiring the order for creditors to appear to be published ten weeks, an order for an assignment after a shorter advertisement is void. *Underwood v. Irving*, 3 Cow. (N. Y.) 59.

Bond by Imprisoned Debtors.—Defendant, being under arrest, gave bail and a *cognovit* forthwith, he having no attorney present to advise him. *Held*, that there being no duress, the judgment should not be set aside. *Smith v. Storm*, 1 Wend. (N. Y.) 37; consult also **DURESS**.

Where the debtor, before his arrest, had surrendered his property in voluntary bankruptcy proceedings, *held*, that the court should require a bond, with condition to surrender the property in case it should be restored to him. *People ex rel. Galsten v. Brooks*, 40 How. (N. Y.) Pr. 165.

Discharge of Debtor—Discretion of Court.—N. Y. Code of Procedure, § 302, as amended in 1851, which provides that a debtor committed to prison in supplementary proceedings, or under the act to abolish imprisonment for debt, may be discharged in case of inability to perform the act required, or to endure the imprisonment, must be construed as applicable, in the discretion of the court, to cases of imprisonment under Laws 1831, notwithstanding the commitment is general, and does not specify anything to be done. *Maass v. La Torre*, 6 Abb. (N. Y.) Pr. N. S. 219.

Non-payment of Alimony.—Defendant, in a divorce suit, imprisoned for non-payment of alimony, can be relieved from imprisonment only under 2 R. S. 538, § 20, etc., relating to proceedings for contempts in civil actions. On a motion for discharge, and for the reduction of the amount of alimony, he may be discharged on paying the amount due for alimony for which he was committed, and the amount accrued during his imprisonment. And the order for alimony may at the same time be reduced. *N. Y. Sup. Ct., Sp. T. 1866, Graley v. Graley*, 31 How. (N. Y.) Pr. 475.

Undertaking by Debtor—Effect of.—The provision of N. Y. Code Civ. Proc., § 111, as amended by Laws 1886, ch. 672, for the discharge of the defendants from imprisonment in civil actions, apply only to those imprisoned within the jail walls or within the jail liberties, and not to a defendant who has

given an undertaking on arrest to the effect that he will at all times render himself amenable to any mandate which may be issued to enforce final judgment in the action. *Wright v. Grant*, 18 Abb. (N. Y.) N. C. 451.

The court cited *People ex rel. Lust v. Grant*, 19 Abb. (N. Y.) N. C. 220; *rev'g* 19 Abb. (N. Y.) N. C. 52, and *Peters v. Henry*, 6 Johns. (N. Y.) 121; *Brown v. People*, 75 N. Y. 437.

The death of the prosecuting creditor, after notice of the debtor's application for his discharge, does not abate the proceedings. *Cobb v. Harmon*, 23 N. Y. 148; *aff'g* 29 Barb. (N. Y.) 472.

Defendant Debtor in Custody, Though on Bail.—Since the defendant may be at any time taken into custody by the sureties upon the undertaking and surrendered to the sheriff, and be thereupon again imprisoned, unless new bail is given, he is to be deemed in custody in a general sense, and that is as much as § 572 requires. *Havemyer Sugar Refining Co. v. Taussig*, 19 Abb. (N. Y.) N. C. 57.

In *Wright v. Grant*, 18 Abb. (N. Y.) N. C. 451, where this question of custody was also considered, the court cited, as to the rule under the former practice, 3 Rev. Stat. (5th ed.) 870; N. Y. Code Civ. Proc., § 288; *Bostwick v. Goetzel*, 57 N. Y. 582.

Discharge—Evidence of Transactions Prior to Judgment.—In proceedings under N. Y. Code Civ. Proc., § 2201, for release from imprisonment, it is error for the county court, in determining whether the petitioner's proceedings have been just and fair, to exclude evidence offered by the creditor, relating to transactions prior to the date of the judgment. *Matter of Brown*, 39 Hun (Y. N.) 27. The court cited *Matter of Brady*, 69 N. Y. 215; *Carpenter v. Roe*, 10 N. Y. 227; *Savage v. Murphy*, 34 N. Y. 508; *Case v. Phelps*, 39 N. Y. 164; *Shand v. Hanley*, 71 N. Y. 319.

Same—Discretion of Officer.—Where in a statute a measure of discretion is left to the inspectors of the penitentiary in carrying out the provisions and in the execution of that discretion, they decline to discharge the prisoners or to execute the act, on the ground that public justice will not be promoted thereby, the supreme court will not control that discretion, if the reasons assigned by the inspectors are such as justify their course. *Com. v. Hallows*, 42 Pa. St. 446.

IMPRISONMENT FOR DEBT.—(See FRAUDULENT DEBTOR, JAIL LIMITS).

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I. Definition.—Imprisonment for debt¹ may be defined as any restraint upon the liberty² of the defendant in a civil action,³ whether upon execution against the person, or upon an order of arrest granted by the court during the dependency of the proceedings, for the purpose of holding him to bail.

II. Constitutional Provisions.—**I. General Nature.**—The constitutions of many of the States contain provisions restricting the

1. "The Legal Acceptation of debt is, a sum of money due by certain and express agreement; as, by a bond for a determinate sum; a bill or note; a special bargain, or a rent reserved on a lease, where the quantity is fixed and specific, and does not depend upon any subsequent valuation to settle it." 3 Bl. Com. 154. Again, with reference to implied contracts, which arise from the express determination of any court, or the positive direction of any statute, it is said: "It is a part of the original contract entered into by all mankind who partake the benefits of society to submit in all points to the municipal constitutions and local ordinances of that State of which each individual is a member. Whatever, therefore, the laws order anyone to pay, that becomes instantly a debt, which he hath beforehand contracted to discharge." 3 Bl. Com. 158.

2. Imprisonment is "the restraint of a man's liberty." 1 Bouv. Law Dict. 15th ed., 777. To constitute imprisonment it is not necessary that there should

be confinement in a jail or other place of detention. Any restraint is sufficient. *Hawk v. Ridgway*, 33 Ill. 473; *Mowry v. Chase*, 100 Mass. 79; *Whithead v. Keyes*, 85 Mass. (3 Allen) 495; *Brushaber v. Stegemann*, 22 Mich. 266; *Ahern v. Collins*, 39 Mo. 145; *Smith v. State*, 7 Humph. (Tenn.) 43; *Bloomer v. State*, 3 Sneed. (Tenn.) 66; *Warner v. Riddiford*, 4 C. B. (N. S.) 206; *Wood v. Lane*, 6 Carr. & P. 645. Accordingly a sheriff may subject himself to liability for an escape, simply by allowing the debtor to control his own movements, upon a promise to find bail. See *Browning's Exrs. v. Rittenhouse*, 40 N. J. L. (11 Vr.) 230; *Stickle v. Reed*, 23 Hun (N. Y.) 417.

3. The N. Y. Code of Civ. Proc., §§ 3335, 3336, 3337, declares "actions are of two kinds: (1) civil; (2) criminal. A criminal action is prosecuted by the people of the State, as a party, against a person charged with a public offence, for the punishment thereof. Every other action is a civil action."

right to imprison debtors upon execution. These provisions in some instances amount to a general declaration that no person shall be imprisoned for debt.¹ But in many cases an exception is made of "cases of fraud;"² and in some of the States the exemption from imprisonment is confined to debts arising *ex contractu*, in which event "cases of fraud" are also usually excepted from the operation of the prohibition.³ In some instances the exemption conferred takes effect only after the debtor has delivered up his property for the benefit of his creditors, except there be a presumption of fraud.⁴ In all cases where the constitution declares that, except in certain specified instances, no person shall be imprisoned for debt, it would seem that there can be no imprisonment, even in the excepted cases, if no statute have been enacted providing therefor.⁵

2. *Cases of Fraud.*—Where the constitutional prohibition is couched in such terms as to preclude imprisonment in an action upon contract, the mere fact that the debtor is a non-resident

1. "No person shall be imprisoned for debt." Ala. Const., art. 1, § 21; Tex. Const., art. 1, § 15.

"There shall be no imprisonment for debt." Ga. Const., art. 1, § 21.

"Imprisonment for debt cannot exist in this State, except for fines or penalties imposed for violation of law." Mo. Const., art. 1, § 9.

"The legislature shall pass no law authorizing imprisonment for debt in civil cases." Tenn. Const., art. 1, § 18.

2. "No person shall be imprisoned for debt, except in cases of fraud." Fla. Const., Declaration of Rights, § 15; Ind. Const., art. 1, § 22; Kan. Const., Bill of Rights, § 16; Nev. Const., art. 1, § 14; N. C. Const., art. 2, § 16.

"No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud." Cal. Const., art. 1, § 15; Neb. Const., art. 1, § 20; Ohio Const., art. 1, § 15.

"No person shall be imprisoned for debt, on mesne or final process, unless in cases of fraud." Iowa Const., art. 1, § 19.

"No person shall be imprisoned for debt in this State, but this shall not prevent the legislature from providing for imprisonment or holding to bail persons charged with fraud in contracting said debt." Minn. Const., art. 1, § 12.

"There shall be no imprisonment for debt, except in cases of fraud or absconding debtors." Oreg. Const., art. 1, § 19.

3. "No person shall be imprisoned for debt arising out of, or founded on a

contract, express or implied, except in cases of fraud or breach of trust, or of moneys collected by public officers, or in any professional employment." Mich. Const., art. 6, § 33.

"No person shall be imprisoned for debt in any action or on any judgment founded upon contract, unless in cases of fraud." N. J. Const., art. 1, § 17.

"No person shall be imprisoned for debt arising out of, or founded on a contract, express or implied." Wis. Const., art. 1, § 16.

4. "The person of a debtor, where there is not a strong presumption of fraud, shall not be continued in prison after delivering up his estate for the benefit of his creditors in such manner as shall be prescribed by law." Ky. Const., art. 1, § 19; Pa. Const., art. 9, § 16; R. I. Const., art. 1, § 11.

"The person of a debtor, when there is not strong presumption of fraud, shall not be detained in prison after delivering up his estate for the benefit of his creditors in such manner as shall be prescribed by law." Miss. Const., art. 1, § 18.

5. "This constitutional provision clearly contemplates legislation before any arrest could be made in civil actions, though fraud may have intervened. Courts, therefore, whether of general or limited jurisdiction, had now no common law power to authorize arrests in such cases, and the power, if it exists at all, must have been conferred by express legislation." *Spice v. Steinruck*, 14 Ohio St. 213, 218.

constitutes no ground for his arrest and imprisonment.¹ If fraud is excepted from the operation of the exemption, such fraud includes not only fraud in contracting the debt, but also fraud in avoiding its payment.² An assault and battery is not a case of fraud, within the meaning of the term as implied in the constitution;³ nor is the simple failure of an agent to account for moneys received by him.⁴ Fraudulent representations are, however, sufficient to warrant the imprisonment of a debtor,⁵ and it has even been held that the sale of goods in violation of the revenue laws constitutes such fraud as will admit of the incarceration of the offending parties.⁶ An exception of "absconding debtors" can only apply where the debtor is leaving secretly to avoid payment of his debts.⁷ A breach of promise of marriage is simply a breach of a contract, and does not justify the arrest of the de-

1. *Chappee v. Thomas*, 5 Mich. 53, 56. Liability to pay money growing out of any contract, express or implied, constitutes a debt, within the meaning of this provision. *Parker v. Follensbee*, 45 Ill. 473.

2. *Baker v. State*, 109 Ind. 47; *Bromley v. People*, 7 Mich. 472, 487. *Ex parte Bergman*, 18 Nev. 331.

Refusal to Apply Money in Payment.

—The constitution of New Jersey, art. 1, § 17, provides that "No person shall be imprisoned for debt in any action or on any judgment founded upon contract, unless in cases of fraud." Under this provision, imprisonment for debt is restricted to cases of fraud. *Hill v. Hunt*, 20 N. J. (Spen.) L. 476. But a refusal to apply money, of which the defendant has the possession or control, to the payment of the judgment is a fraud, within the meaning of the constitution. *Ex parte Clark*, 20 N. J. (Spen.) L. 648. In this case the court say: "Whatever is dishonest is fraudulent *in foro conscientiae*, and is so treated in a court of equity. Fraud and dishonesty are synonymous terms. The true spirit of the constitution is this—and it speaks the enlightened and benevolent language of the age in which we live: The honest debtor, who is poor and has nothing to pay with, shall not be imprisoned at the mercy of his creditor. But if the debtor, instead of putting himself upon his honest poverty, seek to elude the jurisdiction and process of the courts; if he conceal, or assign, or remove his property to keep it out of the reach of his creditors; or if he have the means in his pocket, or under his control, of paying his

debt, and refuse to do so, he is a dishonest and fraudulent man. He is a man that the constitution says may be, and that common sense and common honesty say ought to be, imprisoned until he disgorge his money and deliver up his property to his confiding creditor."

3. *Ex parte Prader*, 6 Cal. 239.

4. *People v. McAllister*, 19 Mich. 215; *In re Holdforth*, 1 Cal. 438. An affidavit which is based simply upon the failure of an agent to account is insufficient, even though it aver a fraudulent conversion, if it contain nothing from which the court can infer more than a mere violation of an agent's duty. *Ex parte Stephenson*, 32 Mich. 60.

5. Fraudulently Procuring Advances.

—Fraudulently inducing the owner of a building to advance a sum of money for the purchase of materials for its construction is such fraud as brings the contractor within the meaning of the proviso in the constitution. *Parker v. Follensbee*, 45 Ill. 473.

6. Infringement of Revenue Laws.—

The sale of goods without payment of duty in violation of the revenue laws is a case of fraud upon the United States, and comes within the purview of the exception. *U. S. v. Walsh*, 1 Abb. C. C. 66.

7. **Absconding Debtor.**—The term "absconding debtor" in the constitutional provision involves the idea of secrecy, and a removal from the State that authorizes an arrest must be something more than a mere leaving of the State in an open and public manner, or in the ordinary course of business. *Norman v. Zieber*, 3 Oreg. 197, 205.

fendant.¹ If, however, the claim arising therefrom is coupled to a claim for damages for seduction, the element of fraud is introduced.²

3. *Actions Founded in Tort*.—Even in those cases where it is declared in general terms that “there shall be no imprisonment for debt,” the courts have, as a general rule, held that the word “debt” must be confined to obligations arising *ex contractu*; that it has no application to claims for damages which arise *ex delicto*; and that, therefore, orders of arrest or executions against the person may competently issue where the claim is founded upon a tort;³ and it has been judicially declared that the mere fact that the claim has been reduced to judgment has not the effect of altering its character, so as to make an execution issued thereon a warrant for imprisonment for a debt, and to bring it within the statutory prohibition.⁴ It has accordingly been held that, not-

1. *Tyson's Case*, 32 Mich. 262; *Moore v. Mullen*, 77 N. Car. 327; *Perry v. Orr*, 35 N. J. (6 Vr.) L. 295.

In *Moore v. Mullen*, 77 N. Car. 327, it was, however, held that an action for breach of promise to marry was simply an action for breach of contract, and that a statute authorizing arrest in such actions was unconstitutional.

2. *Sheahan's Case*, 25 Mich. 145. A breach of a promise of marriage is not of itself a fraud which will justify the arrest of the defendant, but he may be arrested where, under such promise, he has seduced the plaintiff, and seeks to avoid performance by secretly leaving the jurisdiction. *Perry v. Orr*, 35 N. J. (6 Vr.) L. 295. It ought, however, to be noticed that the courts have, as a general rule, sustained executions founded upon claims for seduction, not upon the ground of fraud, but upon the ground that such claims were founded in tort, and therefore did not come within the meaning of the term “debt.” *Kinney v. Laughenour*, 97 N. Car. 325; *Hoover v. Palmer*, 80 N. Car. 313. See, also, *Steinberg v. Lasker*, 50 How. (N. Y.) Pr. 432; *Taylor v. North*, 3 N. Y. Code Rep. 9.

3. *Ex parte Hardy*, 68 Ala. 303; *People v. Greer*, 43 Ill. 213; *McKindley v. Rising*, 28 Ill. 337; *People v. Cotton*, 14 Ill. 474; *Ex parte Bergman*, 18 Nev. 331; *Kinney v. Laughenour*, 97 N. Car. 325; *Long v. McLean*, 88 N. Car. 3; *Hoover v. Palmer*, 80 N. Car. 313; *Moore v. Mullen*, 77 N. Car. 327; *Moore v. Green*, 73 N. Car. 394; *U. S. v. Walsh*, 1 Abb. C. C. 66; *Hanson v. Fowle*, 1 Sawy. C. C. 497, 505.

4. *Effect of Judgment*.—In *Moore v.*

Green, 73 N. Car. 394, an order of arrest was issued in an action for libel, and it was held that such order was not issued in violation of the constitution. The court say: “The argument is this: The moment a judgment shall be obtained, the claim for damages is converted into a debt; the person of the defendant is thereupon liberated and his bail discharged. For what purpose then require bail, who are to be discharged at the first moment when their liability can be of any value? It is an oppression to the defendant, and of no possible benefit to the plaintiff. *Dellinger v. Tweed*, 66 N. Car. 206, is cited as the authority for the proposition that the claim for damages is converted into a debt, within the meaning of the constitution by the recovery of judgment. Undoubtedly, for some purposes it is. An action of debt may be maintained on it, and a *fi. fa.* may issue on it. But to construe the above cited clause of the bill of rights, as forbidding imprisonment for any cause of action which, by judgment would become a debt, would make its prohibition extend to all cases, as every action becomes a debt in one sense when a judgment is recovered on it. Chitty, in his standard work on pleading, divides all actions into two great classes: those which arise *ex contractu*, and those which arise *ex delicto*. No doubt the framers of the constitution had this familiar classification in mind, and in forbidding imprisonment for debt, they referred rather to the cause of action as being *ex contractu*, than to the form it would assume upon a judgment. If they had meant to forbid imprisonment in every civil action,

withstanding the constitutional prohibition, orders of arrest or execution against the person might issue upon claims for assault and battery,¹ for the wrongful conversion of personal property,² and for seduction.³ In States where the exemption from imprisonment is confined to debts arising out of contract, it has been held that execution may be issued upon judgments for damages and costs in replevin,⁴ and in ejectment;⁵ and for the wrongful conversion of property, even though may have been entrusted to the defendant under contract.⁶

It ought, however, to be noticed that in some instances where the immunity from arrest is declared to be from imprisonment from debt generally, it has been held, without apparently taking into consideration any distinction that may exist between debts arising *ex contractu* and debts arising *ex delicto*, that there can be no commitment in an action founded upon tort, where there is no element of fraud.⁷

they would have said so. But by forbidding it for debt, they plainly imply that it may be allowed in actions which are not for debt. In forbidding imprisonment for debt, as popularly understood, viz.: for a cause of action arising *ex contractu*, they responded to the general public sentiment, but I know of no writer on the reform of law who has recommended the abolition of punishment for trespassers and wrongdoers. Such a provision might be humane to the injuring, but it would not be so to the injured parties. It would withdraw from the State its power to impose a wholesome check on violence and wrong, and would tend to license disorders and lawbreakings incompatible with the peace and welfare of society. *Dellinger v. Tweed* has no application to the present case. It is confined to a construction of the article of the constitution respecting homesteads." The distinction of the North Carolina court in this case seems, however, to be at variance, not only with the law as laid down by Blackstone, 3 Com. 158, but also with the opinions rendered in *Ex parte Prader*, 6 Cal. 239, and *Southern Express Co. v. Lynch*, 65 Ga. 240. In *Ex parte Prader*, *supra*, the court held that an execution upon a judgment for damages for assault and battery was illegally issued, and said: "The judgment is a debt as much as though recovered in an action of *assumpsit*." In *Southern Express Co. v. Lynch*, *supra*, it was held that the detention of a defendant in bail-trover became illegal whenever the plaintiff elected to accept a judgment for money damages. The

plaintiff in that case had accepted a verdict, and the defendant thereupon applied for his discharge. The court granted it, saying: "It seems clear that this verdict authorized a judgment following its terms for that sum of money and when entered the verdict became a judgment for money or the highest form of debt known to the law."

1. *Hanson v. Fowle*, 1 Sawy. C. C. 497.

2. *Long v. McLean*, 88 N. Car. 3.

3. *Kinney v. Laughenour*, 97 N. Car. 325; *Hoover v. Palmer*, 80 N. Car. 313.

4. *Fuller v. Bowker*, 11 Mich. 204.

5. *Howland v. Needham*, 10 Wis. 495.

6. **Wrongful Conversion.**—In *Cotton v. Sharpstein*, 14 Wis. 226, it was held that an attorney who had bid in property at a sale upon execution, had taken the certificate of sale in his own name and had afterwards wrongfully sold the same and converted the proceeds to his own use, was guilty of a tort for which he might be imprisoned, notwithstanding the contract of employment by his client. In the case of *In re Mowry*, 12 Wis. 52, execution against the person upon a judgment for damages for the wrongful and fraudulent conversion of school land certificates, deposited as security for a loan, was sustained, such judgment being founded upon the tort, and not upon the contract between the parties.

7. *Ex parte Prader*, 6 Cal. 239; *Southern Express Co. v. Lynch*, 65 Ga. 240.

Assault and Battery.—In *Ex parte Prader*, 6 Cal. 229, it was held that a

4. *Disobedience to Orders of Court.*—If an order of court directs the defendant to deliver to the plaintiff or to any other person, such as a receiver, certain property or money which is actually in his possession, he is not entitled, under the constitutional provision, to any immunity from arrest for failure to comply therewith.¹ But where no element of contempt enters into the fail-

statute which provided that "the defendant may be arrested when the action is for willful injury to person or character," was in violation of this provision, and that a person could not be imprisoned on a judgment obtained against him in an action for assault and battery. The court says: "An assault and battery is not a case of fraud, in the sense that that term is employed by the constitution; neither can it be made so by the legislature; and the judgment is a debt as much as though recovered in an action of *assumpsit*."

1. *Harris v. Bridges*, 57 Ga. 407. *Ex parte Grace*, 12 Iowa 208; *State v. Becht*, 23 Minn. 411; *Roberts v. Stoner*, 18 Mo. 481. But see *Ex parte Hardy*, 68 Ala. 303.

Order to Pay Over Money.—In *Ex parte Grace*, 12 Iowa 208, it was held that, notwithstanding the provisions of the Iowa constitution, a statute which provides for the examination of the debtor in proceedings supplementary to execution and for his imprisonment for refusal to obey any order therein, was not unconstitutional. In that case the debtor was imprisoned for disobedience of an order which required him to pay over money found to be in his pocket.

Non-compliance with Order to Deliver Property.—In *State v. Becht*, 23 Minn. 411, the defendant had been imprisoned for contempt in failing to comply with an order requiring him to deliver certain property to a receiver, and it was held that such imprisonment was not a violation of the constitutional inhibition. The court say: "In the case at bar the imprisonment is for contempt in refusing to obey an order of the court. It is true that the order relates to the debt evidenced by the judgment against the relator, but this in no way alters the fact that the imprisonment is for the contempt and not for the debt. And the contempt does not consist in the relator's neglect or refusal to pay the debt, but in his disobedience of the order directing him to hand over certain property to the receiver. The fact that the property in question is to

be handed over for the purpose of being applied to the payment of the judgment is in no way important. The commitment is, nevertheless, in no proper sense imprisonment for debt."

A contrary view has, however, been adopted by the Alabama court. The Alabama Code provides for the examination of judgment debtors in proceedings supplementary to execution, and confers upon the court power, when it appears that defendant has money, property, or other effects, to order him to pay or deliver the same to the register of the court for the payment of the execution; and declares that "If any such defendant shall fail to comply with the terms of such decree, he shall be guilty of a contempt, and the court shall . . .

have the power to imprison the defendant in the county jail until he shall obey the decree." It has been held that the provision authorizing the imprisonment for contempt is a violation of the constitutional inhibition, and that an order committing the defendant for failure to deliver certain United States bonds as directed by the court, was illegal. *Ex parte Hardy*, 68 Ala. 303. The court say: "An order committing a defendant for contempt for such refusal is an imprisonment for debt, and as such is prohibited by said section of the Declaration of Rights. Whether the provisions of this law, in its present shape are so separable as to authorize such imprisonment where the complainant's judgment is founded on tort, while at the same time it is void as applicable to those founded on contract, is a question not now before us, and which we are not called on to decide."

Judgment in Bail Trover.—A Georgia statute provides for the imprisonment of the defendant in proceedings to recover the possession of personal property, until he shall find bail for its production, and it has been held that this provision is not unconstitutional, and that the defendant may be committed for failure to comply with an order to produce the property or find

ure or refusal of the defendant, and the order simply directs the payment of a sum of money, a commitment is a violation of the constitutional inhibition.¹

bail. *Harris v. Bridges*, 57 Ga. 407. The court say: "If one man obtains the possession of the personal property of another by fraud or violence, or having possession of it, and there is reason to apprehend that it will be eloiigned or moved away, or will not be forthcoming to answer the judgment that may be made in the case, there would seem to be no good reason why he should not be proceeded against, and be required to comply with the terms of the statute made and provided for such cases; and if the defendant should be imprisoned in accordance to the terms of the statute he cannot be said to have been imprisoned for debt. . . . In the case now before us, the defendant failed to enter into a recognizance, with security for the forthcoming of the property, as required by the statute, and the property sued for was not to be found, so that it could be seized by the sheriff and delivered over to the plaintiff; and the sheriff, in obedience to the express mandate of the statute, committed the defendant to jail, where the statute declares that he shall be in safe and close custody until the personal property sued for shall be produced, or until he shall enter into bond, with good security, for the eventual condemnation money." But if in bail-trover under the statute, the plaintiff elects to take an alternative verdict for a sum of money, to be discharged on delivery of the property within a specified time, and the defendant fails to deliver within such time, the verdict becomes absolute for money, and the defendant can no longer be detained in custody." In *Southern Express Co. v. Lynch*, 65 Ga. 240, the plaintiff sued one of its messengers to recover a package of money. At the trial the plaintiff elected to take an alternative verdict for \$25,000, to be discharged on the delivery of the package within twenty days from the date of the verdict. It was held that on the expiration of the twenty days the verdict became absolute, and the defendant could be no longer detained. The court say: "The plaintiff elected the alternative verdict, and got it; what did the plaintiff get? A property verdict, if the defendant saw fit to discharge it by a sur-

render of the package in twenty days, he undoubtedly got, but at the end of twenty days what remained to the plaintiff? Unquestionably nothing but a verdict for \$25,000, or a debt for that sum in the form of a judgment for damages to that amount. Now, if the verdict had been for the package alone, we are clear that under the principle ruled in the case of *Harris v. Bridges*, 57 Ga. 407, the verdict being for property alone, would not be a debt of any sort so as to come within the constitutional prohibition of imprisonment for debt, and under the judgment pronounced in that case by this court, this defendant would not have been entitled to his discharge. For it would be absurd to hold a man by mesne process in jail for the purpose of recovering from him another's property, and then turn him out the moment final judgment for that property had been obtained. To hold such a principle would be to plant and grow the tree that its 'fruits might turn to ashes on the lips.' But this verdict is not for the property. It was not for the property—the package—after twenty days. The defendant could not pay the verdict after twenty days with the package. The judgment became a debt of record—a lien binding on all his property for \$25,000, and all he owned could be seized and sold to pay it. . . . It seems clear, then, that this verdict authorized a judgment, following its terms for that sum of money, and when entered, the verdict became a judgment for money, on the highest form of debt known to the law. . . . And defendant's right to be relieved from prison became perfect twenty days after the return of the verdict, whether judgment was entered up thereon immediately or not, because the verdict only gave him twenty days to pay it with the package; after that time he could only pay it with money—lawful money—just as any other debt he owed; and whenever entered the judgment could not add to or change the verdict in any respect."

1. *Board of Education v. Scoville*, 13 Kan. 17; *Coughlin v. Ehlert*, 39 Mo. 285; *Roberts v. Stoner*, 18 Mo. 481.

Alimony.—Failure to pay alimony as

5. *Bastardy Proceedings*.—Although bastardy proceedings are in some respects in the nature of civil actions, they are also in the nature of police regulations; and, upon the failure of the defendant to comply with an order of the court therein requiring the payment of a sum for the maintenance of the child, he may be committed to prison without violating any constitutional provision.¹

6. *Costs in Criminal Proceedings*.—The costs imposed upon a defendant who has been found guilty in criminal proceedings, do not constitute a "debt," within the meaning of the term as used in the different constitutional provisions, and he can claim no immunity thereunder from imprisonment for non-payment.²

directed by order of court is no ground for imprisonment. *Wightman v. Wightman*, 45 Ill. 167; *Steller v. Steller*, 25 Mich. 159.

1. *Non-Compliance with Order of Court*.—In *Ex parte Cottrell*, 13 Neb. 193, the court held that a committal to prison for failure to comply with a judgment in bastardy proceedings requiring the payment of alimony and costs, and the execution of a bond to the county, with approved security for the performance of the judgment, was not imprisonment "for debt in a civil action," within the meaning of the constitution. The court say: "The proceeding, which is in the nature of a civil action, is properly a police regulation requiring the putative father to furnish maintenance for the support of his child, and to indemnify the public against liability for its support. The sum charged against the petitioner is not a debt in the sense in which that word is used in the constitution. The statute is not in conflict with the constitution." See also *Musser v. Stewart*, 21 Ohio St. 353.

The contrary view has, however, been adopted by the supreme court of Iowa. In *Holmes v. State*, 2 G. Greene (Iowa) 501, it was held that a proceeding against the father for the support of his illegitimate child is not in the nature of a criminal action, and therefore under the constitutional provision the defendant cannot be committed to prison. The court say: "The complaint and proceedings are of a summary nature to secure to the woman (who is in such cases favored by the law) a speedy remedy for the support of the infant child. She is permitted to use the name of the State to have compulsory process, and thus she can obtain a judgment without that delay attending civil

suits in the usual form. In this way she is saved much trouble and inconvenience. Immediate means can be obtained for the support of the child, and the door of escape to some extent closed upon the defendant, whereby he is prevented from avoiding those legal and moral obligations which men under such circumstances are very reluctant to observe. For the purpose of affording a prompt remedy this statute was passed. But while the statute gives the right to a speedy action, and the woman is permitted to bring to her assistance the forms of criminal law, still the suit thus allowed to be instituted is a civil suit, to enure to the benefit of herself and child. The mother may dismiss the prosecution, settle the matter and release the defendant if she chooses, or if judgment is obtained, receipt it in full, and the State cannot interfere or prevent it. The object and purposes of the complaint are to obtain from the putative father an amount sufficient to maintain the child, and not to punish him criminally for the carnal intercourse. . . . We think it clear from the authorities, as well as from the nature and object of the action, that the suit brought in this case was a civil suit, and that the defendant under the constitution was exempt from imprisonment."

2. *Caldwell v. State*, 55 Ala. 133; *Morgan v. State*, 47 Ala. 36; *McCool v. State*, 23 Ind. 127.

In *McCool v. State*, 23 Ind. 127, it was held that the immunity conferred by the provision must be confined to "debts" within the proper and legal meaning of the term, and that therefore the defendant in a prosecution for the illegal sale of liquors might be imprisoned for the costs, such costs being but an incident of the fine assessed.

III. Statutory Provisions.—1. *General Nature.*—Even in States in which there is no constitutional prohibition, imprisonment for contract debts is generally abolished, except in cases of fraud.¹ Imprisonment in cases of fraud and tort is generally allowed, and also in cases where the defendant is guilty of contempt in proceedings supplementary to execution.

2. *Impairing Obligation of Contracts.*—The right to take the person of a debtor in execution does not constitute any inherent part of the obligation of the contract, but forms part of the remedy, and may be abrogated by the legislature at pleasure, even in the case of existing contracts,² or although the debtor may

This decision overrules in express terms the earlier case of *Thompson v. State*, 16 Ind. 516, where a view exactly opposite was adopted.

In *State v. District Court*, 16 Nev. 76, it was said that no person could be imprisoned for the costs of a criminal prosecution, and that a judgment therefor could only be collected and enforced in the same manner as costs in civil cases, *i. e.*, by execution. Some doubt seems to have been cast upon this *dictum* in *Ex parte Bergman*, 18 Nev. 331, 343, and its authority must be deemed to be greatly shaken.

Judgment for Costs Against Prosecuting Witness.—By the Kansas General Statutes, p. 881, § 18, it is provided in effect that when, upon a trial before a justice of the peace for misdemeanor, it shall be found that the prosecution was maliciously instituted, or without probable cause, the prosecuting witness shall be adjudged to pay the costs, and unless a bond is given therefor, shall be committed to the county jail until paid. It was *held* that the costs were not a debt, within the meaning of the constitutional inhibition, and that the statutory provision was not unconstitutional. *In re Ebenhack*, 17 Kan. 618. The court say: "These costs are cast upon him as a penalty. They do not constitute strictly and simply a debt, in the technical sense of the word, any more than the fine imposed upon a party convicted of assault and battery is a debt."

Execution to Recover Fine.—A statute which authorizes the arrest, on execution, of a person against whom a fine has been adjudged, and his imprisonment until such fine be paid, or he be otherwise discharged according to law, is not within the constitutional inhibition. *In re Beall*, 26 Ohio St. 195.

1. See *Blanco v. Lauradon*, 11 Phila. (Pa.) 368.

Breach of promise to marry is not a fraud, but simply a breach of contract. *Tyson's Case*, 32 Mich. 262; *Moore v. Millen*, 77 N. Car. 327; *Perry v. Orr*, 35 N. J. L. (6 Vr.) 295. In *Siefke v. Tappay*, 3 N. Y. Code Rep. 23. Notwithstanding the fact that the N. Y. Code of Procedure contained a provision authorizing arrests in actions for breach of promise of marriage, it was *held* that a female defendant in such an action could not be held to bail.

Contract of Carriage.—An action against a common carrier, in which the summons was in the form prescribed in the case of actions upon contracts, and in which the complaint alleged a contract for the carriage of certain trunks, and that articles were taken therefrom while in defendant's possession, is an action upon a contract. *Catlin v. Adirondack Co.*, 11 Abb. (N. Y.) N. C. 377.

Partnership Accounting.—A failure on the part of a partner to account for money received by him in the course of the partnership business is a mere breach of contract, and does not come within a statute which provides for arrest in an action for money received "by any factor, agent, broker, or other person in a fiduciary capacity." *Soule v. Hayward*, 1 Cal. 345.

Costs.—Execution against the person cannot issue upon a judgment for costs or master's fees incident to a suit founded on contract, and not involving a breach of trust. *Pierce's Appeal*, 103 Pa. St. 27. If, however, the action was founded upon a breach of duty by a trustee, execution might issue for costs. *Church's Appeal*, 103 Pa. St. 263.

2. *Maxey v. Loyal*, 38 Ga. 531; *Bronson v. Newberry*, 2 Doug. (Mich.) 38; *Ware v. Miller*, 9 S. Car. 13; *Sommers v. Johnson*, 4 Vt. 278; s. c., 24 Am. Dec. 604; *Penniman's Case*, 103 U. S. 714; *Beers v. Houghton*, 34 U. S. (9

already be imprisoned upon the judgment.¹

3. *Fraudulently Contracting Debts.*—To authorize imprisonment for fraud in contracting a debt there must be actual and not merely constructive fraud.² Hence, it is not sufficient merely that a purchaser knew he was insolvent, and did not disclose his condition. It must also be shown that he intended to acquire the property without paying for it.³ But a direct representation of solvency is sufficient to constitute such fraud as will furnish a

Pet.) 329; *Mason v. Haile*, 25 U. S. (12 Wheat.) 370; *Sturges v. Crowninshield*, 17 U. S. (4 Wheat.) 122.

Distinction Between Obligation and Remedy.—In *Sturges v. Crowninshield*, 17 U. S. (4 Wheat.) 122, MARSHALL, C. J., said: "The distinction between the obligation of a contract and the remedy given by the legislature to enforce that obligation, has been taken at the bar and exists in the nature of things. Without impairing the obligation of the contract the remedy may certainly be modified, as the wisdom of the nation shall direct. Confinement of the debtor may be a punishment for not performing his contract, or may be allowed as a means of inducing him to perform it. But the State may refuse to inflict this punishment, or may withhold this means and leave the contract in full force. Imprisonment is no part of the contract, and simply to release the prisoner does not impair its obligation."

1. *Sommers v. Johnson*, 4 Vt. 278; s. c., 24 Am. Dec. 604; *Penniman's Case*, 103 U. S. 714; *Beers v. Haughton*, 34 U. S. (9 Pet.) 329; *Sturges v. Crowninshield*, 17 U. S. (4 Wheat.) 122.

Release of Debtor.—In *Beers v. Haughton*, 34 U. S. (9 Pet.) 329, the court say: "There is no doubt that the legislature possessed full constitutional authority to pass laws whereby insolvent debtors should be released or protected from arrest or imprisonment of their persons on any action for any debt or demand due by them. The right to imprison constitutes no part of the contract, and the discharge of the person of the party from imprisonment does not impair the obligation of the contract, but leaves it in full force against his property and effects."

2. *Morris v. Talcott*, 96 N. Y. 100, 107; *Hathaway v. Johnson*, 55 N. Y. 93; *Birchell v. Strauss*, 28 Barb. (N. Y.) 293.

In Nature of Crime.—Fraud which

consists in the obtaining of goods by means of false and fraudulent representations and concealment of insolvency "is of the nature of a crime, and cannot be presumed, but must be established." *Henry v. Henry*, 8 Barb. (N. Y.) 592; *Ward v. Center*, 3 Johns. (N. Y.) 281; *Jackson v. King*, 4 Cow. (N. Y.) 207; *Morris v. Talcott*, 96 N. Y. 100, 107. See, also, *Claflin v. Frank*, 8 Abb. (N. Y.) Pr. 412.

3. *Morris v. Talcott*, 96 N. Y. 100, 107, citing *People's Bank v. Bogart*, 81 N. Y. 108; *Wright v. Brown*, 67 N. Y. 9; *Nichols v. Pinner*, 18 N. Y. 295; s. c., *Sub. nom. Nichols v. Mitchell*, 23 N. Y. 264.

Intent to Defraud Inferred from Circumstances.—Positive proof of an intention to defraud the seller is not necessary. Thus in *Morrison v. Garner*, 7 Abb. (N. Y.) Pr. 425, the defendant who was accustomed frequently to purchase from plaintiffs for cash, bills of exchange for remittance to Europe in his business, becoming insolvent, induced them to sell him bills to a large amount, on credit, concealing his insolvency, though making no directly false representations as to his condition or the use to which he intended to put the bills. He then sold the bills in the market. *Held*, that the circumstances being such as to show that he purchased the bills with the intention to make use of them, and knowing his inability to pay for them, the purchase was fraudulent, and that he was liable to arrest in an action for their value. See also *Lovell v. Martin*, 11 Abb. (N. Y.) Pr. 126; *Dale v. Jacobs*, 10 Abb. (N. Y.) Pr. N. S. 382.

Knowledge of his insolvency, and that he can have no reasonable hope or expectation of paying for the goods, is such fraud as will subject a purchaser to imprisonment. *Wright v. Brown*, 67 N. Y. 1; *Wells v. Selling*, 53 How. (N. Y.) Pr. 35. See, also, *Anonymous*, 67 N. Y. 598; *Aff'g Roebbling v. Duncan*, 8 Hun. (N. Y.) 520.

ground of arrest, if made in the knowledge of his insolvency.¹ The general rule has been declared to be that to justify an arrest for false and fraudulent representations, the representations must be material; false to the defendant's knowledge; believed by the plaintiff to be true, and forming part of the inducement upon which he parted with his property.² Fraudulent representations

1. *Freeman v. Leland*, 2 Abb. (N. Y.) Pr. 479; *Scudder v. Barnes*, 16 How. (N. Y.) Pr. 534.

Knowledge of Falsity.—In *Scudder v. Barnes*, 16 How. (N. Y.) Pr. 534, the defendant represented that he was good for all he purchased, and that he owned certain real estate. Within a month from the purchase he made an assignment for the benefit of his creditors. There had been no change in his circumstances in the meantime, and the assignment disclosed an indebtedness equal to twice the value of the property assigned. *Held*, that defendant must have known of the falsity of his representations, and that an order of arrest was properly granted.

Scienter Necessary.—It is essential that a purchaser who represents himself to be solvent, should do so with a knowledge of the falsity of the representation. If he honestly believed himself to be solvent there is no fraud such as will justify his arrest. *Birchell v. Strauss*, 28 Barb. (N. Y.) 293; *Gaffney v. Burton*, 12 How. (N. Y.) Pr. 516.

Representations as to solvency of third party, if made with knowledge of the falsity, will justify the arrest of the person making them. *Sherman v. Brantley*, 7 Robt. (N. Y.) 55. But, see, *Smith v. Corbiere*, 3 Bosw. (N. Y.) 634.

2. *Brown v. Ashbough*, 40 How. (N. Y.) Pr. 226; *Smith v. Jones*, 4 Robt. (N. Y.) 655; *Wannemacher v. Davis*, 2 Sweeny (N. Y.) 272. See also *Wilmerding v. Cohen*, 8 Abb. (N. Y.) Pr. N. S. 141.

Falsity of one out of several material misrepresentations forms sufficient ground for the defendant's imprisonment. *Wannemacher v. Davis*, 2 Sweeny (N. Y.) 272.

Fraudulent Purchase.—Fraud committed in contracting a debt for goods purchased, subjects the purchaser to arrest, whether such fraud would annul the sale or not. *Wallace v. Murphy*, 22 How. (N. Y.) Pr. 414. In this case it was *held* that if it appears that goods were purchased for cash, and the purchaser obtained possession of them with

the intent of immediately converting them into a form in which they could not easily be reached on execution, or with the intent of transferring them to a *bona fide* purchaser to prevent a stoppage *in transitu*, the fraud is such as will warrant the arrest of the purchaser. In *Harding v. Shannon*, 20 How. (N. Y.) Pr. 25, the defendant agreed to pay cash for beef cattle on delivery. While plaintiff and he were consulting as to payment, his agent drove off the cattle and slaughtered them the same day. Defendant thereupon induced the plaintiff to accept a worthless sight draft in payment. *Held*, that the facts showed a fraudulent scheme to obtain possession of the cattle, and that an order of arrest might issue. Similarly, where one note broker induced another to allow him to take certain notes to his office on the understanding that the price should be paid immediately, such a fraud arises, on the detention or disposal of the note without payment, as authorizes the arrest of the purchasing broker. *Robbins v. Seithel*, 20 How. (N. Y.) Pr. 366. If defendant offered in payment the check of a third party, which he represented to be good, and there were in fact funds in bank against such check at the time when the representation was made, but they are suddenly withdrawn before presentation, the evidence must connect defendant in some way with the sudden withdrawal before an order of arrest can issue. *Stewart v. Potter*, 37 How. (N. Y.) Pr. 68.

Same—Resale at Loss.—Usually the fact that a purchaser sells for less than he pays, almost immediately after obtaining possession, is considered a badge of fraud, and evidence that the purchaser intended not to pay the purchase price, but such fact may be explained—as by evidence that the sale was made at the full market value. *Manning v. Solis*, 50 Barb. (N. Y.) 224.

Action of Deceit for False Warranty.—In an action on the case in the nature of deceit for a false warranty, the plaintiff can recover without proving fraud on the part of the defendant, and it does

on the part of an agent which induce a person to give credit to his principal do not justify the arrest of the principal, except he has been cognizant of the fraud, and authorized it, or subsequently ratified his agent's acts.¹ In the case of partners, the decisions are not unanimous, but the weight of authority seems to be to the effect that a partner may be arrested, although he may have been entirely innocent of his copartner's fraud.² And

not necessarily follow that an order of arrest can issue from the nature of the action. *Fowler v. Abrams*, 3 E. D. Smith (N. Y.) 1.

Fraud in Sale of Lands.—A complaint to recover damages for deceit—*e. g.*, fraudulent representations as to the acreage of lands sold,—which contains facts that merely constitute a cause of action for fraud, is sufficient to authorize an order of arrest, although the demand for judgment asks equitable relief, which could not, under the facts, be granted. *Redfield v. Frear*, 9 Abb. (N. Y.) Pr. N. S. 449.

Extension of Debt.—Defendant obtained from plaintiff the extension of a debt on a promise to turn over to him, as collateral security, a bond and mortgage owned by defendant, as soon as it was returned from the register. Instead of doing so, he collected the amount thereof from the mortgagor, at a discount, and applied the same upon other obligations. *Held*, that the defendant had committed such a fraud as would sustain an order of arrest. *Easton v. Cardwell*, 11 N. Y. Civ. Pro. Rep. 301. But in *Woodruff v. Valentine*, 19 Abb. (N. Y.) Pr. 93, it was *held* that a deceit practised by one of several joint debtors, in inducing the creditor to accept his check, post-dated, and endorsed by the other, was not a ground for authorizing his arrest in an action on the check against both. See also *Wheeler v. Frenche*, 33 N. Y. Super. Ct. 63.

Loan for Specific Purpose.—If the defendant has obtained a loan of money on a promise to apply it to a specific use, he is guilty of a fraud in contracting the debt if he applies it to a purpose other than that for which he received it. *Lovell v. Martin*, 11 Abb. (N. Y.) Pr. 126. In this case the defendant borrowed money on the representation that he intended to establish a business, and that he would employ the plaintiff's husband in it as a clerk. Instead of doing so, he used the money for his individual purposes.

Fraudulently Obtaining Loan.—Misrepresentations as to defendant's business, which induce plaintiff to make a loan to defendant upon his engagement as defendant's clerk, are sufficient to authorize an arrest in an action for the money advanced. *Ely v. Mumford*, 47 Barb. (N. Y.) 629. In *Wilmerding v. Mooney*, 11 Abb. (N. Y.) Pr. 283; 1 E. D. Smith 281, the defendants obtained from plaintiff a loan of \$10,000 on the representation that their stock was worth \$20,000, and that if they obtained the loan, their failure would be prevented. Two months later the stock was turned over to plaintiff, and on realization by him it brought only \$4,000. It was *held* that, in the absence of any explanation of the discrepancy, defendants' arrest was properly ordered.

Foreign Debt.—It is not necessary that the debt should be contracted within the jurisdiction. The defendant may be arrested if it was fraudulently contracted in a foreign country. *Brown v. Ashbough*, 40 How. (N. Y.) Pr. 226; *City Bank v. Lumley*, 28 How. (N. Y.) Pr. 397.

Costs in Suit to Set Aside Deed.—An execution against the person may issue against a defendant to collect the costs in an action brought to set aside a conveyance fraudulently obtained by the defendant from the plaintiff. *Smith v. Duffy*, 37 Hun (N. Y.) 506. See also *Finkemaur v. Dempsey*, 8 N. Y. Civ. Pro. Rep. 418. But see *Mason v. Lambert*, 3 Daly (N. Y.) 250.

1. *Hathaway v. Johnson*, 55 N. Y. 93; *Claffin v. Frank*, 8 Abb. (N. Y.) Pr. 412.

2. *Sherman v. Smith*, 42 How. (N. Y.) Pr. 198; *Coman v. Reese*, 21 How. (N. Y.) Pr. 114; *Townsend v. Bogart*, 11 Abb. (N. Y.) Pr. 355; *Bull v. Melliss*, 9 Abb. (N. Y.) Pr. 58; *Anonymous*, 6 Abb. (N. Y.) Pr. 319, n.; *Hawkins v. Appleby*, 2 Sandf. (N. Y.) 421; *Bowman v. Gates*, 11 Rep. 744.

But quite a number of decisions lay down the rule that a partner must be

a husband has been held to be liable to arrest for the tort of his wife, if it was of such a nature that an order of arrest might issue therefor.¹

4. *Disposal and Concealment of Property.*—Under a statute which authorizes imprisonment for the disposal of property with intent to defraud creditors, there must, as in the case of debts fraudulently contracted, be evidence of an actual intent to defraud, constructive fraud being insufficient.² But, generally, any facts which are sufficient to establish an intent to defraud are sufficient;³ and the right to arrest exists, although the fraudu-

guilty of actual, not of constructive, fraud before he can be arrested in a suit brought to enforce against the firm the liability upon which the fraud is predicated. *Bacon v. Kendall*, 49 N. Y. Super. Ct. 123; *Hitchcock v. Peterson*, 14 Hun (N. Y.) 389; *Natl. Bank v. Temple*, 39 How. (N. Y.) Pr. 432; 2 Sweeny 344; *Hanover Co. v. Sheldon*, 9 Abb. (N. Y.) Pr. 240; *Wetmore v. Earle*, 9 Abb. (N. Y.) Pr. 58 n. See, also, *Scott v. Reed*, 2 How. (N. Y.) Pr. N. S. 521.

1. *Solomon v. Waas*, 2 Hilt. (N. Y.) 179. In this case it was *held* that the fact that the tort was one for which a female could not be arrested did not affect the husband's liability.

2. *Pacific Mutual Ins. Co. v. Machado*, 16 Abb. (N. Y.) Pr. 456; *Caldwell's Case*, 13 Abb. (N. Y.) Pr. 405; *People v. Kelly*, 35 Barb. (N. Y.) 444; 13 Abb. (N. Y.) Pr. 405; *Spies v. Jael*, 1 Duer (N. Y.) 669; *Stroub v. Henly*, 1 How. (N. Y.) Pr. N. S. 400; *Courter v. McNamara*, 9 How. (N. Y.) Pr. 255.

The presumption is in favor of an honest and not a dishonest purpose. *Stroub v. Henly*, 1 How. (N. Y.) Pr. N. S. 400; *Flour City Nat. Bank v. Hall*, 33 How. (N. Y.) Pr. 1; *Pacific Mut. Ins. Co. v. Machado*, 16 Abb. (N. Y.) Pr. 451.

Thus, it was *held* that an arrest was not justified when the only facts shown were that defendant was about to go to Europe with his wife, and had stated that he did not intend to pay plaintiff's debt. There was nothing in these facts which necessarily showed an intended removal of his property with intent to defraud his creditors. *Stroub v. Henly*, 1 How. (N. Y.) Pr. N. S. 400.

Preferences.—The mere fact that a partner of a firm has withdrawn moneys to pay his individual creditors at a time when he knew that the firm was insolvent, does not establish such fraud as will subject him to arrest.

Sherrill Roper Air Engine Co. v. Harwood, 30 Hun (N. Y.) 9. See also *Toffey v. Williams*, 5 N. Y. Sup. Ct. (T. & C.) 294.

Insufficiency of Affidavit.—An affidavit charged that a legacy had been left to defendant; that he refused to apply any part of it in payment of plaintiff's debt; and that when the summons was served plaintiff had declared that he would not pay the debt because plaintiff had sued him. *Held*, that it did not set out facts warranting an order of arrest, on the ground that defendant had assigned, removed or disposed of his property, or was about to do so. *Vredenburg v. Hendricks*, 17 Barb. (N. Y.) 179. See also *Hathorn v. Hall*, 4 Abb. (N. Y.) Pr. 227.

3. See *Phillips v. Benedict*, 33 Barb. (N. Y.) 655; s. c., 12 Abb. (N. Y.) Pr. 355; *Arnold v. Shapiro*, 29 Hun (N. Y.) 478; *Duncan v. Guest*, 24 Hun (N. Y.) 639; *Ex parte Bergman*, 18 Nev. 331; *Brooklyn Daily Union v. Hayward*, 11 Abb. (N. Y.) Pr. N. S. 235; *Kern v. Rachow*, 12 Abb. (N. Y.) Pr. N. S. 352; 2 *Jones & S.* 239.

Partnership Property.—The withdrawal of partnership property may be given in evidence for the purpose of showing the intent to defraud partnership creditors; *Hinck v. Desar*, 3 N. Y. State Rep. 349; and in *Hanover Vulcanite Co. v. Nathanson*, 38 Hun (N. Y.) 488, a partner who, with intent to defraud his copartner, had withdrawn property belonging to the firm, and had converted it to his own use, was *held* to be subject to arrest in a suit by creditors of the firm on the ground that the conversion was with intent to defraud them. But in *Scott v. Reed*, 2 How. (N. Y.) Pr. N. S. 521, it was *held* that evidence that one of two partners had withdrawn a large sum from the business, because it had suffered severe losses, and that the

lent disposal has been effected in another State.¹ It is also necessary that the property disposed of should be something of value, out of which the creditor could have realized some portion of his claim, at least.² Under the statutes there is usually a provision that the defendant may be arrested in actions to recover a chattel where the defendant has concealed it so that it cannot be found or taken by the sheriff. As construed by the New York courts, such a statute does not authorize arrest when it is merely shown that the property has been removed or concealed,³ but only when the concealment or removal is shown to have been with the intent that it should not be taken by the sheriff, or with

other partner had already transferred a large portion of his property to his wife without consideration, would not support an order of arrest against the first partner without proof that he had disposed of this sum, or intended to do so, to defraud his creditors.

Property Disposed of to Defraud Wife.—In *Tunsdall v. Winton*, 27 Hun (N. Y.) 264, it was *held* that a husband who had disposed of his property so that his wife (whom he had deserted) might not obtain it, might be arrested under the statute against the disposal of goods in fraud of creditors, in an action by one who had supported her; but this decision was reversed on appeal, without any opinion. See 90 N. Y. 653.

Disposal After Assignment.—A debtor who removes and conceals property after making a general assignment for the benefit of his creditors, may be arrested in an action by a creditor. *Untermeyer v. Hutter*, 26 Hun (N. Y.) 147. See also *McButt v. Hirsch*, 4 Abb. (N. Y.) Pr. 441.

Removal Without Fraudulent Intent.—The defendant, a foreigner, being informed by the officer levying upon his property, that certain articles were exempt from execution, removed them thereafter openly from the State. *Held*, that such removal, being open and without intent to defraud, did not justify an arrest. *Krauth v. Vial*, 10 Abb. (N. Y.) Pr. 139. See also *Anonymous*, 2 N. Y. Code Rep. 51.

1. Property in Another Jurisdiction.—The plaintiff, in New York, sold certain goods to the defendant in Alabama. The defendant made a fraudulent disposal of his property in Alabama with intent to defraud his creditors. The plaintiff brought suit in New York and obtained an order of arrest, and it was *held* that the defendant was liable to arrest in New York, although the property fraudulently disposed of was

situated in Alabama. *Clafin v. Frenkel*, 29 Hun (N. Y.) 288. But in *Blason v. Bruno*, 21 How. (N. Y.) Pr. 112, it was *held* that a defendant who had contracted a debt in a foreign country, and had there disposed of his property, and had brought the proceeds to this country, was not liable to an arrest in this country for fraudulently disposing of his property. See also *Brown v. Ashbough*, 40 How. (N. Y.) Pr. 226.

2. Cancellation of Worthless Claim.—In *Hoyt v. Godfrey*, 88 N. Y. 669, the defendant had, upon the eve of a general assignment, cancelled upon his books an old account against his brother, who was insolvent. It was *held* that this claim did not constitute property, within the meaning of the statute, and that the defendant could not be arrested. The court say: "To constitute such a disposition of property three things must concur: first, the thing disposed of must be of value, out of which the creditor could have realized all, or a portion of his claim; second, it must be transferred or disposed of by the debtor; and, third, this must be done with intent to defraud. Does a debt, payment of no part of which can be enforced by reason of the insolvency of the debtor, constitute property, within the purview of this statute? We doubt it. (*Shultz v. Hoagland*, 85 N. Y. 464.) Does such an entry in the books of account amount to a transfer or disposition of the debt? We think not. If made without consideration it does not amount to a satisfaction of the debt. The assignee could sue and recover judgment for it as if such entry had not been made. But, however this may be, if the debtor believed the debt to be worthless, it could hardly be said that he cancelled it with intent to defraud his creditors."

3. *Watson v. McGuire*, 33 How. (N. Y.) Pr. 87; 2 Daly 219.

the intent to deprive the plaintiff of the benefit of it.¹ If the complaint simply demands relief by a judgment for damages for the conversion, and contains no demand for the return of the specific property, an order of arrest, under the provisions of the statute applicable to action to recover possession of property,

1. *Fitch v. McMahon*, 103 N. Y. 690; *Barnett v. Selling*, 70 N. Y. 492; *Jananiqué v. De Luc*, 1 Abb. (N. Y.) Pr. N. S. 419; *Watson v. McGuire*, 33 How. (N. Y.) Pr. 87; 2 *Daly* (N. Y.) 219; *Roberts v. Randel*, 3 Sandf. (N. Y.) 710.

Nature of Fraudulent Intent.—The New York Code Civ. Proc., § 549, subd. 2, provides that the defendant may be arrested when the action is brought "to recover a chattel, where it is alleged in the complaint that the chattel or a part thereof has been concealed, removed or disposed of so that it cannot be found or taken, or to deprive the plaintiff of the benefit thereof." In *Barnett v. Selling*, 70 N. Y. 492, 495, the court say, with reference to this provision: "To authorize an order of arrest, there must be a concealment, removal or disposal of the property, or some part thereof, with intent either to defeat the process of the court or to deprive the plaintiff of the benefit thereof; that is, of the property. An intent to put the property beyond the reach of the owner, by selling it to a *bona fide* purchaser when a transaction would avail for the purpose, or by so changing its form that it could not be identified, or by any other act, will authorize the order, although the fraudulent actor may not contemplate an action at law to recover the specific property. When, as is alleged and appears by the affidavits on which the order was made, possession of property has been acquired fraudulently, and under circumstances justifying a reclamation of it by the owner, and the fraudulent purchaser has sold the property with intent to perfect the fraud and put the property beyond the reach of the owner; the intent 'to deprive the owner of the benefit thereof,' contemplated by the act is established, and the case is not only directly within the letter of the statute, but is also within its spirit. Any other interpretation would deprive the last words of all meaning, as they would add nothing to the other provisions of the statute." See, also, *Lippman v. Shapiro*, 50 N. Y. Super. Ct. 367; *Thompson v. Strauss*, 29 Hun (N. Y.) 236.

Fraudulent Purchase.—The defendant may be arrested in an action to recover goods left with him under an agreement that the title shall not pass if the defendant has sold the same. *Myers v. Shupeck*, 3 N. Y. St. Rep. 289. But there can be no arrest under this clause of the statute where the defendant has fraudulently purchased the goods, if he has merely sold them in the usual course of trade, the removal or concealment with the necessary fraudulent intent being apparently absent. *Pike v. Lent*, 4 Sandf. (N. Y.) 650.

Mortgage of Personalty.—If, upon default in a mortgage of personal property, and absolute title being vested in the mortgagee thereby, the mortgaged property cannot be found, an order of arrest may issue in an action for the conversion. *Woodbridge v. Nelson*, 13 Hun (N. Y.) 390.

Acceptance of Bills for Value.—In *Person v. Civer*, 29 How. (N. Y.) Pr. 432, the defendant obtained the possession of certain property belonging to plaintiff under an agreement to return it at a certain time, or to pay a specified sum as its value. After the expiration of the stipulated time, the defendant paid a part of the sum and gave his due bills for the balance. Subsequently, plaintiff demanded the return of the property or payment of the bills. On defendant's failure or refusal to return the property (it having, in fact, been sold), or to pay the bills, he brought a suit, and it was held that defendant was liable for the conversion of the property and might be held to bail.

Action Brought Subsequent to General Assignment.—In an action to recover the possession of certain goods, it appeared that plaintiffs had been induced by the false and wrongful representations of the defendant to sell him the goods in question; that he, soon after, made an assignment for the benefit of his creditors; and that the sheriff was unable to find the goods. It was held that, as defendant knew the goods were obtained by fraud, and should be paid for or returned, whether he disposed of them before the assignment, or concealed them from the as-

ought not to be granted.¹ It would appear that this provision has no application to actions to recover realty, or which are connected therewith.²

5. *Agents and Persons Occupying Fiduciary Relations.*—A statute which authorizes an arrest in an action to recover money received by a factor, agent, broker or other person in a fiduciary capacity applies to all contracts not based on credit, but on confidence.³ Hence, in an action against an agent to recover money received by him for plaintiff, something in the nature of a violation of a trust or some wrong-doing on the part of the agent, other than a mere failure to account, must be shown.⁴ Among

signee, which was also a concealment as to plaintiffs, it was in furtherance of the original fraud, and tended to deprive plaintiffs of the benefit of their goods, and it would be inferred that such was defendant's intent; and that a like intent would be presumed if the goods were delivered to the assignee, unless the assignment was made in such a way that the assignee could not deem it his duty to oppose a reclamation thereof. *Lippman v. Shapiro*, 50 N. Y. Super. Ct. 367.

Inference Arising from Fraud in Purchase.—Fraud in the purchase of goods will justify a further inference in an action of claim and delivery, that the inability of the sheriff to find the same, was in consequence of a fraudulent disposition of them by the defendant in pursuance of his original fraud, with the intent that they should not be taken. *Fitch v. McMahon*, 103 N. Y. 690.

1. *Seymour v. Van Curen*, 18 How. (N. Y.) Pr. 94; *Tracy v. Veeder*, 35 How. (N. Y.) Pr. 209; 50 Barb. 70.

Fraud in Purchase.—Although the complaint states incidentally that the property has been concealed, if the ground upon which the claim is made by plaintiff is fraud in the purchase, an arrest is to be deemed to have been ordered on the ground of a fraudulent purchase and not on the ground of fraudulent concealment. *Tracy v. Veeder*, 35 How. (N. Y.) Pr. 209; 50 Barb. 70.

2. See *Griswold v. Sweet*, 49 How. (N. Y.) Pr. 171; *Brush v. Mullen*, 12 Abb. (N. Y.) Pr. 242.

3. *Dunaher v. Meyer*, 1 N. Y. Code Rep. 87. See also *Stoll v. King*, 8 How. (N. Y.) Pr. 298.

4. *Decatur v. Goodrich*, 44 Hun (N. Y.) 3; *Graeffe v. Currie*, 52 N. Y. Super. Ct. 554; *Stoll v. King*, 8 How. (N. Y.) Pr. 298.

Agents for Sale on Commission.—

An agent or factor who receives goods for sale on a commission, acts in a fiduciary capacity, and may be imprisoned in the event of his failure to pay over the net proceeds after sale. *Standard Sugar Refining Co. v. Dayton*, 70 N. Y. 486; *Kelly v. Scripture*, 9 Hun (N. Y.) 283; *Schudder v. Shields*, 17 How. (N. Y.) Pr. 420; *Ridder v. Whitlock* 12 How. (N. Y.) Pr. 208; *Duguid v. Edwards*, 50 Barb. (N. Y.) 288; *Barret v. Gracie*, 34 Barb. (N. Y.) 20. The fact that the sales are made upon a *del credere* commission does not alter his liability. *Wallace v. Castle*, 14 Hun (N. Y.) 106; *Ostell v. Brough*, 24 How. (N. Y.) Pr. 274. And it has been held that an agent for sale, acting under agreement by which accounts were to be rendered, and the proceeds to be paid over weekly, was liable to arrest in an action for the proceeds. *Turner v. Thompson*, 2 Abb. (N. Y.) Pr. 444. But if a custom has been recognized by both parties which authorizes the agent to mingle his principal's funds with his own, accounting at stated periods, no fiduciary comes into existence, and the agent cannot be arrested at the suit of the principal. *Donovan v. Cornell*, 3 How. (N. Y.) Pr. N. S. 525; 13 Daly (N. Y.) 339. See *Angus v. Dunscombe*, 8 How. (N. Y.) Pr. 14; *Robbins v. Falconer*, 43 N. Y. Super. Ct. (J. & S.) 363.

Consignee.—In *German Bank v. Edwards*, 53 N. Y. 541, certain time drafts drawn on defendant were discounted by plaintiff, who received with each, as security, a carrier's receipt for goods consigned by the drawer to the defendants. Each receipt was endorsed and delivered to defendants, upon acceptance of the accompanying draft, and signature of an agreement that, upon sale of the goods, the proceeds would be applied in the first instance to

those who have been held to receive money in a fiduciary capacity are assignees for the benefit of creditors, who fail to divide moneys received among their assignors' creditors,¹ auctioneers,² directors and officers of a corporation,³ note-brokers entrusted with acceptances to drafts for the purpose of being discounted;⁴ stock-brokers entrusted with or receiving money for a specific purpose;⁵ a person entrusted with money to be deposited in bank, and held for the bailor's benefit,⁶ or for the purpose of being paid over directly to a third person;⁷ but a banker receiving money in the usual course of business does not assume a fiduciary relation towards his depositor or customer;⁸ nor does a

the payment of the draft. *Held*, that defendants did not receive the money in any fiduciary capacity, but had a joint interest in the property and its proceeds, and, therefore, an order of arrest was improperly granted.

Agent for Collection.—An agent who is employed to collect moneys for his principal is liable to arrest if he appropriates such moneys to his own use. *Stoll v. King*, 8 How. (N. Y.) Pr. 298. And similarly, an agent to receive goods, deliver them to his principal's customers, and collect the purchase price, acts in a fiduciary capacity, and may be arrested. *Frost v. McCarger*, 14 How. (N. Y.) Pr. 131. See also *Hall v. McMahon*, 10 Abb. (N. Y.) Pr. 319.

Agent for Purchase.—An agent entrusted with money for the purchase of specified goods, with the condition that it shall not be employed for any other purpose, acts in a fiduciary capacity, and may be held to bail if he misapplies the money. *Noble v. Prescott*, 4 E. D. Smith (N. Y.) 139; *Obregon v. DeMier*, 52 How. (N. Y.) Pr. 356.

1. *Roberts v. Prosser*, 53 N. Y. 260.

2. *Holbrook v. Homer*, 6 How. (N. Y.) Pr. 86. But in *Sutton v. DeCamp*, 4 Abb. (N. Y.) Pr. (N. S.) 483, it would seem to have been *held* that auctioneers receiving goods on consignment, and guarantying payment of the price, did not receive the proceeds in a fiduciary capacity, and was not liable to arrest; but it is to be noticed that the action was brought upon the guaranty, and not for moneys actually received. See also *Morange v. Waldron*, 6 Hun (N. Y.) 529.

3. **Directors and officers** of a corporation may be arrested in an action by a stockholder for damages sustained from the fraudulent and illegal acts of the defendants in selling corporate property,

on the ground of the fraudulent misapplication and embezzlement. *Crook v. Jewett*, 12 How. (N. Y.) Pr. 19. See also *Pierson v. Freeman*, 77 N. Y. 589; *Northern R. R. Co. of France v. Carpentier*, 4 Abb. (N. Y.) Pr. 47.

4. *Wolfe v. Brouwer*, 5 Robt. (N. Y.) 601.

5. **A stockbroker** who receives money from a client for the purpose of purchasing specified stock, receives it in a fiduciary capacity. *Dubois v. Thompson*, 25 How. (N. Y.) Pr. 417. See also *Mann v. Sands*, 2 N. Y. City Ct. 25. But money received for the purpose of securing himself against loss upon his client's transactions, is not received in a fiduciary character. *Mann v. Sands*, 2 N. Y. City Ct. 25; *McBurney v. Martin*, 6 Robt. (N. Y.) 502. But see *Clark v. Pinckney*, 50 Barb. (N. Y.) 226.

6. *Bullen v. Murphy*, 8 N. Y. Civ. Pro. Rep. 8.

7. *Burhaus v. Casey*, 4 Sandf. (N. Y.) 707.

8. As to deposits, see *Buchanan Farm Oil Co. v. Woodman*, 1 Hun (N. Y.) 639; and collections, see *Bussing v. Thompson*, 15 How. (N. Y.) Pr. 97; 6 Duer 696.

Knowledge of Insolvency.—But if a banker, in the knowledge that he is hopelessly insolvent, receives money from his customers he is guilty of fraud in incurring the obligation, and may be arrested on that ground, although he may not have had any special intent to defraud the plaintiff. *Anonymous*, 67 N. Y. 598; *Roebeling v. Duncan*, 1 Hun (N. Y.) 502.

Remittance for Specific Purpose.—If, however, a banker receives funds for a specific purpose, he stands in the same position as any other agent who receives property or money in a similar manner. Thus, a banker received a re-

partner who has received partnership money or property, and has failed to account for it to his fellow-partner.¹ To justify the arrest it is not necessary, under the statute, that the fiduciary should have fraudulently misapplied or embezzled the sum sued for;² and the fact that the plaintiff has accepted security for the demand will not operate as a waiver of his right to issue execution.³ The defendant is subject to arrest, although the money was received by him in another State,⁴ and, also, it would appear, although the money has been received in a foreign country.⁵

In the case of public officers, and of persons professionally employed, there is also usually involved a fiduciary relation; but, notwithstanding that fact, the right to imprison is usually conferred in express terms by a provision applicable to such persons.⁶ Thus, an attorney who, by virtue of his professional employment, receives money on behalf of a client, and fails or refuses to pay over the same, may be imprisoned,⁷ and to subject him to liability to imprisonment it is not necessary that he should have acted in bad faith.⁸

mittance from a correspondent with instructions to send a draft to a third party for the amount, and acknowledged receipt subject to such instructions. It was *held* that he received the money in a fiduciary capacity, and might be arrested. *Johnson v. Whitman*, 10 Abb. (N. Y.) Pr., N. S. 111. See also *Eckert v. Belden*, 1 Month. L. Bull. 61.

1. *Soule v. Hayward*, 1 Cal. 345; *Smith v. Small*, 54 Barb. (N. Y.) 223.

2. **Claim for Commissions.**—In *Republic of Mexico v. De Arangoiz*, 5 Duer (N. Y.) 634, the defendant claimed that he was entitled to retain the amount sued for as commissions payable to him for his services.

3. *Pettingill v. Mather*, 12 Abb. (N. Y.) Pr. 436.

4. *Castree v. Kirby*, 2 Civ. Proc. Rep. 334; *Brown v. Ashbough*, 40 How. (N. Y.) Pr. 226; *Frost v. McCarger*, 14 How. (N. Y.) Pr. 131; *Yates v. Blodgett*, 8 How. (N. Y.) Pr. 278.

5. *Peel v. Elliott*, 16 How. (N. Y.) Pr. 485; 28 Barb. 200; 7 Abb. (N. Y.) Pr. 433.

6. As to public officers see *People v. Clark*, 45 How. (N. Y.) Pr. 12; *Peel v. Elliott*, 16 How. (N. Y.) Pr. 485; s. c., 28 Barb. (N. Y.) 200; 7 Abb. (N. Y.) Pr. 433; *Republic of Mexico v. De Arangoiz*, 5 Duer (N. Y.) 634.

7. *Stage v. Stevens*, 1 Denio (N. Y.) 267; *Yates v. Blodgett*, 8 How. (N. Y.) Pr. 278; *Gross v. Graves*, 2 Robt.

(N. Y.) 707; s. c., 19 Abb. (N. Y.) Pr. 95. An attorney against whom *assumpsit* is brought to recover money collected for his client, is liable to imprisonment for "misconduct in a professional employment," notwithstanding the fact that the money was received by him independently of any judicial proceeding. *Stage v. Stevens*, 1 Denio (N. Y.) 267.

Foreign Attorney.—An attorney residing and practising in another State has been *held* by the New York court to be subject to arrest in New York, for a failure to pay over money collected by him on behalf of a client. *Yates v. Blodgett*, 8 How. (N. Y.) Pr. 278.

Fraudulent Conversion.—In *Cotton v. Sharpstein*, 14 Wis. 226, it was *held* that an attorney who recovered a judgment for his client and bid off the land of the debtor at a sale upon execution in satisfaction of the judgment, and took the certificate of sale in his own name, and afterwards sold it and converted the proceeds to his own use, was liable to arrest for the conversion of the certificate.

Amount Must be Certain.—But an attorney cannot be arrested for failure to turn over money received, unless the affidavits or pleadings show the amount received by him. *Crotty v. Kimball*, 22 N. Y. Weekly Dig. 433.

8. In *Schadle v. Case*, 16 How. (N. Y.) Pr. 413, a client paid over money to

6. *Injuries to Person and Character*.—It has been held that the seduction of a daughter being an infringement of the father's relative rights of person, is an "injury to his person,"¹ within the meaning of the statute providing for arrests in actions therefor.² Similarly it has been held that criminal conversation is an injury to the person of the plaintiff, and furnishes sufficient ground for the defendant's arrest;³ but such a statute will not authorize the imprisonment of the defendant in an action for divorce by the wife on the ground of the defendant's adultery,⁴ although where a limited divorce is asked on the ground of cruel and inhuman treatment, the person of the defendant may be imprisoned.⁵ Such a statutory provision will justify the issuance of an order of arrest in an action of libel,⁶ even though the plaintiff be a corporation;⁷ in an action for malicious prosecution;⁸ or in an action for assault and battery.⁹ It is not essential that personal injuries should be intentionally inflicted; if the plaintiff has been injured by the defendant's negligence, it is a sufficient ground for

his attorney for a specific purpose. Before the money was applied to that purpose, the client demanded its return, and the attorney refused to repay on the ground that the money ought by right to be applied to fulfil obligations which he alleged plaintiff had undertaken. It was *held* that the attorney might be arrested, although he might not have acted in bad faith.

1. **Personal Injury Defined**.—"A 'personal injury' includes libel, 'slander, criminal conversation, seduction and malicious prosecution; also, an assault and battery, false imprisonment, or other actionable injury to the person either of the plaintiff or of another." New York Code Civ. Proc., § 3343.

2. *Hoover v. Palmer*, 80 N. Car. 313; *Taylor v. North*, 3 N. Y. Code Rep. 9; *Steinberg v. Lasker*, 50 How. (N. Y.) Pr. 432. But see, to the contrary, *Wagner v. Lathers*, 26 Wis. 436.

Seduction as Malicious Act.—In *Whiting v. Dow*, 42 Vt. 262, it was *held* that the seduction of the plaintiff's daughter was a wilful and malicious act, within the meaning of the statute authorizing execution against the person upon judgments obtained in actions for such acts. But in *People v. Greer*, 43 Ill. 213, it was *held* that malice is not of the gist of seduction, within the meaning of an Insolvent Debtors act, which provides for the discharge of debtors on the surrender of property, except in cases in which malice is the gist of the action in which the judgment was recovered.

3. *Straus v. Schwarzwalden*, 4 Bosw. (N. Y.) 627; *Delameter v. Russell*, 4 How. (N. Y.) Pr. 233.

4. *McIntosh v. McIntosh*, 12 How. (N. Y.) Pr. 289.

5. *McIntosh v. McIntosh*, 12 How. (N. Y.) Pr. 289; *Gardiner v. Gardiner*, 3 Abb. (N. Y.) N. C. 1; *Jamieson v. Jamieson*, 11 Hun 38.

A wife's action for enticing away her husband is an action for a personal injury, within the meaning of the statute. *Breiman v. Paasch*, 7 Abb. (N. Y.) N. C. 249.

6. *Blakelee v. Buchanan*, 44 How. (N. Y.) Pr. 97; *Britton v. Richards*, 13 How. (N. Y.) Pr., N. S. 258.

7. *Knickerbocker Life Ins. Co. v. Ecclesine*, 6 Abb. (N. Y.) Pr., N. S. 9; 11 Abb. (N. Y.) Pr., N. S. 385; 42 How. (N. Y.) Pr. 201.

8. *Dempsey v. Lepp*, 52 How. (N. Y.) Pr. 11.

9. *Davis v. Scott*, 15 Abb. (N. Y.) Pr. 127.

But in actions in assault and battery, libel or slander, as a matter of practice, an order of arrest ought not to be granted, except in cases in which the defendant is a non-resident, or has no fixed residence, or where the battery has to be extremely violent and cruel in its nature. *Davis v. Scott*, 15 Abb. (N. Y.) Pr. 127.

Malice is of the gist of an action of assault and battery, within the meaning of the Illinois Insolvent Debtors act, which provides for the discharge of debtors where malice is not the gist of

imprisonment.¹ But the defendant in an action to recover damages for injuries to a decedent causing his death, cannot be arrested, at all events where the statute gives the right of action for "pecuniary injury resulting from such death, to the relatives of the deceased."²

7. *Injuries to Property*.—Under a statute which authorizes imprisonment or arrest in actions to recover for injuries to property, the right to arrest exists, not only in the case of wilful torts,³ but also in torts arising from simple negligence,⁴ and although the action is strictly to be regarded as an action founded in tort, the right to arrest may exist, notwithstanding the fact that a contract has been alleged by way of inducement.⁵

the action. *Re Murphy*, 109 Ill. 31.

1. *Ritterman v. Ropes*, 52 N. Y. Super. Ct. (J. & S.) 236.

2. *Negligent Killing*.—In an action by the personal representatives for injuries to the decedent causing his death, the defendant is not liable to arrest under a statute authorizing arrests in actions "for an injury to person or character." *Gibbs v. Larrabee*, 23 Wis. 495. The court say: "What is the real basis of this action? In the language of the statute, by which the action is given, it is 'the pecuniary injury resulting from such death to the relatives of the deceased,' and it is for such pecuniary or consequential injury, and not for the injury to the person of the deceased, though the remote cause, that the action is brought." See also *Ryall v. Kennedy*, 41 N. Y. Super. Ct. (J. & S.) 531. But in *Haines v. Jeroloman*, 2 N. Y. Civ. Proc. Rep. 196, it was held that the term personal injury, as defined in section 3343 of the N. Y. Civ. Proc., included a claim for damages for negligently causing the death of a decedent, and that execution against the person might issue on a judgment obtained therefor.

3. See *Niver v. Niver*, 43 Barb. (N. Y.) 411.

Combination to Injure Plaintiff's Business.—In *Old Dominion Steamship Co. v. McKenna*, 18 Abb. (N. Y.) N. C. 263; 30 Fed. Rep. 48, it was held that an action against certain defendants to recover damages for a combination to injure plaintiff's business, and to interfere with the use of his property by inducing his workmen to strike, and by declaring and enforcing a boycott, was an action for an "injury to property," and an order of arrest might be issued therein.

Money Lost at Gaming.—An action to

recover money lost by the plaintiff at gaming is not an action for an "injury to property including the wrongful taking and detention, or conversion of personal property," and does not authorize the defendant's arrest. *Tompkins v. Smith*, 62 How. (N. Y.) Pr. 499.

Malicious trespass is such an injury as authorizes an arrest. *Goldsmith v. Jones*, 53 How. (N. Y.) Pr. 415; *Welch v. Winterburn*, 14 Hun (N. Y.) 518. But an action of trespass, *quære clausum fregit*, is local in its character, and an order of arrest granted for such a trespass upon lands situated in another State must be vacated, as the action can only be maintained in the State in which the land is situated. *American Union Tel. Co. v. Middleton*, 80 N. Y. 408.

Obstruction of Water Course.—An action for damages for obstructing a water course does not authorize an arrest under a provision which has reference to actions for injuring, wrongfully taking, or detaining property. *Griswold v. Sweet*, 49 How. (N. Y.) Pr. 171.

4. **Negligence of Bailee**.—In *Keeler v. Clark*, 18 Abb. (N. Y.) Pr. 154, the defendant, while using plaintiff's oxen, negligently broke the leg of one of them, and it was held that he was liable to arrest in an action to recover damages therefor.

5. *Keeler v. Clark*, 18 Abb. (N. Y.) Pr. 154. See, also, *Person v. Civer*, 29 How. (N. Y.) Pr. 432.

In *Cotton v. Adirondack Co.*, 11 Abb. (N. Y.) N. Cas. 377, reversing 20 Hun (N. Y.) 19, it was held that an action against a common carrier for non-delivery of goods, in the form of an action on the contracted carriage, was not an action for injury to property, within the meaning of a State, and..

8. *Unsuccessful Plaintiffs*.—In cases in which the plaintiff brings a suit upon a ground of action, which would justify the defendant's arrest, the New York courts have, as a rule, issued execution against the persons of unsuccessful plaintiffs upon judgments against them for the costs therein.¹

9. *Joinder of Causes of Action*.—It is a general rule that where the demand for judgment is founded upon two or more causes of action, upon part of which the defendant might be arrested, whilst upon the others he would be entitled to the benefit of the statutory or constitutional immunity, there can be no arrest, as the plaintiff, by joining the different causes, is deemed to have waived his right to enforce his debt against the defendant's person.²

would not, upon that ground, authorize the issuance of an execution against the person.

1. *Miller v. Scherder*, 2 N. Y. 262; *Hovey v. Starr*, 42 Barb. (N. Y.) 435; *Merritt v. Carpenter*, 30 Barb. (N. Y.) 61; *Parker v. Spear*, 62 How. (N. Y.) Pr. 394; *Parce v. Halbert*, 2 How. (N. Y.) Pr. 235; *Philbrook v. Kellogg*, 21 Hun (N. Y.) 238; *Kloppenbergh v. Neefus*, 4 Sandf. (N. Y.) 655.

Action Against Sheriff for Penalty.—The plaintiff in an action against a sheriff for a penalty for the irregular sale of real estate, the declaration in which also contains counts for goods, wares, and merchandise, and money counts, is subject to imprisonment on a *ca. sa.* on a judgment for the defendant for costs. *Parce v. Halbert*, 1 How. (N. Y.) Pr. 235.

Joinder of Causes.—Notwithstanding the rule that the defendant in an action cannot be arrested where the plaintiff has joined causes on part of which an arrest might issue, whilst on the remainder the defendant was exempt from arrest, the defendant in such an action may obtain an execution against the person of the unsuccessful plaintiff upon the judgment for costs. *Miller v. Scherder*, 2 N. Y. 262.

Married Woman.—A married woman cannot be imprisoned on a judgment against her for costs in an action brought by her for the conversion of personal property. *Hovey v. Starr*, 32 Barb. (N. Y.) 435. Nor in an action brought by her for slander. *Maloy v. Dagnal*, 1 T. & C. (N. Y.) Addenda 10.

Ejectment.—An unsuccessful plaintiff, in an action to recover real estate and damages for withholding possession, is not subject to imprisonment on an execution against the person for costs. *Merritt v. Carpenter*, 3 Keys (N. Y.)

142; 35 How. (N. Y.) Pr. 428; *Fullerton v. Fitzgerald*, 18 Barb. (N. Y.) 441.

Claim and Delivery.—In an action to recover the possession of personal property and damages for its detention, the defendant, although he succeeds in the action, cannot issue an execution against the plaintiff's person, except the plaintiff, during a pendency of the proceedings, obtained an order of arrest against the defendant. *Purchase v. Bellows*, 19 Abb. (N. Y.) Pr. 306; 23 How. (N. Y.) Pr. 421; 14 Abb. (N. Y.) Pr. 357.

2. *American Union Telegraph Co. v. Middleton*, 80 N. Y. 408; *Bowen v. True*, 53 N. Y. 640; *Miller v. Scherder*, 2 N. Y. 262; *Ely v. Stiegler*, 9 Abb. (N. Y.) Pr. N. S. 449; *How v. Frear*, 13 Abb. (N. Y.) Pr. 241; 21 How. Pr. 343; *Molenaar v. Koerner*, 13 Abb. (N. Y.) Pr. 241 n; *Lambert v. Snow*, 9 Abb. (N. Y.) Pr. 91; 2 Hilt. 501; 17 How. Pr. 517; *McGovern v. Payn*, 32 Barb. (N. Y.) 83; *Mason v. Lambert*, 3 Daly (N. Y.) 250; *Toffey v. Williams*, 3 Hun (N. Y.) 217; *Goodale v. Finn*, 5 Hun (N. Y.) 151; 4 T. & C. 432; *Brown v. Ashbough*, 40 How. (N. Y.) Pr. 226; *Sherwood v. Pierce*, 50 N. Y. Sup. Ct. 378. See also *Suydam v. Smith*, 7 Hill (N. Y.) 182; *Brown v. Treat*, 1 Hill (N. Y.) 225.

Running Account.—Where there has been a running account between the parties, fraud in contracting only part of the defendant's obligation thereunder furnishes no ground for an arrest in an action upon the balance due. *Toffey v. Williams*, 5 T. & C. (N. Y.) 294.

Loan and Fraudulent Purchase.—If the plaintiff's claim is founded upon the sale of a drug store to defendant and also upon a loan, there can be no arrest if the affidavit merely aver fraud in

10. *Effect of Judgment.*—If a creditor obtains a judgment against his debtor, the cause of action is, according to the decisions of the New York courts, merged in such judgment, and in an action to enforce the same, the plaintiff is not entitled to an order of arrest;¹ at all events where, upon the face of the first judgment, the recovery has been had upon a cause of action for which no arrest could be made.² If, however, the judgment has been recovered in a foreign jurisdiction, a distinction seems to have been made, and an order of arrest may, in such case, be issued where the original cause of action was such as to authorize it.³

IV. Privilege from Arrest.—1. *Members of Parliament, Congress and State Legislatures.*—Arising out of their duty to the State, and the necessity of their presence in the legislative body, members of parliament,⁴ members of congress,⁵ and members of the various State legislatures⁶ are privileged from arrest during the session of the respective bodies to which they belong, and it has been held that the privilege from arrest secured to members of congress by the federal constitution extends as well to delegates from the territories as to senators and representatives.⁷ In England the privilege of members of parliament exists not only during the session, but also for forty days before and forty days

relation to the purchase of the drug store. *Goodale v. Finn*, 4 T. & C. (N. Y.) 432.

Claim for Interest.—A complaint which seeks to recover money collected by the defendant as county treasurer, with interest, does not state two causes of action upon one of which, the claim for interest, the defendant cannot be arrested. *People v. Clark*, 45 How. (N. Y.) Pr. 12.

1. *Goodrich v. Dunbar*, 17 Barb. 644; *McButt v. Hirsch*, 4 Abb. (N. Y.) Pr. 441.

2. *Field v. Bland*, 8 Abb. N. Cas. 221; 81 N. Y. 239.

3. *Baxter v. Drake*, 85 N. Y. 502; 22 Hun (N. Y.) 265; *Arthurton v. Dalley*, 20 How. (N. Y.) Pr. 311; *Wanzer v. DeBaum*, 1 E. D. Smith (N. Y.) 261; 1 N. Y. Code Rep. N. S. 280. But see *Suydam v. Barber*, 18 N. Y. 468; *Mallory v. Leach*, 14 Abb. (N. Y.) Pr. 449; n. s. c., 23 How. (N. Y.) Pr. 507; *Goodrich v. Dunbar*, 17 Barb. (N. Y.) 646; *Besley v. Palmer*, 1 Hill (N. Y.) 482.

Statutory Provision.—To reconcile the conflicting decisions in the New York courts, a special provision was enacted by the N. Y. Code Civ. Proc., § 542, which declared: "The recovery of a judgment in a court not of this

State, for the same cause of action or where the action is founded upon fraud or deceit for the price or value of the property obtained thereby, does not affect the right of the plaintiff to arrest the defendant."

4. *Goudy v. Duncombe*, 5 D. & L. 209; 1 Ex. 430; 17 L. J., Ex. 76.

5. *Lewis v. Elmendorf*, 2 Johns. (N. Y.) Cas. 222; *Hoppin v. Jenckes*, 8 R. I. 453; *United States v. Cooper*, 4 U. S. (4 Dall.) 341; bk. 1, L. ed. 859; *Nones v. Edsall*, 1 Wall. Jr. C. C. 181.

6. *King v. Coit*, 4 Day (Conn.) 133; *Colvin v. Morgan*, 1 Johns. (N. Y.) Cas. 416; *Corey v. Russell*, 4 Wend. (N. Y.) 204; *Gibbes v. Mitchell*, 2 Bay (S. Car.) 467.

7. *Doty v. Strong*, 1 Pinn. (Wis.) 85.

Members of a state convention are privileged from arrest during the sitting of the convention, and for a reasonable period before and after the session. *Bolton v. Martin*, 1 U. S. (1 Dall.) 296.

Extent of Privilege.—The immunity from arrest which exists in favor of a member of a legislative assembly not only exempts their persons from actual arrest, but also exempts them from suit on any civil process which may interfere with their public duties during the continuance of their privilege. Ander-

after each meeting of parliament; ¹ but in America the privilege exists only during the session of the congress, and for a reasonable time for going and returning.²

2. *Queen's Household and Servants*.—In England, members of the queen's household and servants in attendance upon her are, by virtue of their office, privileged from arrest.³

3. *Voters*.—On the day of an election, voters are privileged from arrest, but only whilst voting and going to or returning from the polls; ⁴ and in the town or ward in which he resides, or has a right to vote.⁵

4. *Soldiers, Sailors and Police*.—From the nature of their employment, soldiers, the sailors of the United States navy, and policemen are necessarily protected from imprisonment upon civil process while in the discharge of their duties.⁶

5. *Foreign Ambassadors and Consuls*.—The ambassadors and ministers of foreign countries residing in the United States, or passing through in the ordinary mode of travelling are also privileged.⁷ Similarly, the consuls of a foreign government are

son *v.* Roundtree, 1 Pinn. (Wis.) 115.

1. Goudy *v.* Duncombe, 5 D. & L. 209; 1 Ex. 439; 17 L. J., Ex. 76.

A *capias* against a member of the house of commons is irregular, and will be set aside, although it is not intended to be put into execution till the privilege of the defendant expires, or proceedings against the person of the member are not contemplated. Cassidy *v.* Stewart, 2 Scott, N. R. 432; 2 M. & G. 437; 5 D. P. C. 366.

2. Lewis *v.* Elmendorf, 2 Johns. (N. Y.) Cas. 222; Hoppin *v.* Jenckes, 8 R. I. 453.

Under the provision of a New York statute to the effect that any member of the legislature, or his servants, should be liable to arrest on civil process whilst going or returning, such time not to exceed fourteen days, a member was not deemed to be privileged from arrest during the whole fourteen days specified if he had actually reached home before the expiration of that period. Colvin *v.* Morgan, 1 Johns. (N. Y.) Cas. 416; Corey *v.* Russell, 4 Wend. (N. Y.) 204.

3. King *v.* Foster, 2 Taunt. 167; Bartlett *v.* Hebbes, 5 T. R. 686; Hatton *v.* Hopkins, 2 Maule & Sel. 271.

It has been held that the following persons are privileged, viz.: a lord of the bed-chamber; Aldridge *v.* Barry, 3 D. P. C. 450 n.; a page of the presence; Reynolds *v.* Pocock, 7 D. P. C. 4; 4 M. & W. 371; yeomen of the guard; Sard *v.* Forrest, 2 D. & R. 250;

1 B. & C. 139; Hatton *v.* Hopkins, 2 Maule & Sel. 271; chaplains in ordinary; Swan *v.* Dakins, 16 C. B. 77; *sub nom.* Swan *v.* Dakins, 24 L. J., C. P. 131; Byom *v.* Dibdin, 1 C. M. & R. 821; 3 D. P. C. 448; 1 Gale 58; 5 Tyr. 357; Winter *v.* Dibdin, 2 D. & L. 211; 13 M. & W. 25; 13 L. J., Ex. 263; Harvey *v.* Dakins, 3 Ex. 266; 6 D. & L. 437; 18 L. J., Ex. 156; a herald at arms; Dyer *v.* Disney, 16 M. & W. 312; 4 D. & L. 698; 16 L. J., Ex. 183.

4. Petrie *v.* Fitzgerald, 1 Daly (N. Y.) 401.

Under the constitution of Maine an elector preparing to go to the polls is not privileged from arrest if he has not actually proceeded on his way. Hobbs *v.* Getchell, 8 Me. 187.

An elector who, having voted, waits in a house while the officers are counting the votes was held to be attending to the business of the election, and therefore privileged from arrest, under the constitution of Connecticut. Swift *v.* Chamberlan, 3 Conn. 537.

5. Frisbee *v.* Phelps, 3 Johns. (N. Y.) Cas. 544.

6. Greening *v.* Sheffield, Minor, (Ala.) 276; Hart *v.* Flynn, 8 Dana (Ky.) 190; People *v.* Campbell, 40 N. Y. 133; Squire's Case, 12 Abb. (N. Y.) Pr. 38; Hart *v.* Kennedy, 38 Barb. (N. Y.) 186; Coxson *v.* Doland, 2 Daly (N. Y.) 66; Ray *v.* Hogeboom, 11 Johns. (N. Y.) 433.

7. Holbrook *v.* Henderson, 4 Sandf. (N. Y.) 619; Dupont *v.* Pichon, 4 U. S.

exempt from execution against the person.¹ The privilege conferred upon the representative of foreign governments is attached to the office, and is not personal, and, therefore, cannot be waived.²

6. *Judicial Officers*.—Judges,³ magistrates,⁴ coroners,⁶ jurors,⁶ and attorneys⁷ are all privileged from arrest while engaged in the execution of their public duties, or in attendance upon the court, but no privilege exists in the case of sheriffs.⁸ In the case of

(4 Dall.) 321; bk. 1, L. ed. 851; U. S. v. Benner, 1 Baldw. C. C. 234.

1. Valarino v. Thompson, 7 N. Y. 576; Davis v. Packard (7 Peters), 32 U. S. 276; bk. 8, L. ed. 684. But see U. S. v. Ravara, 2 U. S. (2 Dall.) 297; bk. 1, L. ed. 388; Marshall v. Critico, 9 East 446; Clark v. Critico, 1 Taunt. 106.

In Viveash v. Becker, 3 M. & S. 284, it has held that a resident merchant of London who had been appointed and acted as consul to a foreign prince was not privileged.

Termination of Privilege.—In Marshall v. Critico, 9 East 446, it was held that one who had been appointed consul-general from the porte, but had been dismissed several months before, and another person, resident in London, appointed in his room, was not privileged; although at the time of the arrest he had not received any official notification of his dismissal or the appointment of his successor.

Acts Done by Virtue of Sovereign Power.—A person who has wielded the sovereign or chief-executive power of a State, remains privileged from arrest from claims springing from the manner of his exercise of that power, although he no longer acts in such capacity. Thus, a former president of the Dominican republic, while residing in the city of New York, was arrested in an action against him for injuries sustained at his hands while he was sovereign of San Domingo. It was held that the general rule that all persons within the territorial jurisdiction of a State are amenable to the jurisdiction of the courts did not apply to such a case; that the fact that the defendant had ceased to be such president did not destroy his immunity, and that the order of arrest must be vacated. Hatch v. Baez, 14 N. Y. Supr. Ct. 596.

2. Valarino v. Thompson, 7 N. Y. 576; Davis v. Packard, 32 U. S. (7 Peters) 276; bk. 8, L. ed. 684; Marshall v. Critico, 9 East 446; Barbunt's Case, Talbott's Cases 281.

In Marshall v. Critico, 9 East 446, LORD ELLENBOROUGH said: "This is not a privilege of the person, but of the State he represents; and the defendant having been divested of the character in which he claims that privilege, there is no reason why he should not be subject to process as other persons."

In Davis v. Packard, 32 U. S. (7 Peters) 276; bk. 8, L. ed. 684, the defendant was sued on a recognizance bail entered into by him in a suit of the plaintiffs against another. He joined issue upon the merits of the cause, and a verdict was found and judgment rendered against him. On writ of error he assigned for error, in fact, that he was consul-general of the King of Saxony. This objection had not been raised by plea or otherwise in the court in which he sued. The supreme court held that the failure to plead the privilege did not constitute any waiver.

3. Livingston's Case, 8 Johns. (N. Y.) 271; Geyer v. Irwin, 4 U. S. (4 Dall.) 107; bk. 1, L. ed. 762; Lyell v. Goodwin, 4 McLean C. C. 29.

4. Bubo v. Vyse, 5 Ir. C. L. R. 303; Glendenning v. Browne, 3 Ir. C. L. R. 115.

5. *Ex parte* Deputy Coroner (Middlesex), 6 H. & N. 501; 30 L. J. Ex. 77; 7 Jur., N. S. 103; 3 L. T. 754.

6. McNeil's Cases, 3 Mass. 288; Brookes v. Chesely, 4 Har. & M. (Md.) 295; Edme's Case, 9 Serg. & R. (Pa.) 151.

7. Corey v. Russell, 4 Wend. (N. Y.) 204; *In re* Jewitt, 33 Bev. 559; 33 L. J., ch. 730; 10 Jur., N. S. 814; 10 L. T. 556; Attorney-General v. Leather-sellers' Co., 7 Bev. 157; Attorney-General v. Skinners' Co., 1 Coop. 1; Williams v. Webb, 2 D., N. S. 904; 5 Sco. N. R. 598; 12 L. J., C. P. 89; *In re* Hope, 9 Jur. 846. But see Elam v. Lewis, 19 Ga. 608.

8. Day v. Brett, 6 Johns. (N. Y.) 22; Hill v. Lott, 10 How. (N. Y.) Pr. 46. See also Morgan v. Bower, 1 U. S. (1 Dall.) 295.

attorneys, the exemption is strictly limited to the time necessarily consumed in going to, attending and returning from court.¹

7. *Parties to Suits and Witnesses.*—As the administration of justice would otherwise be very much impeded and delayed, a privilege from arrest while going, attending or returning from court, exists in favor of parties to suits² and wit-

1. *Gibbs v. Loomis*, 10 Johns. (N. Y.) 463; *Corey v. Russell*, 4 Wend. (N. Y.) 204; *Republica v. Fisher*, 1 Yeates (Pa.) 350.

Attorney for Bail.—In *Jones v. Marshall*, 2 C. B., N. S. 615; 26 L. J., C. P. 229, it was held that an attorney who attended on the occasion when his client became bail for a defendant in an action in the lord mayor's court, and who acted there only as the attorney and adviser of such bail, and not as the attorney and adviser for either of the parties to the cause, was not privileged from arrest in going to or returning from the court on such occasions.

Attendance at Taxation of Costs.—An attorney is privileged while in attendance at the master's office taxing costs as well as returning therefrom. *In re Hope*, 9 Jur. 856.

In *In re Jewett*, 33 Bev. 559; 33 L. J., ch 730; 10 Jur., N. S. 814, it was held that a solicitor on his way to attend a summons at the chambers of one of the judges in Sergeants-inn, is privileged from arrest under an attachment.

In *Williams v. Webb*, 2 Dowl., N. S. 904; 5 Sco. N. R. 898, an attorney who was a party to a cause in which a motion was about to be made in the court, left his private residence with the intention of calling at his office for some papers material in the cause and proceeding with them to court. On his way to his office he was arrested and forced to pay a sum of money to procure his discharge. Held, that he was entitled to have the money refunded, being privileged both as an attorney and a party in the cause.

2. *Henegar v. Spangler*, 29 Ga. 217; *Crocker v. Duncan*, 6 Blackf. (Ind.) 278; *Wood v. Neale*, 71 Mass. (5 Gray) 538; *McNeil's Case*, 6 Mass. 245; *People v. Judge of Detroit Superior Court*, 40 Mich. 729; *Hammerskold v. Rose*, 7 Jones (N. Car.) L. 629; *Harris v. Grant-ham*, 1 N. J. L. (Coxe) 142; *Salhinger v. Adler*, 2 Robt. (N. Y.) 704; *Com. v. Ronald*, 4 Call. (Va.) 97; *Richards v. Goodson*, 2 Va. Cas. 381; *McFerran v. Wherry*, 5 Cranch C. C. 677; *Blight v. Fisher*, Pet. C. C. 41;

Ex parte Hurst, 1 Wash. C. C. 186; 4 U. S. (4 Dall.) 387; bk. 1, L. ed. 878; *Chauvin v. Alexander*, 2 B. & S. 47; 31 L. J., Q. B. 79; 8 Jur., N. S. 262; *Selby v. Hills*, 1 D. P. C. 257; 1 M. & S. 253; 8 Bing. 166; *Walpole v. Alexander*, 3 Dougl. 45; *Childerston v. Barrett*, 11 East 439; *Willingham v. Matthews*, 2 Marsh. 57; 6 Taunt. 56; *Pitt v. Coombs*, 3 N. & M. 212; 5 B. & Ad. 1078; *Newland v. Harland*, 8 Scott 70; 3 Jur. 679; *Ex parte King*, 7 Ves. 312; *Ex parte List*, 2 Ves. & B. 373; 2 Rose 24; *Lightfoot v. Cameron*, 3 W. & Bl. 1113.

A slight deviation will not deprive a party returning from a court of justice of his privilege. *Pitt v. Coombs*, 3 N. & M. 212; 5 B. & Ad. 1078. See also *U. S. v. Dobbins*, 1 Pa. L. J. Rep. 5.

To Whom Privilege Extends.—The privilege extends to all persons who have any relation to a cause which calls for their attendance in court, whether compelled by process or not, and whether parties, attorneys, witnesses or bail. And in general the courts will discharge them on motion without issuing out a writ of privilege. *Walpole v. Alexander*, 3 Dougl. 45.

A party who had attended his cause all day in court, and had returned in the evening to dine with his attorney and witnesses at a tavern, has been held to be privileged *causa redeundi*. *Lightfoot v. Cameron*, 2 W. & Bl. 1113; *Newton v. Harland*, 8 Scott 70; 3 Jur. 679. And a plaintiff, who, whilst attending the sittings in expectation of his cause being tried, was waiting at a coffee-house in the vicinity before the day of trial, was also held to be exempt from arrest. *Childerston v. Barrett*, 11 East 349. Though an appellant comes from Ireland to London long before it is necessary to do so, in order to attend the hearing of his case in the house of lords, so that, if then arrested he would not be discharged, yet if no arrest is made until his case is actually in the papers he will be discharged out of custody. *Persse v. Persse*, 5 H. L. Cas. 671.

Party to Reference.—A party attending a reference is privileged in the same

nesses.¹ Bail are privileged from arrest when attending to justify.² There is, however, no privilege from arrest in favor of defendants in criminal proceedings whilst returning after discharge or sentence;³ and it has been held that a person brought into the jurisdiction,

manner as if he were attending a trial in court. *Clark v. Grant*, 2 Wend. (N. Y.) 257; *Vincent v. Watson*, 1 Rich. (S. Car.) 194; *Spence v. Stuart*, 3 East 89; *Webb v. Taylor*, 1 D. & L. 676; 13 L. J., Q. B. 24; *Rishton v. Nisbitt*, 2 M. & Rob. 554.

In Bankruptcy Proceedings.—Any person attending before the commissioners of bankruptcy under a summons from them, is privileged from arrest. *Ex parte King*, 7 Ves. 312; *Ex parte List*, 2 Ves. & B. 373; 2 Rose 24. Thus it has been held that an insolvent debtor is privileged when attending at or returning from the court in which his petition is held, although on the day he was arrested the consideration of the final order was adjourned *sine die*. *Chauvin v. Alexander*, 2 B. & S.; 31 L. J., Q. B. 79; 8 Jur., N. S. 262. See also *Chan v. Chan*, 2 Pa. L. J. 175. And a petitioning creditor, attending for the purpose of watching the progress of the commission, and proposing himself as assignee, is protected going, staying and returning. *Selby v. Hills*, 1 D. P. C. 257; 1 M. & Scott 253; 8 Bing. 166. Similarly, creditors attending to prove their debts have been held to be exempt from arrest. *Wood v. Neale*, 71 Mass. (5 Gray) 538; *Ex parte King*, 7 Ves. 312; *Ex parte List*, 2 Ves. & B. 373; 2 Rose 24.

1. *Page v. Randall*, 6 Cal. 32; *May v. Shumway*, 82 Mass. (16 Gray) 86; *Ballinger v. Elliott*, 72 N. Car. 596; *Schlesinger v. Foxwell*, 1 N. Y. City Ct. 461; *Sanford v. Chase*, 3 Cow. (N. Y.) 381; *Dixon v. Ely*, 4 Edw. (N. Y.) 557; *Bours v. Tuckerman*, 7 Johns. (N. Y.) 538; *Norris v. Beach*, 2 Johns. (N. Y.) 294; *Ex parte Edme*, 9 Serg. & R. (Pa.) 157; *In re Dickenson*, Pa. St. (3. Harr.) 517; *Huntington v. Shultz*, Harp. (S. Car.) 452; *Hurst's Case*, 4 U. S. (4 Dall.) 387; bk. 1, L. ed. 878; *Rex v. Wigley*, 7 Carr. & P. 4; *Walpole v. Alexander*, 3 Dougl. 45; *Webb v. Taylor*, 1 D. & L. 676; 13 L. J., Q. B. 24; 8 Jur. 39; *Rishton v. Nisbitt*, 1 M. & Rob. 347.

Voluntary Attendance.—A witness is privileged, although he should attend voluntarily, without being subpoenaed by either party. *Ballinger v. Elliott*, 72

N. Car. 596; *Dixon v. Ely*, 4 Edw. (N. Y.) 557; *Norris v. Beach*, 7 Johns. (N. Y.) 294; *Montague v. Harrison*, 3 C. B., N. S. 292; 27 L. J., C. P. 24; 4 Jur., N. S. 29. But see *McNeil's Case*, 6 Mass. 264.

Termination of Privilege.—The privilege of a witness from arrest continues after he is discharged from attendance, only for the purpose of enabling him to return home, and if he remains for the purpose of transacting private business he will not be protected. No privilege exists in his favor throughout the term at which the case is marked for trial. *Smythe v. Banks*, 4 U. S. (4 Dall.) 329; bk. 1, L. ed. 854.

Prosecuting Witness.—A person attending a police court as prosecutor or witness, on a charge there pending, is privileged from arrest on civil process, though not attending under compulsion. *Montague v. Harrison*, 3 C. B., N. S. 292; 27 L. J., C. P. 24; 4 Jur., N. S. 29. But in *Ex parte Cobbett*, 7 Ell. & B. 955; 26 L. J., Q. B. 293; 3 Jur., N. S. 665, it was held that a voluntary prosecutor, as common informer, in a proceeding to recover a penalty, was not privileged.

Witnesses at Liberty on Bail.—Where a witness is at liberty upon bail, it is to be presumed that he is in the custody of his bail, and he will not be privileged from arrest by his bail for the purpose of being surrendered; *Ex parte Lyne*, 3 Stark 132; even though he be attending in court at the time of arrest for the purpose of giving evidence. *Horn v. Swinford*, 1 D. & R. N. P. C. 20.

2. *Runner v. Green*, 1 M. & S. 638. See also *People v. Judge of Detroit Sup. Ct.*, 40 Mich. 729.

3. *Lucas v. Albee*, 1 Denio (N. Y.) 666; *Williams v. Bacon*, 10 Wend. (N. Y.) 636; *Shotwell's Case*, 4 N. Y. City Hall Rec. 75; *Lynch's Case*, 1 N. Y. City Hall Rec. 138; *Slade v. Joseph*, 5 Daly (N. Y.) 187; *Moore v. Green*, 73 N. Car. 394; *Com. v. Daniel*, 6 Pa. L. J. 330; *Key v. Jetto*, 1 Pittsb. (Pa.) Rep. 117; *Goodwin v. Larden*, 1 Ad. & E. 378; 3 N. & M. 879; *Barret v. Price*, 1 Dowl. P. C. 725; 2 Dowl. P. C. 504; *Jacob v. Jacob*, 3 Dowl. P. C. 675; *Hare v. Hyde*, 16 Ad. & E. 304.

under a warrant of extradition, from a foreign country may be arrested at the instance of creditors who were not interested in procuring his extradition,¹ or even at the suit of the creditor by whom the extradition was obtained, provided he acted in good faith, and procured the extradition solely for the purpose of punishing the debtor criminally.² But it is a fraud upon a debtor to bring him into another jurisdiction upon any pretext, or by the institution of criminal proceedings of any kind, and if such means be used to effect his arrest, he will be discharged.³

8. *Lunatics and Infants*.—At common law, a person *non compos mentis* is not exempt from arrest by reason of that fact;⁴ nor is the fact that a debtor has become insane since his arrest a sufficient ground for his discharge.⁵ Nor is infancy any ground for exemption from arrest, or for the discharge of a debtor.⁶

9. *Females*.—At common law there existed no privilege or exemption in favor of females whether married or single. Thus, the person of a married woman could be taken in execution upon a joint judgment against herself and her husband, whether her husband was arrested or not,⁷ but according to the later practice, the courts were accustomed to discharge her upon motion if it appeared that she had no separate estate.⁸ Such application was addressed to the discretion of the court,⁹ and would not be granted where it appeared either that the debtor had separate estate,¹⁰ or that the judgment was rendered against the wife alone.¹¹

1. *Adriance v. Lagrave*, 59 N. Y. 110; s. c., 17 Am. Rep. 317; 15 Abb. (N. Y.) Pr., N. S. 272. But see *Com. Hawes*, 13 Bush (Ky.) 697.

2. *Browning v. Abrams*, 51 How. (N. Y.) Pr. 172.

3. *Hill v. Goodrich*, 32 Conn. 588; *Williams v. Bacon*, 10 Wend. (N. Y.) 636; *Slade v. Joseph*, 5 Daly (N. Y.) 187; *Smith v. Meyers*, 1 Thomp. & C. (N. Y.) 665; *Wells v. Gurney*, 1 B. & C. 769. See also *Lucas v. Albee*, 1 Denio (N. Y.) 666.

4. *Ex parte Leighton*, 14 Mass. 207; *Bush v. Pettibone*, 1 N. Y. Code Rep., N. S. 264; s. c., 5 Barb. 273; *Steel v. Alan*, 2 Bos. & P. 362; *Nutt v. Verney*, 4 T. R. 121.

In *Steel v. Alan*, 2 Bos. & P. 362, LORD ELDON said: "I am afraid that there is no prohibition in the law of England against arresting a lunatic. I have often known a court of chancery go out of its jurisdiction in this respect, and order a master to take an account of his debts, considering it to be for the benefit of the lunatic that they should be paid, as he would otherwise be subject to arrest."

5. *Bush v. Pettibone*, 1 N. Y. Code Rep., N. S. 264; s. c., 5 Barb. 273;

Kernot v. Norman, 2 T. R. 390; *Ibbotson v. Lord Galway*, 6 T. R. 133.

A New York statute provides for the discharge of insane persons from prison, and for their commitment to an asylum until cured. See Laws of 1874, ch. 446; *Bush v. Pettibone*, 4 N. Y. 300; 1 N. Y. Code Rep., N. S. 264; 5 Barb. 273.

6. *Lane v. Gower*, 1 Har. & McH. (Md.) 459; *Schuneman v. Paradise*, 46 How. (N. Y.) Pr. 426.

7. *Hall v. White*, 27 Conn. 488; *Com. v. Badlam*, 26 Mass. (9 Pick.) 362; *McKinstry v. Davis*, 3 Cow. (N. Y.) 339; *Pitts v. Weller*, Str. 1167; *Finch v. Duddin*, Str. 1237; *Langstaff v. Rain*, 1 Wils. 149; *Anonymous*, 3 Wils. 125.

8. *Benyon v. Jones*, 15 M. & W. 566; *Edwards v. Martin*, 17 Q. B. 693; 21 L. J., Q. B. 86. See also *Evans v. Chester*, 2 M. & W. 847; *Hovey v. Starr*, 42 Barb. (N. Y.) 435, 440.

In *Connecticut*, the practice of discharging married women on motion has not been recognized. *Hall v. White*, 27 Conn. 488, 495.

9. *Benyon v. Jones*, 15 M. & W. 566; *Chalk v. Deacon*, 6 J. B. Moore 128.

10. *Sparkes v. Bell*, 8 B. & C. 143.

11. *Benyon v. Jones*, 15 M. & W. 566.

Married women were also subject to arrest on *mesne* process, but only if arrested and imprisoned along with their husbands;¹ and even then they were entitled to a discharge upon common bail.² The common law has, however, been altered in the various States, and the right of arrest is now either totally abolished,³ or else

Discharge on Motion.—In *Benyon v. Jones*, 15 M. & W. 566, POLLOCK, C. B., said: "The whole practice of discharging married women, who are in lawful custody on a *ca. sa.*, is of very recent date, and certainly appears to rest on no principle whatever. The writ of *ca. sa.* is the right of the plaintiff as the result of his judgment; and it is admitted that under such a writ the sheriff is bound to take the party against whom the writ is directed, whether she be under coverture or not; he is bound to do so, not only where she is sued with her husband, but also where, as in this case, she has been sued alone as a *feme sole*, and has married during the suit. *Doyley v. White*, Cro. Jac. 323. Since, therefore, the plaintiff has a right to take the *feme covert* in execution, and to detain her in satisfaction of his debt, it would seem, on all principle, to follow that the court cannot interfere to discharge her out of custody, unless there be some special circumstances requiring the court, in the exercise of its equitable jurisdiction, to interfere and prevent the plaintiff from availing himself of his legal right. But certainly, in modern times, the courts, where judgment has been recovered against a husband and wife, and both have been taken in execution, have assumed the right of discharging the wife out of custody, if she has no separate property, on no other ground apparently than that it is hard to detain in custody a defendant who cannot by law acquire property wherewith to satisfy the debt. This, it must be admitted, is making the law rather than administering it. At the same time, the practice has prevailed so long in the case of a judgment against husband and wife, that in such a case we should probably not feel ourselves warranted in deviating from the ordinary course. But in the case of a rightful judgment against a married woman alone, there is no decided case authorizing the court in discharging her, when she has been taken on a *ca. sa.*; and there is certainly a distinction between that case and the case of a judgment against husband and wife. In the

former case, the discharge of the wife deprives the plaintiff of all possible chance of recovering his debt; whereas, in the latter, he has still the husband to whom he can resort. The distinction is not, indeed, at all satisfactory. There seems to be no more principle to warrant the court in depriving a plaintiff of part of his legal right than in depriving him of the whole. Still, it may be said that in one the practical injustice is less than in the other."

1. *Com. v. Badlam*, 26 Mass. (9 Pick.) 362; *McKinstry v. Davis*, 3 Cow. (N. Y.) 339; *Henry v. Cornelius*, 1 Cranch. C. C. 37; *Edwards v. Rourke*, 1 T. R. 486. But see *Hovey v. Starr*, 42 Barb. (N. Y.) 435, 440.

2. *Anonymous*, 3 Wils. 125; *Roberts v. Andrews*, 2 W. Bl. 720. See also *Hovey v. Starr*, 42 Barb. 435.

3. See *Hatheway v. Jones*, 20 Ark. 109; *Strickland v. Bartow*, 27 Mich. 68; *Clark v. Grant*, 38 N. J. L. 257; *Blight v. Meeker*, 7 N. J. L. (2 Hals.) 97; *Desprang v. Davis*, 3 McCord (S. Car.) 16.

Penalty.—If a penalty for an infringement of a liquor law is recoverable by an action of debt, such action is in the nature of a civil action, and not a criminal prosecution; and a *capias* on a judgment therein cannot, under a statute prohibiting the arrest of females, issue against a female defendant in such proceedings. *Strickland v. Bartow*, 27 Mich. 68.

Contempt for Non-payment of Costs.—A statute which enacts that it shall not be lawful to arrest the person of any female by virtue of any *mesne* process or process by execution in any civil action, does not apply to proceedings for contempt, and an attachment for contempt in failing to pay costs in *certiorari* brought unsuccessfully by a female to review the laying out of a highway may be issued. *Clark v. Grant*, 38 N. J. L. 257.

Capias ad Respondendum.—A statute which exempts females from arrest under a *capias ad satisfaciendum* does not exempt them from arrests under a *capias respondendum*. *Desprang v. Davis*, 3 McCord (S. Car.) 16.

IMPRISONMENT FOR DEBT—IMPROPER.

greatly modified and restricted.¹

IMPROPER.—Unfit; not suitable;² wrongful.³

1. **New York Statute.**—By N. Y. Code Civil Proc., § 553, it is enacted that "a woman cannot be arrested, except in a case where the order can be granted only by the court; or where it appears that the action is to recover damages for a wilful injury to person, character, or property." It has been held that this provision protects from arrest a female who has fraudulently contracted a debt; *Wheeler v. Hartwell*, 4 Bosw. (N. Y.) 684; but not a female defendant in an action to recover damages for defrauding the plaintiff of his property. *Muser v. Miller*, 12 Abb. (N. Y.) N. C. 305 n. To bring a female defendant within the exception of the statute, an injury to the right of the owner is sufficient, without any physical injury to the chattel itself. Thus, a warrant of arrest may issue against a female defendant who has been instrumental in inducing the embezzlement of plaintiff's property. *Duncan v. Katen*, 6 Hun (N. Y.) 1; or who has borrowed money by falsely representing that certain worthless bonds delivered to the lender as security for the loan are good, *Eypert v. Bolenius*, 2 Abb. (N. Y.) N. C. 193; or who has aided her co-defendants in taking certain certificates of stock belonging to the plaintiff, and in disposing of the same, and applying the money received to their own use. *Northern Ry. Co. of France v. Carpenter*, 2 Abb. (N. Y.) Pr. 259; 13 How. (N. Y.) Pr. 222. But see *Tracy v. Leland*, 2 Sandf. (N. Y.) 729; 3 N. Y. Code Rep. 47.

It has been held that this provision does not subject a married woman to arrest on *mesne* process; and that, as at common law, she remains exempt from arrest thereon. *Baldwin v. Kimmel*, 16 Abb. (N. Y.) Pr. 353; 1 Robt. 109; *Schaus v. Putscher*, 16 Abb. (N. Y.) Pr. 353 n; 25 How. Pr. 463; Anonymous, 1 Duer (N. Y.) 613; 8 How. Pr. 134. In *Hovey v. Starr*, 42 Barb. (N. Y.) 435, 440, it was pointed out that, as under the New York code, execution against the person could only issue after the return of execution against the goods unsatisfied, and the return constituted evidence of no property, a married woman was practically exempt from imprisonment as she was en-

titled to be discharged on motion as soon as arrested, if she had no property.

Husband's Liability for Wife's Tort.

—In *Solomon v. Waas*, 2 Hilt. (N. Y.) 179, it was held that the provisions of the Code of Civil Procedure have not altered the husband's liability to arrest for his wife's tort. But see Anonymous, 1 Duer (N. Y.) 613; *Tracy v. Leland*, 2 Sandf. (N. Y.) 629.

2. In an act making municipalities liable for damages caused by mobs, but denying the benefits of the act to those through whose own illegal or improper conduct the damage was caused, "improper" means "that which is 'not suitable,' 'unfit,' 'not suited to the character, time and place.'" "That improper conduct was such as a man of ordinary and reasonable care and prudence under the circumstances would not have been guilty of," is a correct charge to the jury. *Chadbourn v. New Castle*, 48 N. H. 196; *Palmer v. Concord*, 48 N. H. 211; s. c., 97 Am. Dec. 601. And see *Co. of Allegheny v. Gibson*, 90 Pa. St. 415.

3. The *Warkworth*, 53 L. J., P. D. 65.

In an attachment act requiring a bond for costs and the damages which the defendant might sustain in consequence of the writ's being sued out *improperly*, this word "has a broader signification than a mere irregularity, and it is insufficient to allege as a breach of the condition, although in the express words of the bond, that it was improperly issued. . . . It is only improperly sued out when the plaintiff has no meritorious cause of action, of the class of actions in which the law authorizes a resort to the remedy against the defendant, or having such a cause of action the ground alleged in the affidavit for its issue is untrue, or not one of the grounds enumerated which must exist before it can be obtained." *Steen v. Ross*, 22 Fla. 480.

Improper Navigation, in policies of mutual insurance against loss or damage to goods by reason thereof, is "anything improperly done with the ship or part of the ship in the course of the voyage." Where, the bilge cock having been opened for the purpose of getting water out of the ship, and

IMPROVE.--To employ advantageously; to enhance in value; to make better.¹ Specifically, of land, to cultivate.² To occupy.³

(For Note 3 see page 242.)

having been negligently left open, the sea cock was opened to get water to work the ship and the cargo was damaged, the injury was decided to have been occasioned by improper navigation. *Good v. London S. S. Owners' Ass'n*, L. R., 6 C. P. 563. The expression would include bad storage, which affects the safe sailing of the ship. Per MONTAGUE SMITH, J., *Ibid.* It extends also to anything negligently done, or omitted to be done, before the navigation begins, which has an effect upon navigation of the ship. It includes "every case where something is omitted to be done, which ought to be done before the departure of the ship in order to carry the cargo safely from the port of departure to the port of arrival, and where that omission leads to the cargo not being safely and properly so carried." *FRY, L. J.* "They do not refer simply to improper navigation with regard to the ship herself, but also to improper navigation with regard to the safety of the goods in the ship." *LORD ESHER, M. R.* Damage occurring because the port through which the ship was loaded was insecurely fastened is within the term. *Carmichael v. Liverpool S. S. O. M. I. Ass'n*, 19 Q. B. Div. 242; s. c., 56 L. J., Q. B. 208, 428, 57 L. T., R. N. S. 550, editorially criticised in 83 L. S. 57.

In construing the same phrase, as used in an act limiting the liability of the owner of a ship for damages to another ship, occurring by reason of the improper navigation of the former, *BRETT, M. R.*, said: "'Improper' really means 'wrongful'—that is, otherwise than by inevitable accident. I will read to what in my judgment the act implies: All damage wrongfully done by the ship to another ship, while the damaging ship is being navigated, where the wrongful act is due to the negligence of any person, for whose negligence the owner is responsible, unless it occurred with the privity of the owner." Inability to steer because of a screw improperly inserted in the steering gear is within the act. *The Warkworth*, 53 L. J., P. D. 65.

Improper removal, with intent to make the county chargeable, in an act relating, means "without legal authority." *Foster v. Cronkhite*, 35 N. Y. 145.

1. It having been contended in argument that the power to improve, of a corporation formed "to buy, *improve*, lease, sell, and otherwise dispose of real estate," was restricted to things performed on the land itself, it was decided that, though this might be the ordinary meaning, yet *improve* "also has a larger and wider signification, and amongst other definitions, Worcester defines the word 'improve' to mean 'to make good use of; to employ advantageously; to increase, augment, or enhance, as to that which is evil; while Webster defines it 'to make better; to advance in value; to use or employ to good purpose; to make productive; to turn to profitable account; to use for advantage'." I think the term

'improve' is here employed in its more liberal sense, and includes the performance of any act, whether on or off the land, the direct and proximate tendency of which is to enhance its value in the market." The appropriation of funds to a railroad in the vicinity is within the powers of the corporation. *Vandall v. S. S. F. Dock Co.*, 40 Cal. 83. In considering a trust to *improve* and manage real estate, Senator Macon in *Coster v. Lorillard*, 14 Wend. (N. Y.) 359, said: "I know not what the trustee could not do with this estate, under the head of improvement; anything, everything which will tend to enhance its value." And see *Trustees of Greene Foundation v. Boston*, 12 Cush. (Mass.) 57.

Where, under a statute providing that patents might be granted for new and original designs, a patent was granted for a new and *improved* design, no prior design being mentioned, the term "improved" was construed to mean new and distinctive, and improved as compared with others; and in connection with new, to mean original. *Wood v. Dolby*, 7 Fed. Rep. 475.

A power to improve the course of roads includes the power to lower and raise roads, to fill up hollows and level hills. *Boulton v. Crowther*, 2 B. & C. 703.

2. In a statute authorizing the laying out of roads through improved or cultivated land, these words are synonymous. They "are to be taken in the popular sense according to the general under-

IMPROVEMENTS.—See DOWER; DRAINS AND SEWERS; EJECTMENT; FIXTURES; LANDLORD AND TENANT; MORTGAGES; PARTITION.

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standing of the community, when distinguishing wild land, or land in a state of nature from that which has been cultivated and improved." The term improved land here does not include land with buildings thereon. *Clark v. Phelps*, 4 Cow. (N. Y.) 190.

"Improved" was held to be synonymous with "converted into arable ground or meadow," in *Ross v. Smith*, 1 B. & Ad. 911.

3. Land improved by one is land occupied, held by him, as this expression is used in descriptions in deeds. This use is not a technical one. Where a description read, "thence running southerly by land improved by A to road," and a straight line would have included part of this land, but a line running west and then south would not, the latter was adopted. *Bond v. Fay*, 8 Allen (Mass.) 212.

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Definition.—In law, *improvements* is a term meaning changes in the condition of property by which its value is increased. It is usually employed in the plural form and with reference to real property. Illustrations may be found in the erection of buildings upon land previously vacant, additions to buildings already upon the land, the construction of sewers, the grading and paving of streets, the removal of obstructions to streams, the draining of swamps, the clearing of woodland, and many other changes by which the realty affected is made better.¹

I. BETTERMENTS OF PRIVATE REAL PROPERTY—1. By Occupants Under Color of Title.—(1) *General Rules.*—The rules governing the subject of improvements, and determining to whom their value should be accredited in cases of ejectment, are not precisely alike in all the States. Statutory modifications of the common law produce many variances in the application of the rules. Everywhere, however, great favor is given to the constructor of improvements who acts in good faith and enhances the value of the land which they modify, or to which they are attached.

1. Definition.—"Improvement is an amelioration in the condition of real or personal property, effected by the expenditure of labor or money, for the purpose of rendering it useful for other purposes than those for which it was originally used, or more useful for the same purposes." Bouvier's Law Dict.

Improvements—work done or things built or placed upon land, rendering it more fit for use, and more capable of producing income. Abbott's Law Dict.

See *French v. Mayor* etc. of New York, 16 How. Pr. (N. Y.) 220; *Spencer v. Tobey*, 22 Barb. (N. Y.) 260;

Schenley's Appeal, 70 Pa. St. 98; *Schmidt v. Armstrong*, 72 Pa. St. 355; *Frederick v. Shane*, 32 Iowa 254.

"The word 'improvement,' as used in a lease, embraces every addition, alteration, erection or annexation made by the lessee, during the term for his use. It is more comprehensive than the word 'fixtures,' which is necessarily embraced in it. *French v. Mayor* etc., 18 How. Pr. (N. Y.) 220; 2 Man. & Gr. (Eng.) 727." *Taylor's Landlord and Tenant*, § 524, n. 1.

It is not the value of the improvements themselves, nor their original cost, nor the purpose of the person who made them, but it is the increased value of the land, by reason of them, which the court is to consider when awarding compensation therefor.¹

Good faith entitles the possessor of land, which he has improved, to great favor. Though he may be ejected from the premises by one holding a superior title, yet he ought not to lose what he has expended in making the property permanently better and more valuable, if the increased value be equal to the outlay.²

Statutory provisions giving compensation to such honest holders and improvers of land, who are ejected therefrom, have been held constitutional.³ If notified of the defect of his title, the possessor should still go on to erect buildings or otherwise improve the premises, he could not justly complain at the loss of his expenditure; but, on the other hand, if neither notified nor put upon inquiry, he has been held entitled to recover; and he has even been protected by statute so far that, for improvements made after knowledge that his title was defective, he could recover, in case he had previously acquired the property believing the title to be good.⁴

1. Enhanced Value.—The rightful owner recovering land of a possessor in good faith under a defective title, is bound to pay only for the value of such improvements as made the property more valuable. Against this, he is entitled to credit from the defendant for the latter's use of the land. *Breit v. Yeaton*, 101 Ill. 242. Only what has given the land additional value can be the proper subject of claim. What has been expended experimentally, without increasing the worth of the land, constitutes no ground for an allowance. *Noble v. Biddle*, 81 Pa. St. 430.

Testimony to the value of the improvements, and not to the increase of the value of the land by reason of the improvements, should be disregarded. *Fisher v. Edington*, 85 Tenn. 23. The allowance for improvements should be measured by the benefit to the land which the true owner received. *McMurray v. Day*, 70 Iowa 671; *Thomas v. Quarles*, 64 Tex. 491.

Defence—Set-off.—The value of improvements cannot be set off against rent by one defending against an action of ejectment and pleading adverse possession for three years under color of title. *Dobbs v. Haviston*, 80 Ala. 594.

On failure of title, a *bona fide* purchaser, mistaking the law, but knowing the facts, cannot claim compensation for improvements made by him while in possession. *Holmes v. Mc-*

Gee, 64 Miss. 129. If entitled to allowance for his improvements, because of his possession in good faith, he is not accountable for the value of the use and occupation accruing from his improvements. *Bitner v. N. Y. & Texas Land Co.*, 67 Tex. 341.

2. Where the possessor had rebuilt burned buildings more costly than the old ones, it was *held*, in an action of ejectment in which the plaintiff recovered, that the improvements should be considered in the defendant's favor in assessing the damages against him. He had rebuilt in the belief that he was rightly entitled to the possession. *Hodgkins v. Price*, 141 Mass. 162.

3. The constitutionality of statutes giving the value of improvements to possessors *bona fide*, ejected by those holding superior titles is affirmed. *Barker v. Owen*, 93 N. Car. 198; *Fee v. Cowdry*, 45 Ark. 410; s. c., 55 Am. Rep. 560.

4. If the defendant in ejectment has neither actual nor constructive notice of defect in his title, and the record did not put him on inquiry respecting it, he may claim the value of his improvements. *Justice v. Baxter*, 93 N. Car. 405. He may recover for improvements made after learning of the defect as well as for those made before, if he believe the title good when he bought the property, under a statute of South Carolina. *Templeton v. Lowry*, 22 S. Car. 389.

If good faith does not always save the ejected tenant from loss of his improvements, it is yet always necessary to his recovery of their value.

(2) *Statutory Compensation*.—In some of the States the honest holder, who makes improvements under color of title, is protected by legislative enactment, so that he may recover compensation when ejected. Even though he has bought at a tax sale, and has acquired no valid title, he is protected by such a statute. He must be in actual possession, and believe himself to hold under a good title, to enable himself to enjoy the benefit of such legislation.¹

The statutes, however, differ with regard to the effect of notice, and the time within which improvements must have been made, to entitle the possessor to recover on eviction.

(3) *Notice*.—It has been held that even the registry of the superior title is not such notice to the person in possession under an inferior one, as to cut him off from his claim for improvements when ejected.² He must prove his own want of knowledge.³

1. Statutory Right.—The Minnesota statute, which entitles an ejected possessor who held under color of title in fee simple to compensation for improvements, means color of title in the claimant-possessor or in one from whom he claims to have derived his right. *Hall v. Torrens*, 32 Minn. 527. See *Wheeler v. Merriman*, 30 Minn. 372.

But one disseised cannot recover the value of crops sowed and removed by disseisor during his occupancy, though the statute gives the value of real property, excluding improvements, for six years or less, as damages against the wrongful holder. Minn. Gen. Stat., ch. 75, § 13; *Nash v. Sullivan*, 32 Minn. 189.

Even a possessor under a void tax deed may claim improvements, under the Wisconsin statute which gives improvements to a *bona fide* holder under color of title. *Zwiefusch v. Watkins*, 61 Wis. 615.

The "occupying-claimant act" does not give a defendant a right to the value of his improvements unless he was in full and actual possession when he made them. *Coonrad v. Myers*, 31 Kan. 30.

2. Registry Notice.—A plaintiff in equity to recover land improved by the possessor in good faith and without actual knowledge of the plaintiff's registered title, must compensate the latter for them if he takes the land. *Howard v. Massengale*, 13 Lea. (Tenn.) 577.

The registry record was held, in *Missouri*, to be not sufficient notice of adverse title to preclude a tenant's recovery for improvements. *Hill v. Tissier*, 15 Mo. App. 299. Compare *Stump v. Hornbeck*, 15 Mo. App. 367.

3. The defendant must show that he occupied without knowledge that the land was part of the public domain, in order to recover for improvements made on school lands held by him; and he must show that he had no means of learning that fact. *Thompson v. Comstock*, 59 Tex. 318.

In Vermont, where, by statute, a defendant in ejectment is allowed for improvements on land purchased by him, he "supposing the title to be good in fee," a purchaser who bought with knowledge of incumbrance but with the belief that the vendor would remove it, is not entitled to the benefit of the act. *Vt. Rev. Laws*, § 1260; *Jones v. Steam*.

An heir who had occupied land for several years and improved it, without objection on the part of his co-heirs, may be allowed compensation for his improvements, when, at their suit, he is deprived of his individual possession. *Litton v. Litton*, 36 La. An. 348. A divisional share of betterments may be shown under such circumstances. *Chandler v. Shaw*, 77 Me. 84.

Parol Transfer.—Good faith cannot be successfully asserted by one who accepted a parol transfer of land, so as to entitle him to the value of his improvements when ejected. The Mississippi

But when suit has been brought against him on the superior title, he cannot then go on and make improvements and plead ignorance, in order to recover their value. In Connecticut, however, under construction of statute, it has been held that even after notice of an adverse claim, he may still improve and be compensated, believing in his own title.¹ Some of the States limit, by statute, the time within which improvements must have been made, in order to enable an ejected possessor to recover compensation. They also provide the method of his procedure. In some instances full value is allowed; in others, only to the extent of the rent, when the land is held merely by sufferance.²

Code of 1880, § 2512, gives the right to claim improvements to a possessor "under some deed or contract of purchase made or acquired in good faith." *Citizens' Bank v. Costanera*, 62 Miss. 825.

Adverse Possession.—Three years' adverse possession by the defendant, in good faith, during which time he made permanent improvements, entitles him to their full value when he is ejected. The plaintiff may recover rent for the time. *Turnipseed v. Fitzpatrick*, 75 Ala. 297.

Bill Filed—Notice.—Improvements made after a bill filed in equity for the recovery of the land cannot be allowed the defendant in ejectment, though taxes paid thereafter may be recovered. *Gordon v. Tweedy*, 74 Ala. 232.

The character of improvements should be specifically shown—proof of their value is not enough. *Clewis v. Hartman*, 71 Ga. 810.

1. Even though made after notice of the adverse claim under which the defendant was ejected, his improvements may be allowed, if made in good faith and belief in his title—a quit claim deed—under a Connecticut statute. *Ct. Gen. Stat. Rev.*, 1875, p. 362; *Griswold v. Bragg*, 19 Blatchf. C. C. 94.

Though the existence of a paramount title might have been learned by due diligence a purchaser under another title, in good faith, was allowed improvements under the construction given to the Miss. statute governing. *Canal Bank v. Hudson*, 111 U. S. 66.

2. One holding land in good faith, under an adverse title, may be allowed the full value of the improvements he has made upon it, though the rule is that the value of permanent improvements made by a mere tenant by sufferance can be allowed only to the extent of the

rent due for the use of the land. *Dean v. Feely*, 69 Ga. 804.

A defendant may recover the value of permanent improvements on the suggestion of three years' adverse possession, if he is an occupant claiming title. A mere trespasser cannot. *New Orleans etc. R. R. Co. v. Jones*, 68 Ala. 48, in exposition of Ala. Code, §§ 2951, 2952.

A possessor who improves real estate in good faith may recover therefor if the rightful owner decides to retain the improvements. Pending the owner's decision, the possessor is the owner of the improvements and owes no rent for them. Lands which are the separate property of a married woman are subject to this rule. *Kibbe v. Campbell*, 34 La. An. 1163.

Improvements made owing to the honest mistaking of the boundary line may be allowed the defendant who made them, if the plaintiff stood by and knowingly permitted his own land to be thus bettered by another. *Gatlin v. Organ*, 57 Tex. 11. But a mistake caused by the defendant's "own, inexcusable negligence," will not avail him in his claim for improvements. *Foley v. Kirk*, 33 N. J. Eq. 170.

Procedure—Mich.—When claims for improvements are filed in ejectment suits, a copy must be served on the plaintiff ten days before the first day of the term at which the cause is to be tried. "The claim must be made before the first term of court after joining issue, and if postponed until a new trial, evidence under such a claim is inadmissible." *Van Den Brooks v. Correon*, 48 Mich. 283.

When the defendant is entitled to the value of the improvements which he claims, and is allowed it, judgment for the plaintiff, in the ordinary form, sufficiently protects the defendant, if

Whether a purchaser, who comes into possession and improves the property he has bought, is entitled to compensation for his outlay, when it afterwards turns out that he obtained no good title and must surrender the property, depends upon notice. If he improved without notice, either actual or constructive, he may recover compensation, as a general rule. If he had notice, of either character, the rule is the other way.¹

Absence of notice must be accompanied with good faith on the part of the purchaser.² One in possession, who has not yet bought, but proposes to buy the premises occupied, and who has improved them by direction of the owner, acquires a lien on them to the amount expended.³ No lien is created for purchase money paid to a husband who wrongfully sought to convey his wife's land; but the honest purchaser is entitled to reimbursement for improvements put upon it by him while in possession.⁴ It would

the plaintiff's failure to pay the assessment is equivalent to an abandonment. *Guild v. Kidd*, 48 Mich. 307.

The statute of Michigan, allowing for improvements on a recovery in ejectment, can apply only to cases where the plaintiff establishes a title in fee simple. *Burkle v. Ingham Co. Circuit Judge*, 42 Mich. 518.

After demurrer to a cross petition had been sustained, the cross petition was treated as properly in the case, so as to award the defendant compensation for his improvements to the real estate in controversy. *Preston v. Brown*, 35 Ohio St. 18.

1. No Notice.—"When a purchaser for a valuable consideration, without notice of any infirmity in his title, has added to the permanent value of the estate by his improvements, he is entitled to full remuneration for such added value;" and he has a lien upon the estate which the owner must discharge before being restored to his original rights. *Hatcher v. Briggs*, 6 Or. 31.

Improvements made may be set off against *mesne* profits by the defendant in ejectment. *Ege v. Kille*, 84 Pa. St. 333.

Constructive Notice.—A purchaser who improves the land purchased by him, after constructive notice, has no claim for compensation therefor when his title proves illegal. *Effinger v. Hall*, 81 Va. 94. If he has notice of the equities of the real owner, he is not entitled to payment for improvements made without the owner's consent. This is *held*, where there has been no concealment of title by the owner, and no delay in the assertion of his rights.

Witt v. Druids' Grand Grove, 55 Wis. 376. The holders of a mechanic's lien, who caused a sale thereunder and purchased the real estate on which the lien rested, and then made improvements on the land, had no claim for the value of the improvements when afterwards evicted by the foreclosure of a mortgage that was superior to the lien. *Powell v. Rogers*, 11 Ill. App. 98.

2. Good faith in the possessor who is ejected is essential to his right to compensation for his improvements. *Shaw v. Hill*, 46 Ark. 333.

3. Lien.—Where the plaintiff gave possession to the defendant, and authorized him to make improvements, while the latter was contemplating the purchase of the property, the value of the improvements was *held* a lien on the land in favor of the defendant when ejected at the suit of the owner. *Hannibal etc. R. R. v. Shortridge*, 86 Mo. 662.

Mortgage Sale.—A *bona-fide* purchaser, who improved the property he had bought at the foreclosure of a mortgage belonging to an estate which had not been inventoried nor assigned to the administrator, was allowed the value of his improvements though he had not acquired title or even color of title. *Miller v. Clark*, 56 Mich. 337.

4. Bona-fide Purchaser.—If a husband assumes to convey his wife's land—she not joining in the deed—the purchaser may have the value of the improvements erected by him in good faith, but not a lien for the purchase money paid to the husband. *Garth v. Fort*, 15 Lea (Tenn.) 683.

have been otherwise, relative to compensation, had the purchaser induced the sale.¹

A purchaser of real property, at a judicial sale which did not affect the title of certain joint owners, sold it. He gave deeds to different persons—each buying a part—and they improved the property by building thereon. The rights of the joint owners above mentioned were held to have been neither increased nor diminished by the sales. They could proceed to a partition of the property as though the sales had not occurred.

If their shares (not being barred by the sales) should be assigned from the improved property, and the value of the improvements, etc., ascertained by judicial inquiry, a heavy expense would be incurred; but if these shares should be satisfied from the unimproved portion of the original land tract, the cost and labor would be avoided. So reasoned the court.

To adjust any inequalities in the partition, the value of the land must be estimated without regard to the improvements. Every portion should be required to contribute in proportion to its value.²

1. A guardian, under a void order of court, sold his ward's land at an inadequate price. Eight years after, the ward, being of age, attacked the transfer. The purchaser, who had been instrumental in procuring the void order, had improved the land; but he was *held* not entitled to allowance therefor. His use of the property compensated him for his outlay. *Grider v. Driver*, 46 Ark. 109.

Oral Purchase.—One who built a house on land which he possessed under an oral contract of sale, was allowed to maintain replevin for it, when the vendor had repudiated the contract and taken possession of the premises. *Waters v. Reuber*, 16 Neb. 99; s. c., 49 Am. Rep. 710. But it has been *held* that if the purchase has not been completed, and the improvements are not betterments, buildings erected on the land of another by one occupying under a contract to purchase, belong to the owner of the soil if the sale is not completed. *Tyler v. Fickett*, 75 Me. 211. But if the vendee is not at fault, he is entitled to the value of the improvements which enhance the worth of the real estate, upon a rescission of the contract. This holds good, regardless of the cost of the betterments or the amount of the rents. *Smoot v. Smoot*, 12 Lea (Tenn.) 274. If, however, the vendor, failing to perform a parol agreement to sell, makes no use of the improvements made by the vendee while

in possession under such agreement, and consents that the structures may be removed, it has been *held* that the vendee can recover nothing for his outlay. *McCracken v. McCracken*, 88 N. Car. 272.

Void Judicial Sale.—A title under a judicial sale, void for want of jurisdiction in the court, but the proceedings regular on their face and unquestioned at the time, enabled the purchaser to recover for necessary repairs made while in possession of the land. *French v. Grenet*, 57 Tex. 273. And a purchaser, in good faith, from a married woman, was *held* entitled to the value of his improvements, though the deed was void. *Hawkins v. Brown*, 80 Ky. 186.

2. *Gittings v. Worthington*, 67 Md. 139.

Improvements Made Under Mistake of Law.—One who had made improvements under a mistaken notion of the law was not allowed for them upon his being ejected. The law provides (in Mississippi, where the case occurred) that no defendant in ejectment shall be entitled to compensation for improvements, unless he claim the premises under some deed or contract of purchase made or acquired in good faith. The defendant, in the case decided, had honestly mistaken the law, but was *held* "not such a *bona fide* purchaser as to entitle him to compensation for such improvements." The purchaser had bought at a tax sale. "He thought his

The value of improvements to the amount to which the realty has been bettered (against which rent may be set off), is allowed by the code of Virginia; but a verdict allowing it in a sum which the evidence does not warrant, will be set aside on appeal.¹

(4) *Offset*.—The rule is well established that the honest occupant, holding under color of title, and without notice of a better one, may have the cost of betterments made by him set off against rents, upon his eviction.²

tax-title was good. . . In this he was mistaken. . . He knew the facts and mistook the law," said the court. *Holmes v. McGee*, 64 Miss. 129. See *Cole v. Johnson*, 53 Miss. 94, distinguished in this case.

Stock Corporation Notice.—A partner sold his interest to his copartner, who sold a part of it to another, who then conveyed it to a corporation. The corporation had no notice of the first vendor's lien for unpaid purchase money, but bought in good faith, agreed to pay in stock, and took possession. The first vendor enforced his lien. The corporation, having improved the property (though it had not paid for it by the delivery of capital stock as agreed, nor had received any deed of sale), was allowed compensation for the improvements. It was said that it must answer for so much of the stock as would correspond to the extent of the lien. *Ware v. Curry*, 67 Ala. 274.

Forfeiture.—If a contractor to purchase land has possession of it, and is to make the purchase within a designated time, meanwhile to make payments; and if, when some of the instalments are overdue, the owner and vendor waives his right to a forfeiture, and the vendee, under such circumstances, makes permanent improvements, enhancing the value of the land, the vendor cannot enforce a forfeiture for non-compliance with the contract to purchase, regardless of his waiver and subsequent agreement. *Braley v. Langley*, 28 Kan. 804.

Purchaser.—Color of title, created under Iowa Code, § 1983, by paying taxes, etc., will justify a recovery for permanent improvements made under the cognizance of the owner of the land. *Finnegan v. Campbell* (Iowa), 37 N. W. 127.

The successful litigant must pay for betterments made in good faith by the other party, in Kentucky, before being accorded possession of the land on which they have been erected. A jury

may estimate the value; but, when the defendant has failed to pray for a jury for this purpose, at the proper time, he did not thereby lose his right to compensation. *Cownts v. Kitchen* (Ky.), 7 S. W. 538.

In an action to recover land of one who purchased from the grandmother and mother of the plaintiffs, each of whom had a life estate in the property, judgment should not be rendered for the back rents for the period prior to the termination of the life estates. *McIlvain v. Porter* (Ky.), 7 S. W. Rep. 309.

Betterments should not be estimated, and their value allowed to a purchaser on his ejectionment, unless it is shown that he had bought and held in good faith, or that the owner knew of the improvements, etc. *Hall v. Hall* (W. Va.), 5 S. E. 260.

1. A defendant had the use of property for forty-eight years, and then obtained a verdict of nearly a thousand dollars for the excess of the value of the improvements over the rent, when a witness testified that five years' rent was worth the improvements, and the other evidence was indefinite. The verdict was set aside. *Hollingsworth v. Funkhouser* (Va.), 8 S. E. 592.

Bona-fide Possessor, in Pa.—In a suit for land, the defendant, cast in the action, may be allowed for the improvements he has made in good faith, under color of title, by way of set-off against the plaintiff's claim for damages for the detention of the land. This seems the only way in which he can recover in such action; and he can recover, for permanent improvements made by him, no greater sum than the amount awarded the plaintiff in damages and *mesne* profits. *Putnam v. Tyler* (Pa.), 12 Atl. Rep. 43; *Scates v. Same* (Pa.), 12 Atl. Rep. 51.

2. An honest occupant, believing himself the owner of the property which he improves, and having color of title, has frequently been allowed to recover

This rule has sometimes been made statutory, and courts have held it constitutional when so made; for it is formed in justice and equity; and, however the common law may view the relations between the rightful owner and the evicted constructor of the improvements, there is basis in the justice of the case to sustain such statutes as consonant with constitutional principles.¹

Even where the improving occupant has had constructive notice by the registry of the deed of the rightful claimant, he has been allowed for his improvements under statute.²

When notified by the institution of a suit, the occupant may be maintained in the possession of the premises while the suit and his claim for remuneration for betterments are pending; but should he improve further meanwhile, he would not be treated as one doing so in good faith as believing himself to hold good title.³

When the adverse claimant has succeeded in his suit, and is to be awarded the rents and profits, he should not have those which have grown entirely from betterments made by the occupant.⁴ By virtue of a statute, an occupant was allowed to tender to the rightful owner the price of the land without the improvements,

the value of the betterments made by him, as offsets for rents and profits when ejected by the rightful owner. *Bacon v. Callender*, 6 Mass. 303; *Jones v. Carter*, 12 Mass. 314; *Newhall v. Sadler*, 17 Mass. 350; *Love v. Shortzer*, 31 Cal. 487; *Stark v. Starr*, 1 Sawy. (U. S.) 15; *Griswold v. Bragg*, 6 Fed. Rep. 342; *Wells v. Riley*, 2 Dill. (U. S.) (Ia.) 551; *Blodgett v. Hitt*, 29 Wis. 169; *Dothage v. Stewart*, 35 Mo. 251; *Fenwick v. Gill*, 38 Mo. 510; *Parsons v. Moses*, 16 Ia. 440; *Wood v. Wood*, 83 N. Y. 575; *Jackson v. Loomis*, 4 Cow. (N. Y.) 168; *Rector v. Gaines*, 19 Ark. 70; *Green v. Biddle*, 8 Wheat. (U. S.) 1.

1. The constitutionality of statutes allowing compensation for improvements under such circumstances has frequently been held. *Fee v. Cowdry*, 45 Ark. 413; *Fowler v. Halbert*, 4 Bibb (Ky.) 54; *Ross v. Irving*, 14 Ill. 171; *Griswold v. Bragg*, 48 Ct. 577; *Albee v. May*, 2 Paine (U. S.) 74; *Plaquette v. Pickness*, 19 Wis. 219; *Huebschman v. McHenry*, 29 Wis. 655; *Childs v. Shower*, 18 Ia. 261; *Whitney v. Richardson*, 31 Vt. 306. Compare *Childs v. Shower*, 18 Ia. 261; *Society etc. v. Wheeler*, 2 Gall. (U. S.) 105.

2. **Good Faith Rights of Occupant.**—An occupant, who has purchased land in good faith, may recover for improvements, though an adverse claimant has

registered a deed and thus given the occupant constructive notice. This applies to purchasers who believe they hold title in fee, and when the improvement was made under the "betterment act" of Arkansas. *Beard v. Dansby*, 48 Ark. 183; s. c., 2 S. W. 701; *Fee v. Cowdry*, 45 Ark. 410; *Shaw v. Hill*, 46 Ark. 333.

But the plea of adverse possession for three years during which permanent improvements were erected, was held inconsistent with the plea of possession in good faith and under color of title by which liability for rents was limited to a year prior to suit. *Hairston v. Dobbs*, 80 Ala. 589; s. c., 2 So. 147; *Dobbs v. Hairston*, 80 Ala. 594; *McQueen v. Lampley*, 74 Ala. 408.

3. An occupant in possession, claiming improvements made in good faith, may continue in possession during the pendencies of the suit to recover his claim. He cannot, however, go on making improvements at the ultimate expense of the owner. He may be enjoined from doing so. *Webster City and C. C. Ry. Co. v. Newson*, 70 Ia. 355; s. c., 30 N. W. 738; *McKim v. Moody*, 1 Rand. (Va.) 58; *Morris v. Terrill*, 2 Rand. (Va.) 6.

4. It was held that an occupant should not be charged for such rents and profits as accrued by sole reason of improvements made by him. *Adkins v. Hudson*, 19 Ind. 392.

and, upon refusal, he could retain possession till remunerated for them.¹

(5) *Strict Construction*.—A statute giving the occupant the right of retaining possession till compensated, should be construed strictly.² It would be manifestly unjust to allow this right where the occupant had knowledge of the adverse title when he made the improvements, or had full means of knowledge which he neglected to use, or if he was wanting in good faith in any respect.³ If he has no color of title, it has been held that he has not even the right to have his claim passed upon by a jury, so far as the question of the value of his improvements is concerned; for, having no ground to sustain his claim to reimbursement, what matters it whether the value be great or small?⁴

His color of title must have existed before the making of the improvements he claims, since his obtaining of it afterwards would have no retroactive effect to sustain his claim.⁵ He must show an equitable right.⁶

(6) *Equity*.—When doing equity, as well as claiming it, the

1. He may offer to buy the land at its value *minus* the improvements, then hold possession until paid for his outlay, should the owner refuse to sell. This under statute. *Armstrong v. Jackson*, 1 Blackf. (Ind.) 374.

2. Though a *bona-fide* possessor, after judgment of eviction, may hold on till he shall have been compensated for the value of his improvements above the rental value, yet the statute allowing this must be strictly construed, and there can be no judgment awarding damages against the rightful owner. *Van Valkenberg v. Ruby* (Tex.), 3 S. W. 746; *Hearn v. Camp*, 18 Tex. 546.

The statute held constitutional. *Scott v. Mather*, 14 Tex. 235; *Saunders v. Wilson*, 19 Tex. 194, with respect to a statute now virtually embodied in the Revised Statutes of Texas. See *McCoy v. Grandy*, 3 Ohio St. 463; *Childs v. Shower*, 18 Ia. 261; *Billings v. Hall*, 7 Cal. 1.

3. "It is only the *bona-fide* occupant who is entitled to compensation for improvements; and it would be plainly inequitable to allow it to one who acted with knowledge of the rights of the plaintiff. *Green v. Biddle*, 8 Wheat. (U. S.) 1; *Jackson v. Loomis*, 4 Cow. (N. Y.) 168 [s. c., 15 Am. Dec. 349, note]; *White v. Moses*, 21 Cal. 34; *Patrick v. Marshall*, 2 Bibb (Ky.) 40; *McKim v. Moody*, 1 Rand. (Va.) 58. Where the occupant had full means of obtaining knowledge of the plaintiff's title, he will not be entitled to compen-

sation for his improvements. *Barlow v. Bell*, 1 A. K. Marsh. (Ky.) 246; *Harrison v. Fleming*, 7 B. Mon. (Ky.) 537; *Dawson v. Grow* (W. Va.), 1 S. E. 564, by SNYDER, J.; *Wood v. Krebs*, 33 Gratt. (Va.) 685.

4. One who has no color of title is not entitled to have the question of the value of his improvements submitted to the jury, under the Iowa Code, § 1976. *Welles v. Newsom* (Ia.), 40 N. W. 105.

5. An occupant, to recover for improvements on land, must have held it under color of title, according to the statute. *McLellan v. Omodt* (Minn.), 33 N. W. 326. Acquisition of color of title, after the making of the improvements, would not avail him. *Carpentier v. Small*, 35 Cal. 346. His apparent title must be such as to satisfy him of his right to possess and improve. *O'Mulcahy v. Florer*, 27 Minn. 449; s. c., 8 N. W. 166; *Cain v. Cox* (W. Va.), 1 S. E. 298; *Green v. Biddle*, 8 Wheat. (U. S.) 1; *Matthews v. Davis*, 6 Humph. (Tenn.) 324; *Carolina Cent. R. Co. v. McCaskill* (N. C.), 4 S. E. 468.

6. The denial of all compensation to such *bona-fide* purchaser in such case, when he has manifestly added to the permanent value of an estate by his meliorations and improvements, is contrary to the first principles of equity. *Bright v. Boyd*, 1 Story (U. S.) 478; *Story, J.*; *Putnam v. Ritchie*, 6 Paige (N. Y.) 404; *Parsons v. Moses*, 16 Ia. 444; *Walker v. Beauchler*, 27 Gratt. (Va.) 511.

occupant may be allowed to assert his claim for improvements after he has contended for title and been cast in the suit, and after the court has filed its findings, so that his right to compensation may be passed upon in the rendition of the judgment in the whole case.¹ He is bound to establish his claim specifically,² and show the value of his improvements without basing the estimate upon their cost.³

If the judgment is in favor of the defendant on the question of improvements, the plaintiff may ask that the value of the land without them be found; but it was held no ground for reversal when the court, acting without a jury, did not respond to such a prayer.⁴

The rule that there must be color of title is not carried so far as to cut off the equitable claim of a purchaser who has yet received no written deed, but who has bought, and has shown his good faith in making payment. It would be gross wrong to him to deny him the value of improvements put upon his purchased land, under such circumstances, on the ground that he had not received his written title, and that he well knew that fact. He has been allowed to recover the payments made and the excess of value of the betterments over the rents for the time of his occupancy. Though parol contracts to sell land were void in his State, yet all the equity was on his side in a contest with the adverse claimant.⁵ Equity will protect a co-tenant who believes himself to be sole owner while making improvements.⁶

1. When a claim for improvements may be made after verdict in an ejectment suit, it may be made after the filing of the court's findings; and it is error to enter judgment before passing on such claim. *Fowler v. Schafer* N. W., 32 Wis. 292.

2. Improvement, to be a set-off against rents and profits, must be specifically proved. *McDowell v. Sutlive* (Ga.), 2 S. E. 937.

3. Actual value—not the cost—is the rule in estimating improvements. *Wetherell v. Gorman*, 74 N. C. 603; *Daniel v. Crumpler*, 75 N. C. 184; *Smith v. Stewart*, 83 N. C. 406; *Carolina Cent. R. Co. v. McCaskill* (N. C.), 4 S. E. 468.

4. Where the defendant had judgment for improvements, and the plaintiff did not pray the court to find the value of the land without the improvements, the failure of the court so to find (a jury having been dispensed with by agreement) is no ground for reversal. *Coleman v. Bell* (N. M.), 12 P. 657.

5. In equity, a purchaser without written title who has made payment and taken possession of land purchased

has a right not only to recover the price when evicted, but also a right to be reimbursed for his improvements when they exceed in value the rental during the time of his occupancy. This was held, notwithstanding that, by statute, parol contracts to convey land were void and could not be enforced by the vendor, in North Carolina. *Albea v. Griffin*, 2 Dev. & Bat. Eq. (N. C.) 9; *Daniel v. Crumpler*, 75 N. C. 184; *Pope v. Whitehead*, 68 N. C. 119; *Wetherell v. Gorman*, 74 N. C. 603. See *Aurand v. Wilt*, 9 Pa. St. 54. S. P. with respect to a lessee, *Attorney General v. Baliol College*, 9 Mod. (Eng.) 411.

It is against conscience that the seller should enrich himself at the expense of the purchaser and to the injury of the latter. *Baker v. Carson*, 1 Dev. & Bat. Eq. (N. C.) 381.

6. A co-tenant, being a *bona-fide* believer that he is sole owner, who improved property legally held in common with another, should be protected against mortgage foreclosure so that he would be left in possession of that part of the land which he has improved, or he should be reimbursed for his im-

With reference to the possessor, under an executory agreement to sell, he will not be entitled to improvements made by him if the failure to carry out the agreement is his own fault.¹

Equity would not go so far to protect one who has made improvements, if he has acted through a mistake which due diligence would have corrected; as, when he has mistaken his boundary and has consequently erected improvements on the land of another, when reference to his own deed would have revealed the error.²

If his deed and that of his antagonist claimant are both from the same source, and both recorded, he cannot rely upon lack of notice, unless the latter was bound to notify him to desist from improving by virtue of some local law.³

In Virginia the evicted defendant was denied compensation for improvements on the ground that the plaintiff had not claimed rents, though he was conceded to have made them while believing in the validity of his title.⁴ In some States the method of recovery for improvements, after eviction, is specially pointed out by statute.⁵

provements out of the proceeds of the sale, if all the land must be sold under the foreclosure to satisfy the mortgage. *Annely v. De Saussure*, 17 S. Car. 389; *Scaife v. Thomson*, 15 S. Car. 337. See *Lewis v. Sellick* (Tex.), 7 S. W. 673.

1. If a purchaser takes possession under an executory agreement to buy, and makes improvements, and then decides to be dispossessed rather than pay the price he had promised for the land, he cannot recover for his improvements. *Allen v. Mitchell*, 13 Tex. 373.

2. The defendant in ejectment cannot claim for a *bona-fide* made improvement on the ground of his supposition that the *locus in quo* was vacant land lying between him and the plaintiffs, when his own deed calls for joining the surveys of the two tracts; and where the evidence shows that the surveyor designed no vacancy; and where due diligence would have shown him that there really was no vacancy. *Brown v. Bedinger* (Tex.), 10 S. W. 90.

3. An evicted claimant cannot recover for permanent improvements if he and the real owner claimed from the same grantor, and if the deed of the latter had been properly recorded, unless the true owner had been guilty of *laches* in failing to notify the possessor to desist from making the improvements. *Dawson v. Grow* (W. Va.), 1 S. E. 564, expository of Amended Code of W. Va., ch. 91.

4. It was held in Virginia that where

the rightful owner recovered his land in ejectment, and made no claim for rents and profits, the evicted party could recover nothing for his improvements made under the honest conviction that he had a good title. *Graeme v. Cullen*, 23 Gratt. (Va.) 296. Compare *Walker v. Beauchler*, 27 Gratt. (Va.) 511.

In Missouri the evicted party, after judgment, can obtain compensation for his improvements in no other way than that pointed out in Rev. Stat., §§ 2259, 2260. *Jasper County v. Mickey* (Mo.), 4 S. W. 424.

5. **Fixtures as Improvements.**—A purchaser of a house, mill and machinery moved them to his own homestead. The title to them was to remain in the vendor till payment. In default of payment, in trespass to try title, the court refused to charge under what circumstances a lien can be fixed on homestead property for work and materials in making improvements on it. *Held*, not error. The law of improvements in good faith (Tex. Rev. Stat., art. 4812, *et seq.*) has no application to improvements which are not part of the realty. *Harkey v. Cain* (Tex.), 6 S. W. 637. See *Manwaring v. Jenison* (Mich.), 27 N. W. 899; *Walker v. Mill Co.* (Wis.), 35 N. W. 332; *Sword v. Low* (Ill.), 13 N. E. 826. Compare *Manufacturing Co. v. Garver* (Ohio), 13 N. E. 493. See, on the general subject, *Schmitz v. Scheifele* (N. Y.), 1 A. 698, note; *McNally v. Connolly* (Cal.), 11 P. 320; *Cooper v. Johnson* (Mass.), 9 N. E. 35;

2. By Lessees—(1) *Betterments and Repairs*.—Whether the lessor or lessee is responsible for repairs depends upon the contract of lease, in many instances.¹ But, in the absence of stipulations upon the subject, the tenant may recover for repairs necessary to render a dwelling habitable, especially if the lessor represented it to be in good order. The outlay for such purposes may be set off against the rent.² It has been held that one holding a perpetual lease may remove a dwelling house from the leased property—the lessor being concerned only in the security of his rent—provided the removal does not render the rent insecure.³

It is not the lessee's duty to make repairs, in the absence of a contract to do so; yet he is responsible to a sub-tenant damaged because repairs were neglected. If he has contracted to make repairs, under promise of the lessor to pay for them, he may hold on to the property, after the lease term has expired, till payment shall have been made.⁴

Moody v. Aiken, 50 Tex. 65; *Hutchins v. Masterson*, 46 Tex. 551; *Tift v. Horton*, 53 N. Y. 377; *Eaves v. Estes*, 10 Kan. 314; *Tibbetts v. Moore*, 23 Cal. 208; *Cullers v. James*, 66 Tex. 494.

1. Repairs by Lessor.—A lessor agreed to make all necessary repairs on the outside of buildings upon notice to him by the lessee. Either party could notify the other and thus terminate the lease, in case any of the buildings should be destroyed by fire. A stable was thus destroyed and the lessee demanded the restoration of the building, but not the termination of the lease. The lessor, on refusing to rebuild the stable, was held liable for breach of covenant. *Crocker v. Hill*, 61 N. H. 345.

2. Repairs by Lessee.—A lessee set off his payments for drainage and plumbing, against the rent when sued therefor. The lessor, when the lease was signed, had represented that the premises were in good order, and that no plumbing and draining facilities were needed beyond what had already been done. The court allowed the set-off. *Wolfe v. Arrott*, 109 Pa. St. 473; *Hall v. Burns*, 17 Abb. (N. Y.) N. Cases, 317.

3. A tenant under a lease with covenant for perpetual renewal will not be enjoined from tearing down and removing a dwelling house, so long as such removal will not render the rent insecure. *Crowe v. Wilson*, 65 Md. 479; s. c., 57 Am. Rep. 343.

4. Contract to Repair.—In the absence of a stipulation to do so, a landlord is not bound to make repairs. *Ragan v. Dockery*, 23 Mo. App. 313;

Hughes v. Vanstone, 24 Mo. App. 637; *Weinsteine v. Harrison*, 66 Tex. 546.

If the lessor has covenanted to keep the premises in repair, and the lessee has sub-let the premises, the action of the sub-lessee for damages for want of repairs lies against his immediate lessor, not against the original lessor. *Quay v. Lucas*, 25 Mo. App. 4.

If the latter has not agreed to make repairs, and there is no secret defect in the building rented which he failed to disclose, he is liable neither to his lessee nor to a sub-lessee for an injury caused by the premises getting out of repair. *Cole v. McKey*, 66 Wis. 500; s. c., 57 Am. Rep. 293.

The landlord's promise, in the lease, to pay for improvements made by his tenant during the term of the lease, is a covenant "running with the land." It, therefore, is binding upon the assignee of the lessor. The lessee may keep possession of the premises until his outlay is reimbursed, though the term of the lease has expired. *Ecke v. Fetzer*, 65 Wis. 55.

Erections by Tenants—Right of Removal.—It was stipulated in a lease of land that improvements made during the term should be considered a part of the realty, but that the lessee might remove them on the expiration of the lease on the written consent of the lessor, to be given on receipt of all rent previously reserved. Before the term had expired the improvements were sold to a third person, and a memorandum was made upon the back of the lease by the lessor, in which he extended the lease; and, when the term had ex-

(2) *Repairs by Tenant, Who Is Also Mortgagee*.—A mortgagee in possession cannot recover for repairs made in his capacity as tenant, unless he has previously notified the landlord thereof, or has made the improvements under contract with him; nor can he in his character as mortgagee in possession, except what is necessary to preserve the property. He cannot make improvements conducive to his own temporary convenience, nor betterments to enhance the value of the property permanently at his own option,

pired, he executed a new one. It was *held* that his claim upon the improvements was commensurate with his lien for the rent, and that the purchaser could remove them at the end of the term upon payment of all rent due. *Rooney v. Crary*, 8 Ill. App. 330. And where land was leased for five years with the privilege of renewal, and the right of the lessee to compensation at the end for such improvements as he should make with the landlord's approval, it was *held* that the erection of a hall for dancing, etc., built upon a stone foundation sunk in the ground, was within the "improvements" contemplated; that the subsequent renewal of the lease was acquiescence by the landlord in the improvements made. The city took the premises for a public park, paying the value of the land to the owner, and depositing \$2,500 in court as the value of the building, for the assignees of the building. The lessor sued for this. The court *held* that the renewals did not deprive the lessee of his right to payment for the buildings at the end of the term, and that the assignees were entitled to the money. *Livingston v. Sulzer*, 19 Hun (N. Y.) 375. So in a lease for twenty-one years, embracing a covenant that if the tenant should build a two-story house on the premises within seven years (or later in case the landlord should consent) he should be compensated therefor by the lessor at the end of the term, or have his lease renewed for twenty-one years more, and that the second lease should contain a stipulation for a third term of equal length in case a three-story building should have been erected and then be on the premises, and that on the landlord's failure to make such promised stipulation in the proposed third renewal, he should pay for such building, it was *held* (under the fact that it was for twenty-one additional years with "all the covenants required in it by the true construction of the first lease"), that the omission, in the second, of provision

for a third renewal did not make it obligatory on the landlord to give a third lease with a covenant to renew in case a three-story dwelling should be on the land. It was also *held* that the first lease meant that if the landlord did not renew at its expiration he should pay for a two-story house erected by the tenant, if any such had been erected; that he should either renew again at the end of the second lease or pay for any three-story dwelling that the tenant might have erected. *Orphan Asylum Society v. Waterbury*, 8 Daly (N. Y.) 35.

A lease contained the stipulation that the landlord should pay the appraised value of a house, should the tenant erect one, at the expiration of the lease. One was built and appraised, and the tenant sued for its value on the landlord's refusal to pay. It was *held* that the lessor could not, independently of the appraisers' report, show the value, nor offer evidence of the lessee's failure to erect a more substantial building. It was *held* that he had waived objection to the character of the building by making no objection till after the award. *Yeatman v. Clemens*, 6 Mo. App. 210.

Where the lease contains a stipulation that the tenant may remove buildings erected by himself, the landlord acquires no ownership of them unless the tenant fail to remove them within a reasonable time after the lease has expired. *Kuhlmann v. Meier*, 7 Mo. App. 260. Under such stipulation the tenant does not forfeit his right to remove them by taking a new lease before the expiration of the old one. *Kerr v. Kingsbury*, 39 Mich. 150. If the stipulation is that he either may be paid their appraised value, or have the lease renewed, at the lessor's option, "without regard to the situation or value of the premises leased," the lessee is entitled to the value of all such improvements on the lessor's refusal to renew. He is not merely entitled to the value of those which, as between him and the landlord,

and yet hold the mortgagor therefor upon redemption.¹ Of course there may be exceptional cases resting upon the doctrine of equitable estoppel. And these must be based on the good faith and ignorance of the person making the outlay.²

might be removed by him; and the present actual value was the sum to be allowed. *Hopkins v. Gilman*, 47 Wis. 581.

Improvements—Landlord and Tenant.

—Where a landlord leases real estate to be occupied by a tenant at a future time, and makes necessary improvements before that time, the tenant is under no legal obligation to pay for them when he had not contracted therefor. *First Nat. Bank of Central City v. Lucas* (Neb.), 31 N. W. Rep. 805.

A defendant had rented a hotel for a year. He had built an elevator therein at the plaintiff's request. Afterwards they agreed to change the lease, and a larger rent was stated. The water for running the elevator (a hydraulic one) cost \$650 a year—an item not mentioned in the lease; and, after the plaintiff had paid it, the defendant could not be made to reimburse him. *Williams v. Kent* (Md.), 10 Am. Rep. 228.

1. *Raynor v. Drew*, 72 Cal. 307; *citing* *Murdock v. Clark*, 59 Cal. 695, *Hidden v. Jordan*, 28 Cal. 309; s. c., 32 Cal. 401; *Moore v. Cable*, 1 Johns. Ch. (N.Y.) 384; 2 Story's Eq. Jur., § 1016 b; 3 Pomeroy's Eq. Jur., § 1217.

2. *Boggs v. Merced Mining Co.*, 14 Cal. 368; *Kelly v. Taylor*, 23 Cal. 15; *Carpentier v. Thirston*, 24 Cal. 281; *cited in* *Raynor v. Drew*, 72 Cal. 307.

Liability of Lessor.—The lessor is not liable for improvements made by his lessee, who expected to purchase the rented property, and the lessor knew that the improvements were made under the circumstances. *Woolley v. Osborne*, 59 N. J. Eq. 54.

Though the lessee has made improvements under the belief that he was entitled to possession for the term of the lessor's life, he can have no compensation therefor when the lease itself shows that he was not entitled to possession for that period. This was *held*, though the landlord had silently stood by and seen the improvements put upon the land by the tenant. So *held* in North Carolina. *Dunn v. Bagby*, 88 N. Car. 91. But when it was proved that the lessor had told the tenant that he might occupy the rented premises as long as he lived, and the latter thereafter erected build-

ings and fences and made other improvements, it was *held* in Missouri that the tenant could not be evicted until he was compensated for the improvements made by him under the parol promise. *Allen v. Mansfield*, 82 Mo. 688.

Equitable Remedy.—A tenant cannot sue at law for the value of the improvements he has made on the ground that equity would have relieved, and therefore the case is as though it had relieved. Equity may relieve against a forfeiture of improvements erected by a lessee on leased land, but relief must be sought in a court of equity. *Stamps v. Cooley*, 91 N. Car. 316.

Third Possessor.—The right of a lessee, whose lease is subordinate to a mortgage, to claim on the foreclosure for improvements, is not that of a third possessor proper. *Penn v. Citizens' Bank*, 32 La. An. 195.

Statute Provisions.—A tenant may recover for betterments made within six years of his eviction. Me. Rev. Stat., ch. 104, § 43; *Page v. Finson*, 74 Me. 512. In North Carolina, to recover for them, the defendant must proceed by petition under the statute, after judgment against him in ejectment, but before execution. *Condry v. Cheshire*, 88 N. Car. 375. So in Missouri: Rev. St. of Mo. (1879), §§ 2259, 2261; *Henderson v. Langley*, 76 Mo. 226; *Jones v. Stonecutter Co.*, 20 Fed. Rep. 477. *Compare* *George v. Steam Stonecutter Co.*, 20 Fed. Rep. 478; *Amsden v. Steam Stonecutter Co.*, 20 Fed. Rep. 479.

Trespass—Improvements.—Only when betterments become a part of the realty, and are made in good faith, can the possessor of the land get allowance for them on eviction, under Rev. St. Texas, art. 4813, *et seq.* *Hankey v. Cain* (Tex.), 6 So. West. R. 637.

A settler on Texas land was in good faith and entitled to the value of his improvements, believing the land to be vacant public domain subject to preemption. He knew that the plaintiff claimed it under a Mexican grant, but thought the grant a forgery, and had been held so in a case in which the plaintiff was a party. It was *held* that the defendant was entitled to show the

(3) *Boundary Mistaken Improvements Compensated*.—Under the Texas statute, which gives improvements or their value to a possessor in good faith, one may recover compensation for them if he has made them in error of fact. A man made improvements on the land of the adjoining proprietor, under mistake with respect to the boundary line. He believed the site of the improvements to be his own, and was a possessor in good faith, within the meaning of the statute. He was ousted at the suit of the real owner, but the court awarded compensation for the improvements he had erected.¹

(4) *Partition*.—A part owner who has enhanced the value of a tract by his improvements, should be compensated therefor by those benefited when partition is made. This is true, though his share be laid off from a portion unimproved. The better way is to assign as his portion the improved part, valued separately from the improvements, so that he may have the enjoyment of his own work.²

Improvements thus made should be necessary, however. If sale of the improved property is made for the purpose of partition, there can be no allowance from the proceeds to a part owner who improved needlessly, without consultation with the other co-proprietors. It is not absolutely necessary that his co-tenants should have consented to his improvement of their common property. Even without it, if he has enhanced the value, he will be reimbursed to that extent, upon a sale for partition, by a court of equity. He has no lien for the amount expended in the unauthorized improvements, but the court will respect his ordinary claim.³

facts and beliefs under which he settled, and the value of his improvements; and he was held to have made the improvements in good faith. *Gaither v. Hanrick* (Tex.), 6 So. West. R. 619.

1. *Houston v. Brown* (Tex.), 8 So. West. Rep. 318.

2. *Tenants in Common*.—"On partition of a farm, a tenant in common is entitled to the benefit of the value of improvements made by him on a part whereof he has the exclusive possession . . . though his share be assigned elsewhere." *Reed v. Reed*, 68 Me. 568.

"Upon a partition of land among tenants in common, the tenant who has improved a part is entitled to have it allotted to him at a valuation, without regard to the improvements." *Collett v. Henderson*, 80 N. C. 337.

Two tenants in common held exclusive possession of ferry property, improved it, and divided it between themselves, regardless of the rights of other co-owners. One who owned a

sixth interest filed a bill for partition and an account against the two usurping tenants. The court awarded them compensation for their improvements, and held them liable for but one year's rent prior to the institution of the suit. *Sanders v. Robertson*, 57 Ala. 465.

The statutes of Michigan, giving compensation for improvements to the holder for six years, are inapplicable to one of several tenants in common; otherwise "he might recover from each the full value of the improvements." *Martin v. O'Conner*, 37 Mich. 440.

3. *Co-Tenants*.—If improvements are not necessary to the enjoyment of the estate, and are made upon indivisible realty by a co-tenant, he cannot be allowed their value out of the proceeds of sale made for the purpose of partition. Being made without notice to his co-tenants, and without belief that the sole ownership was in himself, the improvements give him no claim upon such proceeds. *Elrod v. Keller*, 89 Ind. 382.

Co-tenants joined in erecting an improvement. One of them occupied it with the consent of the other. It was *held* that, on partition, he would be entitled to his homestead estate, but that the other co-tenant should have half the value of the improvements.¹

Before the partition of an estate, the widow occupying with her children may improve it, and be allowed therefor when the division is made. If improvements on her third of the estate have been made by another, the value is to be deducted from it and paid to him. An heir in possession of an estate may recover for useful improvements made, of which his co-heirs were cognizant.²

(5) *Public Land—Improved.*—Compensation was allowed in Texas for improvements by a settler on her domain who made them in good faith. But in Kansas it was refused to a purchaser who had partially paid for the land he improved and then allowed the property to be sold for taxes.³ Acts called "occupying claimant laws" exist in Kansas, Iowa, and perhaps other States, if not by that name. Several States have statutes regulating the question of compensation to occupants who improve the lands they

The rule is that a co-tenant may recover for his improvements; though his co-tenants have not assented to his making them, when the improved property comes to be partitioned. But there are exceptions. If, however, he enhances the value of the property while yet undivided, a court of equity will not grant a partition without first allowing for the improvements a suitable compensation. He does not acquire a lien on the estate by making his unauthorized improvements. *Sarbach v. Newell*, 30 Kan. 102.

A co-heir, having claimed title to the other heirs' share of land held in common, under a deed charged to have been forged, had to pay his part of improvements made under his superintendency, when the land came to be partitioned. *Baird v. Jackson*, 98 Ill. 78.

1. *Lewis v. Sellick* (Tex.), 7 S. W. Rep. 673. Purchaser need not pay mortgagor for improvements. He bought at foreclosure sale. *Neal v. Hamilton* (Tex.), 7 S. W. Rep. 682.

2. A widow who had made improvements on land belonging to herself and her minor children was allowed their value when the property was afterwards partitioned. *Buck v. Martin*, 21 S. C. 590; s. c., 53 Am. Rep. 702.

She was *held* entitled to one third of the value of land conveyed to her by her husband alone, estimated at the time of

the partition made on her own application, less the value of improvements made by the alienee. *Quick v. Brenner*, 101 Ind. 230.

3. *Improvement of Public Land*—"Occupying Claimant."—One who settles upon and improves public land in good faith is entitled to the value of his improvements, on eviction. *Sellman v. Lee*, 55 Tex. 319. But a purchaser of school land, who improved it but allowed it to be sold for taxes after having paid two instalments of the purchase money, was not allowed the value of his improvements when ejected by the tax-sale purchaser. He was *held* not entitled to it under the "occupying-claimant" law. *Newland v. Baker*, 26 Kan. 341. This law, adopted in 1868, provides that no occupying claimant shall forfeit his right to improvements or compensation for their value, but that the successful claimant may take either the land or the value. The amendment of 1873 does not repeal this provision. *Stephens v. Ballou*, 27 Kan. 594. When a judgment of ejectment was rendered against an occupying claimant, who gave up the premises without claiming the benefit of the act and afterwards sued for the value of his improvements, it was *held* that the owner could set off the value of the rents during the time he had been dispossessed. *Barton v. National Land Co.*, 27 Kan. 634.

hold, and there have been expositions of those laws by the courts.¹

A lessee of a lot has no action against a city for not completing improvements begun by it when the owner himself has no such right.²

The holder of a leasehold interest in New York city paid an assessment for a local improvement, which he had covenanted to do in his lease. The lessor having succeeded in getting the assessment proceedings set aside, the lessee sued the city and recovered the payment, since the city had received the money of the lessee while the suit of the lessor was pending.³

3. Improvements by Mortgagors—Mortgagees—(1) *Improvement of Mortgaged Buildings.*—One who takes a mortgage on a building or any other improvement does not have it upon the land on which the structure is situated. Only that which has been placed upon the land by the mortgagor is the subject of the contract. The mortgagee acquires a right in equity to compensation, should the land owner take possession; or he acquires a right to the improvements. If the mortgagor should buy the land after giving the mortgagee, that would not affect the original contract; that is, the mortgagee would not be benefited by the purchase.⁴

If a lessee erect a building on rented land, with the privilege of removing it, and should mortgage it while the lessor has reserved the right of retaining it on payment of its value, it has been held that the mortgage is of realty, and may be classified with common law chattels real.⁵

1. Occupying Claimants.—Settlers on Des Moines river lands in Iowa are entitled to improvements as occupying claimants. Construction of the act of 1877 relative to such claimants. *Litchfield v. Johnson*, 4 Dill., C. C. 551; *Chapman v. Barger*, 4 Dill., C. C. 557.

In California the defendant must have held in good faith, and also under color of title, to enable him successfully to claim improvements. *Field v. Columbet*, 4 Saw., C. C. 523.

In Florida there is an act regulating the practice in the assessment of improvements made by the occupying claimant, which has received construction. *Duncan v. Jackson*, 16 Fla., in exposition of the Occupying Claimant Act of Fla. Laws, ch. 233. Also, the Indiana, similar act. *Westerfield v. Williams*, 59 Ind. 221. And the Kansas statute, of like import. *Bauder v. Bryan*, 20 Kan. 367, in exposition of Kan. Gen. Stat., p. 734, § 534; *Lemert v. Barnes*, 18 Kan. 9; *Maynes v. Veale*, 20 Kan. 374.

2. *Highland v. City of Galveston*, 54 Tex. 527.

3. *Purssell v. Mayor etc. of New York*, 85 N. Y. 330. See *Spears v.*

Mayor etc. of New York, 87 N. Y. 359.

Improvements made by a tenant holding during the life of another were held not chargeable against the fee-simple owner on his coming into possession. *Curtis v. Fowler* (Mich.), 33 N. W. 804.

4. One who mortgages to another the improvements he has put upon land in his possession, but not his own, conveys no title or interest to the land itself. He has an equitable right to compensation for the improvements (under the circumstances stated in the opinion from which this is drawn), which can be assigned and conveyed like any chattel interest (*Lombard v. Ruggles*, 9 Me. 62). But the owner of the land on which they are erected may dispossess the owner of the improvements at will. The latter may then seek compensation for the loss of his improvements by action of assumpsit or bill in equity. He has only his equitable right to compensation, which, however, is recognized by statute in Maine (*Chapman v. Butler*, 22 Me. 191). *Mitchell v. Black*, 64 Me. 48.

5. *Griffin v. Marine Co. of Chicago*,

(2) *The Mortgage of Realty Covers Subsequent Improvements.*—The lien on land is good upon structures put upon the premises after the date of the mortgage. Whether they be erected by the mortgagor, or by one who has purchased from him, the rule is the same. Even though a purchaser has made improvements without actual notice of the existence of the lien, he is presumed to be notified by the record, and the mortgage will cover his improvements.¹ Without naming the improvements in the instrument itself, the mortgage takes hold of them all, and all fixtures thereafter attached to the land.²

A stranger who has notice of the existence of a mortgage upon land, and who erects buildings or other improvements thereon, with the consent of the owner, places them under the lien as though erected by the mortgagor.³

(3) *Corporation Improving before Acquiring Title to Land for Public Use.*—"If a corporation, having power to take the land by condemnation, make improvements before exercising this power, the mortgagee cannot be deprived of the benefit of the improvements by allowing the corporation to redeem the land by paying the value of the land when it took possession. It is negligence on the part of the corporation to proceed with improvements without first either obtaining a release of the mortgage, or condemning the interest of the mortgagee if it had the power. The corporation stands in the relation of a purchaser with notice of the mortgage, it being duly recorded, and it cannot have an advantage as to the improvements which the mortgagor would not have had. There is no good reason for discriminating in its favor. To give a purchaser, with such notice, this right, would enable him to obtain from the mortgagee by means of the improvements, a compulsory release at the value of the land at the time of taking possession."⁴

As against the mortgagee, the mortgagor cannot recover compensation for his improvements made on the mortgaged land.⁵ Nor can mechanics for the construction of a building thereon, or laborers for work done, or persons furnishing material, claim anything of the mortgagee who has not contracted to pay therefor.⁶

Improvements by Lessees.—Where a mortgagor is the lessor,

52 Ill. 130: "The property mortgaged was an actual interest in real estate, a chattel real at the common law, falling under the definition of 'real estate,'" etc.

1. *Martin v. Beatty*, 54 Ill. 100; *Rice v. Dewey*, 54 Barb. (N. Y.) 455.

2. *Union Water Co. v. Murphy's Fluming Co.*, 22 Cal. 621: "A mortgage upon a flume or ditch not completed, but in process of construction, covers the whole work when completed, if apt terms expressing that intent are used in the instrument. . . .

A flume for the conveyance of water is in the nature of real estate, and a mortgage upon it will, without any special provision, include all improvements then on the line of the work, and also all that may afterwards be put there."

3. *Booraem v. Wood*, 27 N. J. Eq. 371.

4. *Jones on Mortgages*, vol. 1, § 681.

5. *Childs v. Dolan*, 5 Allen (Mass.) 319.

6. *Holmes v. Morse*, 50 Me. 102.

who has granted a lease for a term of years, and has had money advanced to him by the lessee, which he has expended in the erection of buildings pursuant to a contract with the lessee so to expend the money, the mortgagee cannot be made to compensate the lessee for his outlay.¹

(4) *When Mortgagee in Possession Is Allowed for Improvements.*—The mortgagee cannot improve the land of the mortgagor which he holds for the purpose of foreclosure, except at the risk of losing his outlay. He is not the owner, but rather a trustee. He may expend what is requisite for the preservation of the property in the way of repairs. He may improve a dwelling so far as to make it habitable if it was not so on his coming into possession.² He may pay out money for the preservation and oversight of property that is tenantless.³ It is his duty to keep the property in order, and a neglect of it will render him liable to the mortgagor.⁴

Betterments require the assent of the mortgagor in order to entitle the mortgagee in possession to compensation for making them.⁵ Should he make them, however, and the mortgaged land be subsequently redeemed, he would not be liable to increased rent and profits on account of them.⁶ The rule is otherwise if the betterments be made by a stranger wrongfully in possession.⁷

Where the mortgagee, in good faith, believing that he has ac-

1. **Tenants—Mortgaged land** cannot be compensated for money advanced to make improvements, as against the mortgagee. *Haven v. Boston & Worcester R. Co.*, 8 Allen (Mass.) 369.

While a mortgage foreclosure is pending, if the mortgagor leases the premises and the lessees take and keep possession under claim of right, the mortgagee may recover damages for rents, etc., after having foreclosed. He can recover rent for the improvements made by the lessees themselves notwithstanding their belief in the validity of their leases. *Jones on Mortgages*, vol. 1, § 779; *Haven v. Adams*, 4 Allen (Mass.) 80.

2. **Mortgagee's Improvements.**—“A mortgagee in possession should be allowed, upon redemption, his necessary expenses for keeping the estate in repair; but not expenditures for convenience or ornament.” *Woodward v. Phillips*, 14 Gray (Mass.) 132.

3. **Ornamental grounds** that cannot be rented for a sum sufficient to pay for keeping them in order, may be preserved by the mortgagee in possession and the cost charged in his favor, upon redemption. *Sparhawk v. Wills*, 5 Gray (Mass.) 423.

4. *Shaeffer v. Chambers*, 2 Halst. (N. J. Eq.) 548; *McCumber v. Gilman*, 15 Ill. 381; *Dexter v. Arnold*, 2 Sum. (C. C.) 108.

5. Consent of the mortgagor should be had in the making of betterments by the mortgagee, to entitle the latter to compensation. *Lowndes v. Chisholm*, 2 McCord (S. Car.) 455; *McCarron v. Cassidy*, 18 Ark. 34; *Mickles v. Dillage*, 17 N. Y. 80; *Harper's Appeal*, 64 Pa. St. 315; *Hidden v. Jordan*, 28 Cal. 301.

Mortgagor Denied Compensation.—The mortgagee bought land at his foreclosure sale and the mortgagor was refused compensation for the improvements he had made. *Neal v. Hamilton* (Tex.), 7 S. W. 672.

6. *Bell v. The Mayor*, 10 Paige (N. Y.) 49; *Moore v. Cable*, 1 Johns. Ch. (N. Y.) 385.

7. *Merriam v. Barton*, 14 Vt. 501. If made by the mortgagor, they enure to his benefit on redemption; but the mortgagee, while in possession, is not responsible for them, or for labor or material employed in making them, except as above stated. *Jones on Mortgages*, 2 vol., § 1127, citing *Holmes v. Morse*, 50 Me. 102; *Childs v. Dolan*, 5 Allen (Mass.) 319.

quired a perfect title by foreclosure, makes betterments, he should be compensated for them on subsequent redemption.¹ If he has been led into his erroneous belief as to title by the mortgagor himself, his right to compensation is the more apparent.²

Where the mortgagee, long in possession, erects betterments with the knowledge of the mortgagor, who interposes no objection, he may claim compensation on redemption—he paying additional rent in proportion to the increased value from the date of their erection.³

(5) *Purchaser at Mortgage Sale*.—Persons buying real estate at a foreclosure sale and subsequently erecting permanent improvements thereon, under the honest belief that the title is in themselves, should be compensated on redemption.⁴ This has been held true where one bought of the mortgagee and, erroneously believing that he had acquired a perfect title, proceeded to erect permanent buildings.⁵

1. Jones on Mortgages, § 1128, *citing*, among other cases, *Miner v. Beekman*, 50 N. Y. 337; *Putnam v. Ritchie*, 6 Paige (N. Y.) 390; *Wetmore v. Roberts*, 10 How. Pr. (N. Y.) 51; *Fogal v. Pirro*, 17 Abb. Pr. (N. Y.) 113; *Troost v. Davis*, 31 Ind. 34; *Roberts v. Fleming*, 53 Ill. 196.

2. *Bacon v. Cottrell*, 13 Minn. 194.

3. *Roberts v. Fleming*, 53 Ill. 196; *Montgomery v. Chadwick*, 7 Iowa 114.

4. *Green v. Dixon*, 9 Wis. 532; *Green v. Wescott*, 13 Wis. 606; *Barnard v. Jennison*, 27 Mich. 230.

5. *McSorley v. Larissa*, 100 Mass. 270, and others cited from Jones on Mortgages, § 1128, from which the cases of the last three previous notes are taken.

Mortgage — Improvements. — The mortgagee being in possession of land which was covered with sprouts and bushes (the large timber having been taken off), and supposing himself absolute owner, cleared the land, built fences and a barn, without any objection being interposed by the mortgagor, who stood by. On a bill to redeem, it was held that the improvements were chargeable to the mortgagor. *Morgan v. Walbridge*, 56 Vt. 405.

Money had been advanced on a mortgage, but the mortgagor was not the beneficial owner of the property; and the mortgagee was informed of this fact when the mortgage was executed. Upon a bill to quiet title, it was held that the person claiming the beneficial ownership should pay for the improvements put on the property by use of the money raised by mortgaging it. *Union*

Mutual Ins. Co. v. Campbell, 95 Ill. 267.

A decree, foreclosing a senior mortgage, provided that a junior one should not be impaired. It was held that the purchaser at the sale could not compel the junior mortgagee to pay for improvements made by him while in possession under the sale. *Coleman v. Witherspoon*, 76 Ind. 285. But could recover to the extent of the mortgage, on foreclosure by the junior. *Catterlin v. Armstrong*, 79 Ind. 514.

Mortgage—Assessments.—Owners of land sold for non-payment of void city assessments, agreed to sell it to a private purchaser, who was to deduct enough from the price to pay the assessments and remove the cloud upon the title created by them. The purchaser paid the city the sum required for the redemption of the property, taking it from the price. It was held that the purchaser at the assessment sale was not entitled to receive this money from the city. [Dissent.] *Remsen v. Wheeler*, 105 N. Y. 573.

One is not personally liable, if his name is not upon the assessment roll, under New York acts 1813, ch. 86, § 175. It was held, therefore, that where a junior mortgagee acquired the property mortgaged by foreclosure, afterwards assessed for improvements with his name omitted from the record; and where the senior mortgagee afterwards foreclosed and bought in the same property, and paid the assessment, the senior could not recover of the junior the amount of the assessment thus paid.

II. IMPROVEMENT OF HIGHWAYS—1. Petition.—The method frequently pursued and pointed out by statute in some States, by which property owners proceed to have a highway opened, is the petitioning of the county authorities to order the improvement. The petition must be confined to one improvement, if the statute so prescribes, though there may be more than one petition, provided all together contain the requisite number of names required by the statute, where the number is prescribed or the necessary proportion of property holders is designated.¹

Power.—Incidental to the power directly conferred on a corporation to construct and maintain highways, is that of providing the means of drawing off the surface water from the highway to the land adjoining, or through channels, covered or open, to more distant places.²

Mutual Life Ins. Co. v. Sage, 41 Hun (N. Y.) 535.

1. Acts Construed.—The act for the improvement of the Troy Hill road in Allegheny City (act of 1871) is constitutional so far as the citizens of that city are concerned, and can be executed according to the legislative intent—the burden being assumed by the city. *Dewhurst v. Allegheny*, 95 Pa. St. 437.

Under the act relative to the construction of gravel roads (March 3, 1877), the petition to the county board must be confined to one improvement. The improvement prayed for may be a continuous single line or one with branches, all the parts being connected. Description as a "gravel road" is sufficient in the petition. *Stoddard v. Johnson*, 75 Ind. 20.

A petition is not rendered unnecessary by the proviso of a statute: "That when one-half or more of the grading, etc., of any street lying between two main street crossings has been already performed, the board of supervisors may order the remainder of such grading, etc., notwithstanding the objection of any or all of the property holders." *Dyer v. Miller*, 58 Cal. 585, in exposition of act of April 1, 1872, § 4.

Petition for Public Roads.—Nevada, by statute, requires that a majority of the taxpayers of a district, according to the last assessment roll previous to the application, should sign the petition to the county commissioners in order to have a public road established. This was *held* jurisdictional; so, when the records of the board of commissioners showed that a majority of the resident taxpayers of the district had signed the

petition, the court thought there had not been full compliance with the statute shown, and *held* the granting of the petition to be void. *Godchaux v. Carpenter* (Nev.), 14 Pac. Rep. 140. Sec. with regard to jurisdiction, *Ely v. County of Morgan* (Ind.), 14 N. E. Rep. 236. To such a petition names may be added or withdrawn, by leave of the board, up to the time of report thereon. A similar statute, *Rev. Stat. Ind. 1881, § 5095*; *Black v. Thomson* (Ind.), 13 N. E. Rep. 409. If the board decide the number of petitioners to be sufficient, and no objection be made, the proceedings will not afterwards be held void in Indiana on the ground that there were too few petitioners, on appeal. *Robinson v. Rippey* (Ind.), 12 N. E. Rep. 141. Nor after the viewers' report has been filed. *Osborn v. Sutton* (Ind.), 9 N. E. Rep. 410.

Where two-thirds of the resident owners must petition the trustees, under a statute, before the latter can proceed to improve a public highway, it is not essential that all the petitioners' names should be attached to one petition. *Campbell v. Park*, 32 Ohio St. 544.

2. General Power.—Corporations, required by law to construct and repair their highways, may make necessary water courses to draw the water from the road to the adjoining land. They may do this in the absence of special statutory authorization on this particular subject. They could not be liable for so doing "if no wanton or unnecessary damage was done, and they were not guilty of negligence in causing the damage." *Bronson v. Borough of Wallingford*, 54 Ct. 513.

It has been held that stones and other material from adjoining land, to repair a highway, may be taken without the assent of the owners of the land.¹

2. Grades.—It is held that an abutter cannot have damages for the building of a new grade, but that he can for the changing of an established one. He must be really damaged before he can recover; so, whether or not he has a building on the land he alleges to have been damaged, may prove an important inquiry. If the question of his being damaged is one over which the commissioners of highways have original jurisdiction, and if it be decided adversely to the abutting proprietor, he may appeal to the supervisors, if the case is in the State of Illinois. And the usage there is not greatly different from that common to the country.²

In Iowa the city corporation has the power of opening roads within its limits to the exclusion of the board of supervisors. This, though the ground be unplatted and cultivated. Code Iowa, § 920; *Gallaher v. Head* (Iowa), 33 N. W. Rep. 620.

For recent decisions respecting the jurisdiction of county commissioners and others in locating and opening gravel road and other public roads: *Town of Wells v. County of York* (Me.), 11 Atl. Rep. 417; *Appeal of Cole* (Me.), 7 A. Rep. 397; *Osborn v. Sutton* (Ind.), 9 N. E. Rep. 410; *Dougherty v. Brown* (Mo.), 3 S. W. Rep. 210; *Fleener v. Claman* (Ind.), 14 N. E. Rep. 76; *C. & P. R. Co. v. Town of St. Johnsbury* (Vt.), 10 A. Rep. 573.

Notice.—Personal notice of the meeting of the viewers need not be given to those through whose lands the proposed road is to pass. Advertisement is sufficient, in Pennsylvania. *In re Road in Sterrett Tp.* (Pa.), 7 A. Rep. 765. Notice that a petition for a public road need not be signed, in Missouri. *Dougherty v. Brown* (Mo.), 3 S. W. Rep. 210. A meeting of surveyors of a road, at a place different from the one advertised, rendered their doings null. *In re Johnson* (N. J.), 8 A. Rep. 113. One who asks a road over his own land is not entitled to notice of the pendency of his own petition. *Graham v. Flynn* (Neb.), 31 N. W. Rep. 742. Want of notice of the viewers' meeting was held waived by the general appearance of a land owner before the county commissioners. *Stephens v. County of Leavenworth* (Kan.), 14 Pac. Rep. 175; *Akin v. County of Riley* (Kan.), 13 Pac. Rep.

2; *Orton v. Tilden* (Ind.), 10 N. E. Rep. 936.

1. Material for Highway Improvement.—It has been held that a supervisor of roads may take stone to repair a road, provided he do not wilfully annoy the owner of the land from which he takes it; that a court of equity will not restrain him from doing so, and that he is the sole judge of the necessity of the taking. *Kendall v. Post*, 8 Or. 141. And if the owner is aggrieved, his remedy is by application to the county court to assess the damages. Or. Misc. Laws, ch. 50, § 29; *Kendall v. Post*, 8 Or. 141. And, under Ohio statutes in 1868, it was decided that a street commissioner might take material necessary to repair a public road from the lands situated near, though in another road district. *Burrows v. Cosler*, 33 Ohio St. 567.

2. Abutting Owner.—An adjoining owner cannot recover damages for the building of a grade where none existed previously. For the changing of an established grade he can recover. *Aldrich v. Providence*, 12 R. I. 241. Damages for a change of grade in the streets of Newark can be awarded only in case there is a building on the land of the complainant at the time of the change. *State v. Sayre*, 41 N. J. L. 158. No one but the owner of land adjoining the road to be laid out or vacated is a "person interested in the decision of the commissioners of highways," in determining who may appeal under the statute from their decision to three supervisors of the county. *Taylor v. Normal Highway Commissioners*, 88 Ill. 526.

If the assessment is on land "fronting on the highway," which is to be im-

If the grade of a highway is raised by authority of a village corporation, the county or township officers have no control over question of damages arising. No general rule can be laid down. The charters of cities and incorporated towns, and the statute powers of counties, are not uniform in respect to their authority derived from the several States. A municipal corporation's powers may be such, respecting highways, that the supreme court cannot review the city's action.¹

3. Street—Fee Owner.—An ordinary public road may become a city street when a town containing it becomes incorporated. Though previously laid out by commissioners as a highway, it is treated like the other streets that are laid out by the corporate officers.

Such officers, duly empowered to open, alter, repair and improve streets, may prohibit anyone from taking dirt from the street even though the fee of the street remains in the adjacent owner. They may change the grade, make sewers, drains, culverts, etc., and the owner of the fee cannot molest them.

When a highway runs over land beyond town limits, the land owner retains his fee-simple title to what is connected with the land, except the necessary right of way belonging to the public. Incidental to this right the public may place tiles beneath the surface of the ground and use the soil, stone, etc., on the road line for building and keeping up the road.²

4. Gravel, Rail and Plank Road.—Whether the petition for a free gravel road in Indiana has the signatures of the required majority of the land owners liable to assessment is an open question up to the time of action on the viewer's report. When the board of commissioners meet and consider the report and act thereon it is then too late to add additional names to the petition to make up the necessary majority. Prior to that time names may be either added or withdrawn. It seems, however, that the board has power to refuse anyone to make withdrawal of his signature. But there should be no exercise of this power in the absence of good reasons.³

proved, it applies only to land on that part of the road which is to be improved. *Kendig v. Knight*, 61 Iowa 29.

Local Legislation.—An act to improve a county road is local, and does not contravene the article of the Ohio constitution: "All laws of a general nature shall have a uniform operation throughout the State." Const. of Ohio, art. 2, § 26; 74 Ohio Laws, 472; *State v. Franklin County Commissioners*, 35 Ohio St. 458.

1. Damage—Power to Assess.—The trustees of an incorporated village raised the grade of a highway by filling it with gravel, in front of a land owner's premises. There was no survey, the

alteration was not recorded, and the selectmen of the town had nothing to do with the changing of the grade, though they knew that it was done. It was held that the county court could not appoint commissioners to appraise the damage. *Penniman v. St. Johnsbury*, 54 Vt. 306.

"The supreme court has no power to review the discretion of a municipal council as to the necessity of widening a street and taking the property of an individual for that purpose." *Goff v. Nelson*, 62 How. Pr. (N. Y.) 323.

2. Town of Palatine v. Kreuger, 121 Ill. 72.

3. Black v. Campbell, 112 Ind. 122.

The board has jurisdiction to decide on both the form and substance of the petition; not only as to the requisite number of signatures by property holders, but also as to "every other fact precedent or concurrent necessary to the granting of the petition." Its judgment on these matters cannot be attacked collaterally.¹

On an appeal from a decision of the board of commissioners the court will not sustain the objection that the petition was not signed by the requisite number of land owners, if this objection was not made before the board itself, and the petition did not disclose the lack of jurisdictional facts on its face. Once acquired, jurisdiction is not lost by the county commissioners by reason of their delay in acting. Nor can the jurisdiction be successfully attacked on appeal on the ground of want of notice by one who made a general appearance before the board.² Indeed, the assessment for a free gravel road cannot be collaterally impeached, if the board had jurisdiction. If it had none and the proceedings are void, there is no presumption in favor of the board.³

A corporation, under the laws of Indiana, had the right of public highway for constructing a plank road. It forfeited the right. Railroad companies had been empowered (by the same statute

Compare Forsythe v. Kreuter, 110 Ind. 27; *Crume v. Wilson*, 104 Ind. 583.

1. *Ely v. Board etc.*, 112 Ind. 361; *Million v. Board etc.*, 89 Ind. 5; *Streib v. Cox*, 111 Ind. 299.

Benefits.—The expense of making gravel roads is payable by the adjoining proprietors, in Indiana. The board of county commissioners, on their own motion, may order an additional assessment of benefits, in case the first proves inadequate to pay the cost of construction. *County of Montgomery v. Fullen (Ind.)*, 12 N. E. Rep. 298. Though they may order it, they are incompetent to assess the amount to be paid by the land proprietors, respectively. The matter must be referred to the viewers. *S. c. Gavin v. Board of Commissioners*, 81 Ind. 480.

Though a free gravel road in Indiana becomes a public road, the property of the locality may be assessed to pay the cost of it; and reassessment for the purpose may be made, not exceeding the benefit conferred. *Co. of Montgomery v. Fullen (Ind.)*, 13 N. E. Rep. 574.

When the lands of a railroad company are crossed by the laying out of a public highway which intersects the tracks and station grounds of the railway at right angles, the railroad company is entitled to an assessment of damages by reason of laying out the

highway. *State v. Capner (N. J.)*, 9 A. Rep. 781.

Under the "two-mile assessment pikes" act of Ohio, commissioners who have ordered an improvement in good faith are not liable to be enjoined because of omissions from the report of lands and persons to be assessed. Vendees, in possession under valid contracts of purchase, tenants for life and guardians of minors and insane persons are "land owners" within the contemplation of the statute, to be assessed as such. . . . A notice of petition for improvement is sufficiently definite, if it describe the improvement by "asking that said road be improved by macadamizing, under the two-mile assessment act." *Thompson v. Love*, 42 Ohio St. 61; *Ohio Rev. St.*, §§ 4829-4864.

The "lot and lands" to be assessed to defray the cost of improving a public road—the work being authorized by the county commissioners—include lots within the city limits, if less than two miles distant, and if benefited by the improvements. *Putnam Co. Comm'rs v. Young*, 36 Ohio St. 288.

2. *Robinson v. Rippey*, 111 Ind. 112; *Lowe v. Ryan*, 94 Ind. 450; *Bradley v. City of Frankfort*, 99 Ind. 421; *Pickering v. State*, 106 Ind. 228; *Rutherford v. Davis*, 95 Ind. 245; *Coolman v. Flemming*, 82 Ind. 117.

3. *Strieb v. Cox*, 111 Ind. 299; *Bur-*

that gave the right above mentioned) to lay tracks across the contemplated plank road, paying nothing for the privilege. When the plank road company forfeited its rights, the railroad companies lost their privilege. Another corporation subsequently constructed a gravel road on the same highway, but the railroad companies had not the right of crossing it without compensation. The general right of crossing roads by such companies, conferred by statute, was held not to extend to gravel roads built by a private corporation under a grant from the county commissioners, and the corporation may recover damages from railroad companies for laying their tracks across such a gravel road.¹

5. Description of Highways.—A projected public road was described in part as bounded by "the right of way" of a railroad, yet the description was not so vague and misleading as to render the whole proceeding void for uncertainty.² The route itself need not be described with "technical certainty," but must be sufficient for the surveyor to trace it from points definitely named and designated.³

A sheriff summoned a jury under a writ of *ad quod damnum* to assess damages in connection with the establishment of a highway. The writ described the place of meeting as "the land of the proprietors over which it is proposed that the road shall run," etc. The description was held sufficient under the statute (Gen. Stat. of Ky. 1883, ch. 94, § 8).⁴

ton v. State, 111 Ind. 600; Walker v. Hill, 111 Ind. 223.

1. Indianapolis etc. Gravel Road Co. v. Belt R. R. Co., 110 Ind. 5: "The gravel road company, by order of the county board, acquires an interest in the highway. The easement, which was before owned by the public, is thus transferred to the gravel road company." Cases cited.

Bridge at City's Cost.—The Schuylkill bridge in Philadelphia, free to the public, was held properly chargeable, under the statute, to the taxpayers of the city for its construction opposite a street. *Philadelphia v. Field*, 58 Pa. St. 320. See *Board of Wardens v. Philadelphia*, 42 Pa. St. 209; *Thomas v. Leland*, 24 Wend. (N. Y.) 65; *Norwich v. County Commissioners*, 13 Pick. (Mass.) 60; *Hingham etc. Corporation v. Norfolk Co.*, 6 Allen (Mass.) 353, to like effect. Such a levy is that of a tax; not what is called an "assessment" when that is contradistinguished from a tax. *People v. Whyler*, 41 Cal. 351; *Smith v. Farrelly*, 52 Cal. 77.

The legislature may impose part of the expense of a city bridge or road, when the work is costly and the benefit shared by the county. Supervisors

of Will County v. People, 110 Ill. 511.

Bridges.—Among the "internal improvements," for the construction of which the cities of Kansas are authorized to issue bonds, a bridge on a highway contiguous to a city is included. *Compare Stat. Kan.*, ch. 45, § 1; *State v. Babcock* (Neb.), 36 N. W. Rep. 474. Cities there are authorized to make appropriations to construct county bridges according to lineal measure of the work. They may issue bonds to help build a public bridge. *Compare Stat. Kan.*, ch. 14, § 77; ch. 45, § 1; *State v. Babcock*, (Neb.) 36 N. W. Rep. 474.

The section entitled "Roads and Bridges" in the Revised Statutes of Illinois, is construed to authorize highway commissioners "to assess and extend property for road purposes annually, and for the year in which such assessment is made or extended." Ch. 121, § 83; *Ohio etc. Ry. Co. v. People* (Ill.), N. E. Rep. 276.

2. McDonald v. Payne (Ind.), 16 N. E. Rep. 795; *Road in Borough of Verona* (Pa.), 12 Atl. R. 456.

3. Adams v. Harrington (Ind.), 14 N. E. Rep. 603; *Wells v. Rhodes* (Ind.), 16 N. E. Rep. 830.

4. Smoot v. Schooler (Ky.), 8 S. W. Rep. 202.

6. Establishment of Highways.—A statute of Michigan requires commissioners of highways to have a survey made when laying out a road, and to incorporate it in an order signed by themselves and recorded in the township clerk's office. That officer is required to make an entry on the record of the time of recording. A record, purporting to be a copy of the field notes of the survey, is insufficient to show compliance with the statute. The highway is not thus proved to have been laid out regularly.¹

The opening of a highway cannot be enjoined for defective proceedings if they afford means of information to interested persons sufficient to enable them to understand what effect the establishment of the road would have.²

The viewers reported a highway laid out but made a mistake in the name of the point of beginning. It was merely the omission of a consonant from a proper name, otherwise the report corresponded with the petition. The error could not have misled anyone, and was immaterial. The court held that parol evidence was admissible to show the identity of the point as described in the report with that in the petition.³ If the report of the viewers is rejected by the board of county commissioners which appointed them for the purpose of laying out a public road, it may reconsider the vote of rejection while yet in session, and then postpone the resolution to adopt or to reject (as the case may be) to a stated day, without affecting its own jurisdiction under the statute.⁴

Establishing Highways—Evidence.—A petition to establish a highway in California failed to show that the road proposed was to be in the district of the petitioners or even in the State. There was an action under the statute providing for condemnation of land for highways, wherein the above mentioned defects of the petition appeared. The court held the petition admissible. The board of supervisors could supply the facts omitted on evidence.

The order of the board for the condemnation of land for the

1. *Kruger v. LeBlanc* (Mich.), 37 N. W. Rep. 880.

2. *McDonald v. Payne* (Ind.), 16 N. E. Rep. 795.

Establishment.—The legality of a highway depends upon its dedication, not upon the return of the surveyors who have laid out the road. *State v. Stillwell* (N. J.), 14 Atl. R. 563.

Where the road commissioners are required to take the relinquishment of rights of way, state the names of those who relinquish and those who refuse to do so, there must be a conference between them and the land owners which must be shown in the proceedings of the county court to give it jurisdiction to appoint jurors for the assess-

ment of damages. *Rev. Stat. Mo.* § 6937 construed. *C. R. I. & P. Ry. Co. v. Young* (Mo.), 8 S. W. R. 766.

County commissioners, required by statute to assess benefits of highway through an unincorporated township at their first regular session after laying out a road, are not authorized, in case of an appeal from their action, to make such assessment before their first regular session after the appeal has been finally disposed of. *Rev. Stat. Me.*, ch. 6, § 78, construed. *Appleton v. County Comm'rs* (Me.), 14 Atl. Rep. 284.

3. *McDonald v. Payne* (Ind.), 16 N. E. Rep. 795.

4. *Higgins v. Curtis* (Kan.), 18 Pac. Rep. 207.

road was admissible in evidence. That it had no power to act on the petition before deciding that it had been signed by the requisite number of freeholders of the district, was not a good objection—for the presumption is that the order was made on the finding of the requisite facts.

The required bond accompanying the petition, as required by the statute of that State, must be deemed approved by the supervisors when they order viewers to be appointed. The notice by the viewers to the land owners need not be written.¹

III. IMPROVEMENTS OF NAVIGATION.—The State may create corporations for river improvement, and give them power even to levy tolls. If they damage property by flooding it or otherwise, they are amenable to the persons injured who have their common law remedy if the statute provides none.²

Ordinarily the federal government has jurisdiction over navigable streams, and exercises it, but on its neglect to exercise it the

1. *Humboldt County v. Dinsmore* (Cal.), 517 Pac. Rep. 710.

Establishment of Highways.—In Maine, there must be a description of the proposed highway, but the courts do not require nicety of description. *Packard v. County Comm'rs* (Me.), 12 Atl. R. 788.

After a road has been dedicated by land owners and accepted by the authorities, strangers cognizant of the proceedings and silent during their progress, cannot enjoin the maintenance of the highway. *Sunderland v. Martin* (Ind.), 15 N. E. Rep. 689.

Compensation to Land Owners.—The county board and the commissioners, to locate a state road, are alike empowered to award damages in Wisconsin. A statute which requires damages caused by opening a state road to be paid by the county of its location, and allows complainants to present their claims to the county board, and gives them the right of appeal to the circuit court, provides for "just compensation," and is constitutional in that respect. *Rev. St. Wis.*, § 1315; *State v. Hogue* (Wis.), 36 N. W. Rep. 860.

Highway Dedication.—A corporate officer had some land of a corporation surveyed and platted. An avenue was laid out on a strip of this land, which connected two highways. The plat was not recorded. The corporation had a "trotting park," which was a thousand feet long, running beside the strip for the avenue, with a fence between. The avenue was opened, graded and used by the public. It was proved

that it was meant for a highway, and was kept up at the town's expense, though it was shown, in rebuttal, that a notice, "This road is private property," once had been posted. The court held that there had been a complete dedication and acceptance as a public highway. *Union Co. v. Peckham* (R. I.), 12 Atl. R. 130.

A public improvement by the State, to which consequential damages can be traced remotely and indirectly, does not create liability to pay for them on the part of the State, unless there is statutory imposition of the liability. It is not under the constitutional inhibition against taking private property. *Green v. State*, 73 Cal. 29; *Lamb v. Reclamation District*, 73 Cal. 125.

2. Improvement Companies.—State Authorizations.—A river improvement company, being duly authorized by statute to improve between designated points, constructed dams, which flooded land several miles below the points. The court held that persons injured had their common law remedy, and that the wrong done was not *damnum absque injuria* as being incidental to a public improvement, and remotely consequential from it. *Hackstack v. Keshena Improvement Co.*, 66 Wis. 439. See DAMS, Am. & Eng. Ency., vol. 5.

A State may authorize the formation of corporations to improve streams that cannot be used for floatage without improvement. And it may authorize such corporations to levy tolls. *Manistee River Improvement Co. v. Sands*, 53 Mich. 593.

State within which such a stream lies may so far exert authority over it as to improve it.¹

A company should make the improvement to navigation for which it is authorized to collect tolls, or should have advanced them so far as to benefit the navigation before attempting to collect. It is held that such charges are not violative of the constitutional guaranty of free navigation.²

IV. LOCAL IMPROVEMENTS—1. Constitutional Provisions—(1) Inhibitions.—While authorizations in a constitution require statutes

1. "If congress has not acted in the matter, the State has authority over navigable waters within its boundaries, and over the lands under them." *American Dock and Improvement Co. v. Public School Trustees*, 39 N. J. Eq. 409.

"In regulating the erection of a bridge over the Ohio river, under U. S. act of December 17, 1872, *held*, that the secretary of war could not order a dyke 900 feet long in place of one of 300 feet authorized by him—nothing in the act conferring the power expressly or by implication." *U. S. v. Pittsburgh & Lake Erie R. R. Co.*, 26 Fed. Rep. 113.

The Connecticut legislature may authorize improvements to the navigation of the waterways of the State without reference to remote and consequential damages within the State. It may diminish water power. This does not amount to "the taking of private property," within the constitution. But the rule is to the contrary with respect to injury thus caused to landholders in other States. *Holyoke Water Power Co. v. Conn. River Co.*, 20 Fed. Rep. 71.

A railroad company, under legislative grant to build a railroad between designated points, may make drawbridges, and maintain and repair them, across navigable rivers, without liability for the temporary obstruction of the streams incidental to the work. *Hamilton v. Vicksburg etc. R. R. Co.*, 34 La. Ann. 970; s. c., 44 Am. Rep. 451.

The Black River Flooding Dam Association was organized under Wis. Rev. Stat., ch. 86. The statute did not affect the authority previously granted to the Black River Improvement Co. to improve the river throughout its length, charge tolls on logs, etc., and to erect flooding dams. *Black River Flooding Dam Ass'n v. Ketchum*, 54 Wis. 313. The Improvement Co. above mentioned took power under its charter to

close the entrance to a navigable stream which was connected, at both its ends, with Black river. It was *held* to have authority to take state lands, without compensation, for the purpose of improving the navigation of the river. Persons who purchased lands from the State, after the company had erected dams and embankments on them, took their title subject to the rights of the company previously acquired. Where an embankment had been made by the company on land held by a purchaser from the State with his consent and the land was afterwards forfeited by him to the State and then sold to another purchaser, the latter took, subject to the company's right. *Black River Improvement Co. v. La Crosse Booming etc. Co.*, 54 Wis. 659.

A boom company, empowered by statute of a State to collect and assort logs and turn them out of its boom at the request of the owners of the logs, will be enjoined from the prosecution of the business, where it is injurious to improvements to river navigation under process of construction by the federal government under an act of congress, though the business of the boom company and the navigation of the river may be temporarily suspended. *U. S. v. Rum River & Miss. Boom Co.*, 1 McCrary, C. C. 397, 601.

2. **Tolls.**—A river navigation company, authorized to collect tolls after improvements shall have been made, cannot collect them before a reasonable compliance with the charter requirements. *Carman v. Clarion River Nav. Co.*, 81 Pa. St. 412. Toll charging for improvements is not incompatible with constitutional provisions securing free navigation. *Benjamin v. Manistee River Improvement Co.*, 42 Mich. 628. And a legislature may empower private citizens to charge toll for the use of their improvements of a navigable river. *Nelson v. Cheboygan Slackwater Nav. Co.*, 44 Mich. 7; s. c., 38 Am. Rep. 222.

to enforce them, prohibitions do not. Applying this rule to city power to improve streets, we see that the inhibition of the taking of private property for public use, without compensation, includes a restraint upon cities from doing so, and that no inhibitory statute is necessary. An injured private owner would have his common law remedy against the injustice done him by the arbitrary taking of his property, though the statutes should give him none. The courts will obey the constitution and enforce its prohibitory clauses, regardless of any construction by the legislature. The common provision, stating what a law shall be construed to mean, is mere surplusage in a statute.¹

(2) *Taking Property for Municipal Purposes.*—The right to compensation has been extended by the constitution of Tennessee to property owners who have had their property injured in various ways by the extension of a city so as to include it.²

A statute authorizing a city to make local assessments upon property fronting streets, for such part of the expense of improvement as the authorities shall consider just, was declared unconstitutional because there was no definite standard for assessment.³ If an assessment is opposed as unconstitutional in its statutory authorization, laches cannot be set up to bar a writ of *certiorari* to set it aside.⁴

Authorizations to assess property on other grounds than its cash value, have been sustained as constitutional with respect to counties; and counties are included in the term "municipal corporations."⁵

Under different State constitutions, statutes have been construed with reference to the time when private property may be taken for public improvements, and when and how compensation shall be made to the bereft owners. A statute was sustained which authorized the taking and the fixing of a day in court when all the owners could present their claims.⁶ And one for fixing the cost of the improvement after its construction was sustained.⁷

1. *Householder v. City of Kansas*, 83 Mo. 488; *McDonald v. Patterson*, 54 Cal. 245.

2. *Gray v. Mayor of Knoxville*, 85 Tenn. 99; *Mayor etc. v. Nichol*, 3 Baxt. (Tenn.) 340.

3. *Barnes v. Dyer*, 56 Vt. 469.

4. *Culver v. Jersey City*, 45 N.J. L. 256.

5. **County Improvements — Constitutional Application to.**—Assessing for local improvements, irrespective of the cash value of the property assessed, was held legal as to counties under constitutional authorization. *In re Appeal of Dowlan* (Minn.), 31 N. W. 517. The constitutional amendment thus authorizing used the term "municipal corporations," which was held to include counties. The court said: "In

our own decisions may be found such language as this: 'A municipal corporation—a city, county or town.' (*Harrington v. Town of Plainview*, 27 Minn. 224-229; s. c., 6 N. W. Rep. 777). 'A county or any other municipal corporation.' (*County of Blue Earth v. St. Paul R. R. Co.*, 28 Minn. 503-507; s. c., 11 N. W. Rep. 73). See also *Winspear v. District Tp. of Hudson*, 37 Ia. 544; *Selma v. Gulf R. Co.* 45 Ala. 696-732."

6. **Constitutionality of Improvement Acts.**—An act directing the taxing and the taking of land for public improvements, and providing a day in court when all interested parties may be heard, is held not unconstitutional. *Lent v. Tilson* (Cal.), 14 Pac. Rep. 71.

7. The act of California providing for

And when a fixed rule of assessment, without reference to benefits, was adopted, it was held constitutional.¹ And it has been held that an ordinance was constitutional though it directed no notice to the property holder before the making and enforcing of the improvement assessment upon his property, and provided for no anterior hearing. The legislature having authorized such an ordinance, the courts would not interfere in a matter held to be exclusively within its discretion.²

The taking of private property for public use without compensation, is forbidden by the constitution of Pennsylvania, as in most others, as well as that of the United States. Under it an ordinance of a borough was pronounced void for authorizing a street committee to make drains and ditches, and repair them on lots belonging to citizens, and to impose fines for filling up the ditches. There was no statute to support such an ordinance by providing reimbursement to the lot-owners for damages done to their property.³

The compensation to private owners for their property taken for public use must be certain, free from contingency, and not dependent upon the collection of taxes or assessments to meet the demand.⁴ They are entitled to its value without reference to the sales of similar property and the prices which it commanded.⁵ And it is the value at the time of the dedication which is to be paid. The contemplated improvements, which may enhance the value of the property, constitute no element in the estimation, unless they have already caused a rise in the price of real estate so as to affect the present worth of it.⁶

Under justifying circumstances, a city may take the land needed for the opening or widening of a street, yet not take a house stand-

work upon streets, sewers and other improvements, but not for the cost of it before the performance, is *held* constitutional. *Thomason v. Ashworth* (Cal.), 14 Pac. Rep. 615.

1. Sewer assessments in Rhode Island were *held* constitutional, though not based on benefits received, but by a fixed rule. *Bishop v. Tripp* (R. I.), 8 Atl. Rep. 692; *Cleveland v. Tripp*, 13 R. I. 50.

Special benefits may be assessed, when caused by the vacation of a street and made a personal claim against the beneficiary. Such personal assessment under statutory warrant, *held* constitutional. *In re Vacation of Centre St.* (Pa.), 8 Atl. Rep. 56.

2. *Alberger v. Mayor etc. of Baltimore*, 64 Md. 1.

3. Const. Pa., art. 16, § 8; *Borough of Strasburgh v. Bachman* (Pa.), 14 Atl. Rep. 148.

4. *Sage v. Brooklyn*, 89 N. Y. 189.

5. *Kerr v. South Park Commissioners*, 117 U. S. 379; *Cook v. South Park Commissioners*, 61 Ill. 116.

6. Such changes as are usual and reasonable are presumably contemplated where land is dedicated and accepted. Compensation cannot be claimed afterwards because of such changes made in the grading and improving of a street on the land dedicated. A material and unusual change, causing injury, is subject to a different rule.

City Council of Montgomery v. Townsend, 80 Ala. 489; s. c., 2 So. 155.

See *City of Elgin v. Eaton*, 83 Ill. 335; *Reardon v. San Francisco*, 66 Cal. 492; *Hannon v. Omaha*, 17 Neb. 548; *Johnson v. Parkersburg*, 16 W. Va. 403, as to whether an abutter is entitled to recover damages in consequence of the changing of the street grade. See also *Rigney v. Chicago*, 102 Ill. 64.

ing thereon, paying for the ground and allowing the owner to remove the building; but this could not ordinarily be done.¹

Since the widening of a street, and the taking of land from private owners for the purpose, is an exercise of the right of eminent domain, while the paving and grading of a street rests on a different principle, both cannot be ordered in one proceeding, it has been held in exposition of statute.² While the latter affects property holders as beneficiaries, the former affects them as persons involuntarily deprived of their property.³

When deprived of it, with the understanding that it is to be devoted to some desirable public improvement, such as a park, it seems that they have no remedy, after receiving compensation, if the property be devoted to some other use. It is illegal on the part of the city, to whom the property has been dedicated, thus to divert the use, and perhaps beneficiaries who have contributed for the purchase might enjoin the city from doing so.⁴

One whose property is taken may have other property left which is benefited by the opening of the street. In such case it is but just that he should be awarded only such damages as are measured by the excess in amount of value between the loss and the benefit.⁵

Though a city be authorized by its charter to exercise the power of eminent domain for public municipal uses upon giving compensation, it cannot appropriate for such purposes what has already been set apart for a railroad depot under legislative authority, it was held.⁶ Why is a private corporation's rights derived from the State any more sacred than those of a private citizen who may have bought land of the State, or holds land, by any good title, under the laws of the State? Yet his property can be taken for street purposes by virtue of the law of eminent domain. And the city itself is the judge of the question whether the designed use is a public one, unless the falsity of the design is apparent.⁷

It has been held, however, that this constitutional inhibition is inapplicable to cities when taking lands from private owners for public streets further than their charters require compensation; that the owner can obtain no more compensation than the charter authorizes.⁸

(3) *Equality and Uniformity.*—Distinction is made between taxation and special assessments for improvements with respect to the constitutional requirement of equality and uniformity. The provision has been held applicable to taxation for revenue,

1. *City of St. Louis v. Connecticut Life Ins. Co.*, 90 Mo. 135.

2. *Mendenhall v. Clugish*, 84 Ind. 94.

3. *Crane v. City of Elizabeth*, 36 N. J. L. 339; *Hayden v. City of Atlanta*, 70 Ga. 817.

4. *Gilman v. City of Milwaukee*, 55 Wis. 328.

5. *Genet v. Brooklyn*, 99 N. Y. 296.

6. *St. Paul Union Depot Co. v. City of St. Paul*, 30 Minn. 359.

7. *Town of Rensselaer v. Leopold*, 106 Ind. 29; *People v. Hyde Park*, 117 Ill. 462.

8. *Simmons v. City of Passaic*, 42 N. J. L. 619.

and confined to that.¹ But assessments for improvements must be just, based on the true value of the property bearing the burden or the benefit conferred, and imposed with uniformity and by the properly constituted authorities, in order to meet constitutional requirement.²

Front-foot assessments, made on the petition of residents, were sustained against the objection of unconstitutionality because of the alleged discrimination against non-resident owners.³

While, as above shown, a city cannot be constitutionally empowered to levy assessments for improvements at will, without a fixed standard, it may be authorized to charge fronting proprietors with a certain and definite proportion of the expense of improving the street upon which they front; and it may be done under the police power.⁴ But the exaction of such forced contributions would be unconstitutional if it is neither imposed as a tax according to property value, nor as an improvement assessment according to benefit conferred.⁵ An assessment may sometimes be sustained as a tax under a constitution which would hardly countenance it as an improvement assessment.⁶

Uniformity—Constitutionality.—Assessment according to frontage is held to be constitutional in Illinois, and in most of the States, though Arkansas holds a different view under its constitution. Equality and uniformity, necessary to the validity of a tax, are generally held not absolutely essential to the contribution required of benefited property holders in return for local improvements.

The real estate, abutting on a street to be improved by paving or by some other work, does not always become benefited in equal measure with the required contribution. For instance, a corner lot, assessed for the number of feet running along its side, must pay three or four times as much as a key lot joining it in the rear; yet the rule of payment is held not oppressive in such sense as to enable the court to declare the assessment unjust and therefore void.⁷

It was held constitutional for a city to issue certificates that contract work had been done, and such certificates were proper evidence against the city when the performance was called judicially into question.⁸

1. R. & A. Ry. Co. v. City of Lynchburg, 81 Va. 473; Norfolk City v. Ellis, 26 Gratt. (Va.) 224.

2. Jersey City v. Vreeland, 43 N. J. L. 638; Mayor etc. of Jersey City v. Carson, 43 N. J. L. 664.

3. Buchan v. Broadwell, 88 Mo. 31.

4. Adams v. Fisher, 63 Tex. 651; Roundtree v. City of Galveston, 51 Tex. 302; City v. Loonie, 54 Tex. 517; City v. Heard, 54 Tex. 420; Highland v. The City, 54 Tex. 527.

5. Reynolds v. Mayor etc. of Paterson, 48 N. J. L. 435.

6. Cleveland v. Tripp, 13 R. I. 46;

7. City of Springfield v. Green, 120 Ill. 269. *Citing*, on the constitutional point, White v. People, 94 Ill. 604; Craw v. Tolono, 96 Ill. 255; Bigelow v. Chicago, 90 Ill. 53; Fagan v. Chicago, 84 Ill. 234; Enos v. Springfield, 113 Ill. 65; Galesburg v. Searles, 114 Ill. 217; Watson v. Chicago, 115 Ill. 78; City of Sterling v. Galt, 117 Ill. 15. On side of corner lots, see cases cited, p. 276, of 120 Ill. 269.

8. *Constitutionality of Charter—Construction.*—Certificates to contractors,

The provision commonly found in city charters, authorizing assessments by front foot, on the petition of the majority of the proprietors of lots abutting the street to be improved, has been held constitutional as before stated.¹ The minority have not assented to be charged in such case, and they are subjected to a forced contribution.

(4) *Police Power*.—Sanitary reasons are often assigned, in acts of the legislature, for forcing private owners to drain their lands, or to bear the expense of the draining. The care of the public health appertains to government, and the right to order draining is found in the police power. As a man might be compelled to fill up a stagnant pool in his garden because of its unhealthfulness to himself and his neighbors; as he might be made to pay for the filling in case he had refused to do it himself, and the public authorities had caused it to be filled by others; so, an extensive marsh or swamp, owned by many different persons, may be drained at their expense for the sanitary good of the public. Each could not practically drain his own lot, or acre, or section; so the public authorities must do it all and equitably charge each. The assessments for such purpose must be regular and in conformity to statute.²

(5) *One Subject, Expressed in Title of Statutes*.—The constitutional requisition, common in many States, that a statute shall be confined to one purpose which the title must indicate, does not render general laws for the incorporation of cities unconstitutional, nor destroy the implication that such municipal bodies may exercise powers germane and incidental to their organization.³

of the fact that they had done work on streets, were authorized by the city charter to be issued as evidence of performance of contract. The authorization was constitutional, and the certificates were evidence, *prima facie*, of the holder's right to recover compensation of the owner of the property benefited. The owner, however, could prove any fact in defence which would tend to relieve him from liability to pay. *Texas Transportation Co. v. Boyd*, 67 Tex. 153.

1. A city charter's provision allowing assessments against abutters on a graded street, when a majority of those whose residences front the street petition therefor, is held constitutional. *Buchan v. Broadwell*, 88 Mo. 31.

2. *Sanitary Purposes*.—Public health promotion is sometimes given in statutes as the reason for drainage, thus placing the authorization under the police power. Cooley has the following note in his *Treatise on Taxation* (2nd ed.), p. 616: "In *Reeves v. Treasurer of Wood Co.*, 8 Ohio St. 333, the subject is considered by BRINKERHOOF, J., and

the right to levy an assessment affirmed, though it does not distinctly appear that sanitary objects were had in view. In *Woodruff v. Fisher*, 17 Barb. (N. Y.) 224, an assessment made ostensibly for the public health was maintained with some hesitation. Other cases are *Anderson v. Kerns Draining Co.*, 14 Ind. 199; *Sessions v. Crunklinton*, 20 Ohio St. 349; *Draining Co. Case*, 11 La. Ann. 338; *Hager v. Supervisors of Yolo*, 47 Cal. 222; *O'Reiley v. Kankakee Draining Co.*, 32 Ind. 169. The following were cases in which, for the most part, only questions of the regularity of assessments were involved: *Jordan Association v. Wagoner*, 33 Ind. 50; *Thompson v. Draining Co.*, 33 Ind. 368; *Kinyon v. Duchene*, 21 Mich. 498; *Bench v. Otis*, 25 Mich. 29; *Atwood v. Zeluff*, 26 Mich. 118; *Etchinson Ass'n v. Bresenback*, 39 Ind. 362; *Slussen v. Rawson*, 39 Ind. 506; *Nevins etc. Draining Co. v. Alkire*, 36 Ind. 189; *People v. Jefferson Co. Court*, 56 Barb. (N. Y.) 136; *People v. Haines*, 49 N. Y. 587."

3. *Potwin v. Johnson*, 70 Ill. 70.

(6) *Limitations*.—When a city has been restricted in its powers, it does not follow that the legislature may not do what the city cannot when the limitation is inapplicable to it, and the power is to be exercised by it and not by the city.¹

The power of assessment is not limited to one levy; for, if that has been set aside as unconstitutional, a second may be ordered.² Omissions are no ground of complaint unless they have injured the complainant.³

The division of the cities of Pennsylvania into seven classes has been held to be in violation of the constitution;⁴ a consequence of this decision is to render void such municipal liens as were based on the statute directing the classification.⁵

2. Statutory Authorization—(1) *Delegation of Power to Municipal Corporations*.—A clause in the constitution which authorized the legislature to grant authority to municipal corporations to make improvements by special assessments or by special taxation, was construed to mean that the legislature might vest the power of doing both in such corporations.⁶

Property exempt from taxation may yet be assessed to bear its burden for local improvements according to the benefits it receives;⁷ and property may be taxed when not benefited, for an improvement, where the expense may be lawfully provided for under the taxing power.⁸

In New Orleans the city council possesses the right to grant authority to a person or company to erect towers for the support and conduct of electric wires and cables. The delegation of the power is upheld by the courts. And the company to which such power is delegated may also be authorized to remove obstructions in the way of the erection of the towers. And the courts go so far as to hold that this delegated right cannot be drawn in question, except by one who claims an exclusive or concurrent right of the same character.⁹ It would seem that anyone injured, or about to be, should be allowed to contradict the claim of the company to a right to remove his property and substitute a tower, and to deny the validity of the authority.

Delegation of Power to Commissioners.—An ordinance delegating to commissioners of public works power to have work done

1. Tift v. Buffalo, 82 N. Y. 204.

2. Righter v. Newark, 45 N. J. L. 104.

3. Righter v. Newark, 45 N. J. L. 104. The legislature cannot validate assessments previously made for improvements under an unconstitutional act. Schuler v. City of Philadelphia (Pa.), 13 A. 947.

4. Appeal of Ayars (Pa.), 16 A. 356.

5. Berghaus v. City of Harrisburg (Pa.), 16 A. 365; Klugh v. City of Harrisburg (Pa.), 16 A. 365; Shoemaker v. City of Harrisburg (Pa.), 16 A. 365.

6. Falch v. The People, 99 Ill. 137; Bucroft v. Council Bluffs, 63 Ia. 646.

7. State v. City of Kansas, 89 Mo. 35; Farrar v. St. Louis, 80 Mo. 379.

8. Pearson v. Zable, 70 Ky. 170.

9. New Orleans Gas Light Co. v. Hart (La.), 4 So. Rep. 215.

A city may be enjoined from proceeding to improve without jurisdiction. It was held incompetent to improve a public market, owned by the corporation, at the expense of the surrounding property. City of Fort Wayne v. Shoaff, 106 Ind. 66.

in such manner as they should deem expedient, when the statute required that the work should be let to the lowest bidder, under sealed proposals, was held void.¹

(2) *Power Conferred Should Be Definite.*—The grant of authority, from the legislature of the State to the council of a city, to levy an assessment for improvements, is as sacred as that which authorizes the imposition of taxes. The authorization should be explicit, and not leave the city council to wide discretion because of vague language in the legislative grant. When a city council was authorized to assess abutting owners as it should deem just and equitable, the court set aside the statute so far as the bestowal of this indefinite power was concerned. The court said that the words "just and equitable" impart no special limitation; that the council, under that clause, "might assess one man in one view, and another in another view."²

But uniformity in assessments is not insisted upon, as in the case of taxes. The usual constitutional requirement of equality and uniformity in the latter, is held inapplicable to the former. Property not taxable may be assessable for improvements.³

1. *Phelps v. City of New York* (N. Y.), 19 N. E. 408; *Laws of N. Y.* 1873, § 91; Act 1882, § 64.

2. *Statute Construed as Unjust—Sidewalk.*—The rule of apportionment was delegated by the legislature to a city council. The court, considering the authority sought to be conferred on the council to assess abutting owners "as they [the council] should deem just and equitable," said: "The only question here is whether the phrase 'as they shall deem just and equitable' is sufficiently certain as a standard of assessment. If it could be properly construed as meaning only what was just and equitable in view of the benefit to the premises fronting on the improved sidewalk, it would possibly be sufficient. The exceptions do not state upon what view or theory the assessment in question was made. If said clause is fairly liable to a different construction from the one above stated, then it furnishes no certain legal standard of assessment. Did the court or common council determine the amount of this assessment in view of the benefit to the abutting land, or of its value, or of the personal convenience to the defendant, or of the ability of the defendant to pay, or of all these combined? Who can say? Why might they not, under this clause, assess one man in one view and another in another view? Just and equitable in respect to what? The words import no

special limitation." *Barnes v. Dyer*, 56 Vt. 469. See *Whiteford v. Probate Judge*, 53 Mich. 130.

Constitutional Provisions.—A law authorizing the application of assessments for benefits on residues of lots, and reducing the awards for the parts taken in opening streets, is not unconstitutional. *Genet v. Brooklyn*, 99 N. Y. 296.

The legislature may constitutionally delegate to a board of assessors who are independent of the city council the power to assess city property for local improvements. *Little Rock v. Board of Improvements, etc.*, 42 Ark. 152.

3. *Uniformity.*—The rule requiring taxes to be uniform, in the constitution of Missouri, does not apply to assessments for street improvements. The city charter of St. Louis, which provides for the assessment of front lots, etc., is not violative of that constitutional rule. *Farrar v. St. Louis*, 89 Mo. 379. And where a cemetery was exempted from "taxation," it was not relieved from such an "assessment." *Lima v. Lima Cemetery Ass'n*, 42 Ohio St. 128; s. c., 51 Am. Rep. 809.

An Ohio statute, confining such assessments to lots benefited, not front ones only, but also those "contiguous and adjacent," was held not unconstitutional. *Ohio Const.*, art. 13, § 6, requiring the legislature to restrict the power of assessment by municipal corporations, etc., was not violated.

It is held to be not taking an abutter's property without his consent, in derogation of the constitution, when streets are narrowed, and some of them previously improved at the cost of the abutting proprietors are changed from public to private property.¹

Where the statute authorizes the city council to determine that some portion of an improvement shall be charged to property holders, the decision of the council in fixing the amount is final.²

Delegation of power to assess for purposes of local improvement, from the State to the city, is common. There are conditions imposed by the State when delegating the power, in many instances, and these must be observed under pain of nullity. It is a principle underlying such grants, that the persons charged should have an equivalent in the benefit conferred; but, when the

Raymond v. Cleveland, 42 Ohio St. 522, in exposition of 70 Ohio Laws 127, § 539.

Assessments for street improvements are not taxes within the constitutional requirement respecting the latter, as to uniformity, etc. *Taylor v. Boyd*, 63 Tex. 533.

Thirteen acres within city bounds, used for agricultural purposes and the owner's residence, were held not taxable for city purposes, under Iowa Laws, 1876, ch. 47, § 4; 1879, ch. 169. *Winzer v. Burlington*, 68 Iowa 279; *Tubbesing v. Burlington*, 68 Iowa 691.

Equality and uniformity and proportion to value, required in the levy of taxes, were held inapplicable to special assessments for local improvements. *Richmond & Alleghany R. R. Co. v. Lynchburg*, 81 Va. 473. General exemption from taxation does not embrace assessments for such improvements. *Buffalo Cemetery Ass'n v. Buffalo*, 43 Hun (N. Y.) 127; *State v. Kansas*, 89 Mo. 34.

In assessing abutters, the question whether the cost of grading is a part of that of paving depends on the necessity of the grading as a foundation for the pavement. The city council's treatment of both as one is not conclusive. *Scofield v. Council Bluffs*, 68 Iowa 695.

When an assessment is set aside for irregularity, the Supreme Court of New Jersey is required to make a valid one by a statute of that State. It was held that a township could not make a reassessment after the first had been set aside, but that it was the duty of the court. *State v. Township*, 48 N. J. L. 125.

Taxation of city property for roads

beyond corporate limits was allowed with reference to the repair of turnpikes, notwithstanding charter inhibition. It was held that turnpikes were not within the contemplation of the legislator when they inhibited the taxation for roads outside the city. *Read v. Yeager*, 104 Ind. 195.

1. Narrowing Streets.—Authority to narrow streets, conferred by statute on towns, does not, in its exercise, take the property of an abutter without his consent and without compensation, in violation of the constitution. The portion of the street abandoned from public use goes usually into private hands, as a result of the narrowing process. *Renselear v. Leopold*, 106 Ind. 29.

Description.—If the statute prescribes that an ordinance for improvements shall specify the nature, locality and description of a proposed improvement, there is substantial and sufficient description if the ordinance requires that the foundation of a brick pavement shall be "of cinders, sand, gravel, or other materials equally suitable." *Jacksonville R. R. Co. v. Jacksonville*, 114 Ill. 562.

2. City councils have sole power to decide what part of local improvements shall be paid by the public, and what part by property holders specially assessed; and their decision is conclusive. *Watson v. Chicago*, 115 Ill. 78, in exposition of the Ill. City and Village act, Rev. Stat., p. 232.

Abutter Buying After the Grading.—The grade of a street being established, it may be altered, if done in a careful and reasonable manner, without giving a right of action in damages to a purchaser who bought an abutting lot, after the first establishing of the grade, and proceeded to make improvements

city orders an improvement and an assessment therefor, there is a presumption that the benefit equals or exceeds the cost.¹

(3) *Scope of the Authorization.*—More than one improvement may be embraced in a single authorization, ordinance, or order. Several streets may be improved in common under one assessment; and several different kinds of improvement, such as grading, paving and sewer-building, may be included, so that the whole shall be treated as one enterprise. It is no objection to the work that it is composed of several different elements, when all are governed by the same principle. The opening or widening of streets could not be included with such works as those above mentioned, because involving a different principle, but the simple amelioration of public property already dedicated may be ramified in many directions.²

(4) *Strict Construction.*—The rule of strict construction, applicable to legislative authorizations of municipal improvements, extends to the particular methods prescribed. Even the power to authorize at all will be held to its proper limits. To grant the assessing of property to pay for work done prior to the grant, was held to exceed this limit—the property not being otherwise liable at the time the improvement was ordered and constructed.

While the authorization may be right, the assessment under it may, in accordance with it, in one part of a city, and not in another; but the illegality in the latter will not affect the former. Under a general authorization with reference to special benefits, it is not illegal to make discrimination in the assessment between properties on account of location.³

It requires legislative grant for a city to buy property for other than public uses by contract with a voluntary vendor. When property was alleged by its owners to have been rendered useless for the purpose to which they had previously devoted it, and when they sought to abandon it to the city because of its being rendered thus useless by a city improvement, and to obtain compensation for it, the court held that this could not be done on the

regardless of the grade. *Denver v. Vernia*, 8 Colo. 399.

1. *Method of Levying.*—The taxing for local improvements, or rather the levying of forced contributions, is frequently delegated to city councils, or other local boards, by the legislature. *Piper's Appeal*, 32 Cal. 530. Actual view by such local boards or commissioners, before assessing benefits to meet the cost of the improvement, is sometimes required, and when required must be performed under pain of nullity. *Johnson v. Milwaukee*, 40 Wis. 315. The assessment ought not to exceed the benefit, as a general rule, and should be impartially proportioned on the property. *Crawford v. People*, 82

Ill. 557. Benefit is presumed: so the *onus* is on him who denies that he is a beneficiary, if he is an owner which the legislature assumed to benefit by the improvement ordered. *Brown v. Denver*, 3 Colo. 169; *In re Bassford*, 50 N. Y. 509; *Petition of Brady*, 85 N. Y. 208.

2. *State v. District Court*, 33 Minn. 295; *Murphy v. Peoria*, 119 Ill. 509; *Grimmell v. Des Moines*, 57 Iowa 144; *Kemper v. King*, 11 Mo. App. 116; *Myall v. City of St. Paul*, 30 Minn. 294; s. c., 299.

3. *Strict Construction.*—The legislative authorization to make assessments for local improvements must be unequivocal and strictly construed. A

principle governing the opening and condemning of streets, and not under the principle of the law of eminent domain; that they had no right under the ordinance to make the surrender, and the city no right thereunder to accept it. The city's duty was to ascertain the damage done and pay for it.¹

A city cannot (unless authorized in other than the general terms empowering it to lay water mains) run its water-pipes through the highways of a neighboring town and across tide waters.²

A city was authorized by charter to apportion the cost of opening, grading, paving, or otherwise improving streets, between itself and the immediate beneficiaries—the owners of real estate thus enhanced in value. The part to be paid by them was collectible as a city tax. The city, however, was authorized to order such improvements only on the petition of the majority of the freeholders to be benefited, unless three-fourths of the city council should unite in the order. This provision of the charter was held accordant with the fourteenth amendment of the constitution of the United States, though it contained nothing to authorize any injured person to contest the proceeding. It was said that each citizen is presumed to have notice of public laws, and that the interested land owners had notice by the progress of the construction of the improvements themselves.³

(5) *Conditional Authorization*.—Conditions upon which the legislature grants powers to municipal corporations to make improvements, must be observed, or there will be no jurisdiction to proceed, and the usurping city may become liable to damages at every step.⁴

An assessment, made within statutory authorization, with regard to one part of an improvement in one ward, may be sus-

prescribed mode must be implicitly followed. *Fayssoux v. Succession of Baroness DeChaurand*, 36 La. Ann. 547.

1. *Gregg v. Baltimore*, 56 Md. 256.

2. *Town of Quincy v. Boston* (Mass.), 19 N. E. 519.

3. *Davis v. City of Lynchburg* (Va.), 6 S. E. Rep. 230.

4. **Conditional Authorization to Make Improvements**.—Where a city made improvements without complying with the conditions upon which its right to proceed depended, a property holder, damaged by them, may have action against the city because of its jurisdictionless proceeding. *Meinzer v. City of Racine* (Wis.), 32 N. W. 139; for the common council had no power to make improvements beyond what was expressly or impliedly granted, and could not disregard the conditions of the grant. *Mayor etc. of Baltimore v. Hughes*, 1 Gill & J. (Md.) 480; s. c., Am. Dec. 243; *Collins v. Hatch*, 18 Ohio 523;

s. c., 51 Am. Dec. 465; *Thompson v. Shermerhorn*, 6 N. Y. 92; s. c., 55 Am. Dec. 385; *State v. Commissioners of Mansfield*, 23 N. J. L. 510; s. c., 57 Am. Dec. 409; *Davis v. Mayor of New York*, 14 N. Y. 506; s. c., 67 Am. Dec. 186; *Logan City v. Buck* (Utah), 4 Am. & Eng. Corp. Cas. 300; *Whelen's Appeal* (Pa.), 1 At. 88; *Fertilizing Co. v. Hyde Park*, 97 U. S. 660; *State v. Regents*, 54 Wis. 170; s. c., 11 N. W. 472; *Gilman v. City of Milwaukee*, 61 Wis. 592; s. c., 21 N. W. 640; *Att'y Gen'l v. Great Eastern Ry.*, 33 Moak (Eng.) 768.

The legislature has no right to authorize assessments of property to pay for work done before the act, so attempting to authorize, was enacted, if the property was not liable at the time the improvement was made or the work ordered. *Kelly v. Luning* (Cal.), 18 P. 335; *People v. Lynch*, 51 Cal. 23; *Brady v. King*, 53 Cal. 45. Compare *Fanning v. Bohme* (Cal.), 18 P. 158.

tained so far, though it be liable to successful attack for another part in another portion of the city.¹

(6) *Inhibited Authorizations*.—Exclusive right to lay mains and pipes in streets to supply gas and oil to the houses of residents, granted to a company, was held to be contrary to the statute of Indiana against monopolies. The statute is that of 1887, page 36. It requires a general ordinance, so that all companies may have substantially the same benefits.² Monopoly it could not rightly be called. It is no more a monopoly than the exclusive right of having a railroad and running cars on it from point to point. Neither is a monopoly, for no ancient calling is disturbed or denied. Prior to the grant for laying the pipes and mains above mentioned, no person or company had any right to use the streets for that purpose; therefore no one was deprived of any right by the grant of an exclusive right to the company. It was competent, however, for the law-maker to make his own definition.

3. Ordinances—(1) *General Features*.—A street improvement may be ordered by a city council by resolution or by ordinance. There is no necessity for a minute description of the work to be done. It need not be inserted that sidewalks are to be made as well as a street. There must be certainty as to the improvement itself, its locality, nature and general description. The material to be used in construction should be named, where that is neces-

1. An assessment can be sustained, when rightly made with respect to one division of the city, though joined with another assessment relative to another division which cannot be held legal. *Parker v. Reay* (Cal.), 18 P. 124.

Corner lots may be assessed more highly than others to meet the expense of street improvements. *Nevin v. Roach* and *Walston v. Nevin*, both 5 S. W. (Ky.) 546.

Limited Authorization.—The legislature of New York intended only to authorize assessments to be imposed for the collection of such expenses as might be lawfully paid or incurred, and to make the certificate of the commissioner of public works conclusive as to the amount of the expenditures, in act 1870, ch. 137, § 77, as amended in act 1871, ch. 574, § 5. In the *Matter of the Metropolitan Gas Co.*, 23 Hun (N. Y.) 327; *In re Mahan*, 20 Hun (N. Y.) 301.

2. *Citizens' Natural Gas etc. Co. v. Town of Elwood* (Ind.), 16 N. E. Rep. 624.

Public Squares Not Salable for Assessments.—A public square belonging to a county cannot be sold on a precept to pay a city assessment for an improvement. *Lowe v. Board of Com'rs*, 94

Ind. 553. It is of public nature and owned for purposes of government. *Westfall v. Hunt*, 8 Ind. 174; *Com. v. Bowman*, 3 Pa. St. 202; *Langley v. Galliopolis*, 2 Ohio St. 107. Such property cannot be sold on execution. *President etc. v. City of Indianapolis*, 12 Ind. 620.

How property of counties may be liable for city improvement assessments and how the assessment should be collected: *County of McLean v. City of Bloomington*, 106 Ill. 209, and cases there cited.

Appraisalment.—Where appraisalment is required, a sale without it to collect the assessment for an improvement is illegal and will be set aside. There is presumption of appraisalment in the absence of proof to the contrary. *Cox v. Bird*, 88 Ind. 142; *Tyler v. Wilkerson*, 27 Ind. 450; *Reilly v. Burton*, 71 Ind. 118; *Stotsenburg v. Same*, 75 Ind. 538.

Implied Authorization.—The Georgia statutes do not empower the city of Augusta to assess, for improvements, the property adjacent to the street to be improved, by implication; express authorization was held necessary. *City Council of Augusta v. Murphy* (Ga.), 3 S. E. 326.

sary to a proper understanding of the work. For instance, if a bridge is to be built, there should be no doubt left whether it is to be constructed of wood, iron or stone.¹

There need be no formal declaration that the council deems the improvement necessary, for the passage of the ordinance indicates that fact. If by this means only they proclaim their judgment that a certain improvement is necessary, it has been held that the courts cannot go behind the decision to say the contrary, unless on *certiorari*.²

(2) *The Term "Street Improvements."*—Statutes and ordinances usually use the word "street" comprehensively, so that it includes sidewalks, crossings and anything rightly appertaining to the street. And under the designation of "street improvements" they frequently include sewers and drains, which are works below the surface, as well as grading and paving above. If, therefore, there is statutory authority to improve a street, the city may not only pave the centre of it, but construct walks on its sides, and tunnel below for drainage purposes. But it cannot change the lines of a street under such general power; the statute must explicitly authorize that, in order to its legality. City ordinances or resolutions need not particularize in descriptions of improvements, where there are other means by which interested persons may obtain all the particulars they desire. There should,

1. City Improvement—Ordinances.—A street improvement need not be described minutely in the resolution authorizing it. *Taber v. Ferguson*, 109 Ind. 227. Same ruling—and an authority to improve streets includes that of improving sidewalks. *Taber v. Grafmiller*, 109 Ind. 206.

An ordinance for the construction of sewers, partly by special assessments, is not invalid on the ground that it does not give the data on which the assessments are to be made, when commissioners are to determine and apportion the gross amount thus to be raised. It is different from special taxation. But such ordinance, in compliance with the statute, must specify "the nature, character, locality and description" of the improvement. *Sterling v. Galt*, 117 Ill. 11.

Where a statute requires that these things shall be specified, an ordinance authorizing the construction of a sewer which gives no information as to the material to be used, or the dimension or capacity of the work, will not be sufficient to justify a special assessment. *Kankakee v. Potter*, 119 Ill. 324.

An ordinance for gravelling a street, sodding the center and constructing a sewer under it was *held* to be one im-

provement—not three. *Murphy v. Peoria*, 119 Ill. 509.

2. Power of City to Make Improvements.—The common council of the city of Rochester are authorized by charter to open streets when they judge such action conducive to the public good. The council are not bound to declare that they deem such action necessary in a given case; the exercise of the power shows that they believe the improvement to be for the public welfare. *Elwood v. Rochester*, 43 Hun (N. Y.) 102. The charter of that city was amended (after the opening of a street had been begun) so as to require the consent of every holder of property worth \$50,000 (instead of \$5,000, as before), in order to the opening of a street over the site of his building. The amendment was *held* not to invalidate the proceedings previously begun. It was *held* that the council had discretionary power to decide what part of the city was benefited, and that the courts could not go behind the decision, unless on *certiorari*. Under the Rochester charter, only "lots and parcels of land" being assessable for improvements, it was *held* illegal to assess gas and water mains, electric light poles and wires and the State Erie canal

however, be a substantial statement of the works proposed.¹

(3) *Description*.—It is essential that a contemplated improvement should be described in the ordinance by which it is ordered. As the purpose is to give information to the public at large, and notify all bidders for contracts, the mere reference to specifications not embodied in the ordinance has been held insufficient.

Ordinarily the amount to be raised and expended upon the proposed work is properly included in the ordinance; but if that depends upon the subsequent action of a board authorized by statute to make estimates, etc., it cannot be required in the ordinance, nor be necessary to the legality of the council's action.²

Mere reference to specifications on file is not such a description of an improvement as the ordinance ordering it should contain.³ If the expense is not to be wholly borne by beneficiaries, but partly from the treasury, it is not absolutely necessary that the relative proportions should be set forth in the ordinance.⁴ In describing the nature of the work, general terms, well understood in the community, may designate the material to be used, and the necessity of particularization may be obviated.⁵

An irregularity or defect in a city ordinance or proceeding may be so serious as to affect the city's jurisdiction to proceed with an improvement; one less serious will not prevent the recovery of the cost of work done by the city.⁶

The description of a proposed improvement is so important, that ordinances which fail to state the character, extent and other important particulars of the work designed, have been held so defective that the assessment for the expense of the work could

lands. *Elwood v. Rochester*, 43 Hun (N. Y.) 102.

1. "*Street*," as a Term.—The word "street" is a generic term, embracing sidewalks; and authority to improve streets embraces sidewalks. *Taber v. Grafmiller* (Ind.), 9 N. E. Rep. 721. And under such authority to sod and park the center of the street, where it is not needed for travel. *Murphy v. City of Peoria* (Ill.), 9 N. E. Rep. 895. But a city cannot straighten or change the lines of a street, except by statutory authority. An ordinance to grade, pave and curb a street gives no authority to straighten it or change its course. No valid lien can be created on property for improvements, in favor of the city, unless they are made according to law. *Hershberger v. City of Pittsburgh* (Pa.), 8 Am. Rep. 381.

A resolution of a city council is not too indefinite which directs city improvements and describes them and the grades, etc., in general terms, if the meaning may be made apparent by

reference to other sources of information. *Taber v. Ferguson* (Ind.), 9 N. E. Rep. 723.

2. "It is claimed that the court erred in stating to the jury that they should consider 'the improvement of the street as contemplated by the ordinance changing the grade.' The ground of the complaint is that the ordinance changing the grade does not allude to the improvement of the street. We think it is immaterial whether the ordinance in terms provides for an improvement of the street. All changes of grade are made for the very purpose of improving streets, and the evidence in this case shows that such was the purpose of the city council. and that the city has been greatly improved thereby." *McCash v. City of Burlington*, 72 Iowa 25, 29; s. c., 33 N. W. 346.

3. *Sterling v. Galt*, 117 Ill. 11.

4. *Sterling v. Galt*, 117 Ill. 11.

5. *Levy v. Chicago*, 113 Ill. 650.

6. *Chariton v. Holliday*, 50 Iowa

391.

not be enforced. The description need not descend to tedious details, but it should be such a general designation of the nature and dimension of the work as to give the public an intelligible apprehension, and prevent the property holders from being misled. A diagram may aid the verbal description in the ordinance, and courts will take note of it as a part of the description.¹

The duty of making the description may be delegated to the mayor; and like duties may be assigned to a committee, but its action would require ratification by the council.²

When an extensive improvement, such as the establishment of a general sewerage system, is to be made, the description should descend to minute particularities as to the route, outlets, basins, and everything necessary to the proper understanding of the enterprise by the public; and such reasonable description has been held essential to the validity of the assessment.³

Description is not confined to verbal recital. A diagram may aid effectually in presenting a contemplated street improvement.⁴ So may a map or a plan. It was held, when such aids were designated by statute, that their omission was not fatal to the assessment.⁵

The essential thing is that the description be sufficient for the purposes of making contract for the work. The material to be used is a very important part of the specifications, in this respect.⁶

1. *City of Kankakee v. Potter*, 119 Ill. 324; *Jacksonville Ry. Co. v. Jacksonville*, 114 Ill. 562; *Taber v. Ferguson*, 109 Ind. 227.

2. **Order for Improvements—Ratification.**—When an ordinance authorizes the mayor of a city to publish an order that a certain improvement shall be made, the duty of describing the dimensions of the work, the material, etc., belongs to him, and the council need not give such descriptions when authorizing the publication. . . . Contracts offered to the lowest bidder were let by a committee; and afterwards the council authorized the committee to engage a superintendent of the contract work. This was *held* to be substantially a ratification of the committee's act in making the contract. *Main v. Fort Smith*, 49 Ark. 481; s. c., 5 S. W. 801; *Bissell v. Jeffersonville*, 24 How. (U. S.) 287, on the latter point.

Assessment, made by a committee and ratified by the council, was *held* good under charter authorization. *Bartram v. City of Bridgeport*, 55 Ct. 122; s. c., 10 A. 470.

3. **Construction of Sewerage System.**—An ordinance for creating a sewerage system and constructing the neces-

sary works should state the locality and character of the contemplated improvement and describe catch-basins, "man-holes," etc. It has been *held* that, in the absence of these particularities, an assessment for the construction cannot be maintained.

Ogden v. Town of Lake View, 121 Ill. 422; s. c., 13 N. E. 159.

City of Kankakee v. Potter (Ill.), 10 N. E. 212.

Want of requiring notice of a proposed construction of a sewer does not invalidate an ordinance for constructing a sewer, under the charter of Portland. *Paulson v. City of Portland* (Or.), 19 P. 450.

The assessment cannot exceed the value of the property assessed, but the proper officers' estimate of that value determines it. *Paulson v. Portland* (Oreg.), 19 Pac. Rep. 450.

Notice of improvements by publication *held* sufficient. *Lyman v. Plummer* (Ia.), 39 N. W. 527. Notice *held* jurisdictional. *Overman v. City of St. Paul* (Minn.), 39 N. W. 66.

4. *Whiting v. Quackenbush*, 54 Cal. 306.

5. *Petition of Upson*, 89 N. Y. 67.

6. *Smith v. Duncan*, 77 Ind. 92; *Deady v. Townsend*, 57 Cal. 208; *Sloan*

(4) *Petition—Order.*—In California, it was held that a board of trustees could fix the "official grade" of all the streets in a city by a general ordinance, without any petition from the front lot owners. This was held under a city charter which authorized the trustees to order grading when the lot owners petition for it, or to act at their own option. In either case, the cost was not to be a charge upon the city at large, but to be assessed on the abutting lots.¹

In Indiana, when there was the requisite petition for the improvement of streets, though not of the sidewalks, the latter work was ordered by the trustees in charge, and was sustained.²

Where the opening and improving of streets, under the direction of a board of public works, could be done only on the petition of the mayor and a majority of the owners of the property abutting on the street, it was held that the certificate of the mayor that a majority had signed was not conclusive of the fact, nor was the judgment of confirmation by the county court; and the proceedings, in a stated case, were held void for non-compliance with the law relative to petition and notice.³

And where like statutory requirements existed, a board of public works were held incompetent to proceed with an improvement after petitioners, representing a majority of the liable properties in the amount of the assessment, had remonstrated against it.⁴

Sometimes the majority of voters are authorized by statute to decide upon proposed improvements.⁵

The statement that a majority of property holders have petitioned will bind the city, though it prove untrue, and the ordinance, therefore, a nullity. For, when the ordinance shows upon its face such a state of things as to mislead a contractor and induce him to take the job of constructing improvements, he is entitled to pay for what he does under false impression so created, though it should be ascertained that an essential to validity was wanting, the ordinance, therefore a nullity, and the city obliged

v. Beebe, 24 *Karst.* 343; *Taber v. Grafmiller*, 109 *Ind.* 206; *Cormin v. Delavan*, 50 *Wis.* 375.

1. *City of Napa v. Easterby* (Cal.), 18 *Pac. Rep.* 253.

2. *Petition and Notice.*—In Indiana, the improvement of city streets on the petition of lot owners is not inconsistent with the enforcement of side-walk construction by order of trustees, though the lot owners charged with the expense have no voice in the matter. *Compare* act of April 27, 1869, with act of Feb. 14, 1859. *Wiles v. Hoss* (Ind.), 16 *N. E. Rep.* 800.

In that State, the sufficiency of the notice required to be given before im-

provements are made cannot be drawn in question after the work has been done. Objections should be made before the beginning of the improvement, or during its progress, if made at all. *Clements v. Lee* (Ind.), 16 *N. E. Rep.* 799.

Street Sprinkling.—*Held* to be a "local improvement," for which front lot owners may be charged according to lineal frontage, regardless of the lot's value. *State v. Reis* (Minn.), 38 *N. W. Rep.* 97.

3. *Mulligan v. Smith*, 59 *Cal.* 206.

4. *Green v. Jersey City*, 42 *N. J. L.* 565.

5. *Simpson v. Commissioners*, 84 *N. Car.* 158.

to abandon the enterprise.¹ And the falsity of such a recital was properly shown by an interested party, on ejectment to recover his land, of which he had been deprived by seizure and sale to pay his tax, even after the county court had confirmed the official report upon the petition.²

The court sustained a petition by a village which contained the allegation that an ordinance for opening a street had been passed, but that the village authorities had not agreed with the property holder whose land was to be taken, as to the value of it; and the prayer that just compensation be awarded to him, and an order issued giving the village possession of the property for the public use set forth, upon paying the award. The court held the petition strictly consonant with law, and therefore not demurrable. It was competent for the property holder, as defendant, to deny the legal enactment of the ordinance, which would throw the burden of proving its passage upon the petitioner.³

4. Notice—(1) *Necessity of*.—Notice to the property owners who are assessed is necessary to the validity of the assessment. If the statute fixes the time within which it must be given, notice after the expiration would be a nullity. All that the statute requires to be inserted with respect to description of the improvement must be inserted in the notice, or a sale of delinquent's property for the non-payment of the assessment will be void.⁴

1. An ordinance untruly recited that a majority of property holders had petitioned for the construction of a sewer. The work was begun under an inspector employed, but the improvement was not finished, the city abandoning it on finding that the necessary petition had not been signed by the majority. It was *held* that the city was liable to the contractor on an implied guaranty that the petition was sufficient and that the assessment would be levied. *Bill v. City of Denver* (Colo.), 29 Fed. Rep. 344.

2. *Zeigler v. Hopkins*, 117 U. S. 683; *Mulligan v. Smith*, 59 Cal. 206.

3. *Village of Byron v. Blount*, 97 Ill. 62.

4. Notice.—Water rates on a vacant lot, assessed but no notice of the assessment given to the owner, were *held* void, in *Brooklyn. Rensselaer v. Wheeler*, 105 N. Y. 573. The requirement that notice of an assessment must be given by the board of public works to land owners, within ten days, is mandatory, and the assessment is void without it. *McDonald v. Littlefield*, 5 Mackey (D. C.) 574 (act of Aug. 10, 1871). If notice of an assessment for a municipal improvement must be given to every owner known to any commis-

sioner, a notice to those known by one commissioner only is insufficient. *Murphy v. Peoria*, 119 Ill. 509.

The notice must be in accordance with the statute, to justify the sale of land for an assessment for street improvement; the character of the improvement must be expressed definitely therein, if the statute so requires. *Hawthorne v. Portland*, 13 Or. 270.

Assessments for improvements, without notice to the owners of the lands assessed, *held* void as to them. Substantial compliance with the authorizing statute is necessary to the validity of such assessment. *Stone v. Boston*, 2 Met. (Mass.) 220; *Salem v. Eastern R.*, 98 Mass. 431; *Northampton v. Abell*, 127 Mass. 507; *Nichols v. Salem*, 14 Gray (Mass.) 490; *Hancock v. Boston*, 1 Met. (Mass.) 122; *Lowell v. Hadley*, 8 Met. (Mass.) 180; *Pickford v. Mayor etc. of Lynn*, 98 Mass. 491; *Fitchburg R. v. Fitchburg*, 121 Mass. 132; *Grace v. Newton Board of Health*, 135 Mass. 490. See last case on assessing for the expense of abating a nuisance, *Brown v. Denver*, 7 Colo. 305.

Estimates must precede the collection of assessments, when required by statute; and omission results in nullity.

But where publication notice failed to specifically point out the property to be assessed for a city improvement, the court held the omission immaterial so long as the notice afforded opportunity to the property holders to object to the valuation. It would be fatal to proceed without any notification at all, even in the absence of any ordinance or statute requirement of it.¹

(2) *Purpose of.*—The supreme court of Iowa held that if the measurement of the front lots and the computation of an owner's portion, rendered notice to him of the proceedings necessary to their validity, all the use of it would be to correct errors in the amount chargeable to his property. Such notice was held not essential to the validity of the assessment and the levy. And the court said that it appears to have been uniformly held that no notice is necessary where a plain, mathematical calculation is the only act necessary to ascertain the amount of the assessment upon the property of anyone assessed.²

(3) *Governed by Statute.*—There seems to be nothing to prevent the passage of ordinances, issuing orders, making contracts and collecting assessments, without notice, when none is made essential by statute. Though assessments are void without notice when it is withheld in contravention of law, yet such is not the case when the law is silent on the subject of notice. Where this principle had been announced by the supreme court of Texas,

Goring v. McTaggart, 92 Ind. 200. That the work has been done before the collection is no ground for defeating an assessment. *Mix v. People*, 106 Ill. 426.

1. Notice — When Necessary.—The statute authorized a city to adopt a sewerage system and assess taxes against benefited owners, without prescribing that they be notified. Two ordinances levying the taxes were published, and there was a special notice advertised in the official newspaper for two days. Neither of these publications specified the particular property taxed, but they afforded the opportunity of objecting to the valuation. The court held that this was sufficient to render the taxes valid, unless there were other and substantial reasons to the contrary. *Gilmore v. Hentig*, 33 Kan. 156. But in Iowa it was held that a sewer assessment without notice is unlawful, though neither the statute nor the ordinance provide for notice. *Gatch v. Des Moines*, 63 Iowa 718.

2. Amery v. City of Keokuk, 76 Iowa 701, 703, citing *Cleveland v. Tripp*, 13 R. I. 50; *Clapp v. City of Hartford*, 35 Ct. 66; *Mayor of Baltimore v. Johns Hopkins Hospital*, 56 Md. 1; *Hagar v. Reclamation Dist.*, 111

U. S. 701; s. c., 4 Sup. Ct. Rep. 663; *Gillette v. City of Denver*, 21 Fed. Rep. 822.

General appearance before the board of county commissioners cuts off the appearer from pleading want of notice. *Stephens v. Comm'rs of Leavenworth Co.*, 36 Kan. 664.

Conditional Jurisdiction.—Notice, and other requirements essential to the jurisdiction of a municipal corporation in making improvements, must be observed or there will be no power to proceed. *Normal Pac. Terminal Co. v. City of Portland (Or.)*, 13 P. 705; *Kansas City etc. v. Campbell*, 62 Mo. 585; *Fravert v. Finlock (Ohio)*, 1 N. E. 875; *Dick v. Wilson*, 10 Or. 490; *Wright v. Edwards*, 10 Or. 298, *LORD, J.*; *Van Saint v. City of Portland*, 6 Or. 395.

An assessment was held not void for want of jurisdiction, when a superintendent, authorized to make it for work performed, included therein work not yet done. *Blair v. Luning (Cal.)*, 18 P. 153, citing, to show that there was no nullity for want of jurisdiction, *Himmelmänn v. Hoadley*, 44 Cal. 276; *Hewes v. Reis*, 40 Cal. 264; *Boyle v. Hitchcock*, 66 Cal. 129. See *State v. Mayor etc. of City of Bayonne (N. J.)*, 8 A. 295.

and a charter was subsequently granted by the legislature which made no requirement of notice to property owners before assessment, that court construed the omission as equivalent to a statutory averment that notice need not be given. The only voice the property owners had under that charter upon the question of street improvement was in his expression by voting for councilmen at the city election.¹

If property is to be taken from private owners for public use, it is held not due process of law to proceed without notice, even when the statute and ordinance require none. The argument is that the person to be affected by such exercise of the law of eminent domain has a right to be heard, and therefore must be notified of his opportunity. And even when fronting proprietors were taxed for sewerage improvement, one of them enjoined its collection because he had not petitioned for the work to be done, nor otherwise waived his right to be notified and heard. The court held that injunction should issue, because neither the statute nor the ordinance thereunder provided for notice; the very opposite inference to that made by the Texas supreme court above referred to.²

Whether or not notice is essential to the validity of an assessment when not specifically required by statute or ordinance, depends upon the question whether there is an exercise of the taxing power, or that of eminent domain. Where the former is held, notice is not imperatively necessary, while the contrary is the rule if the power to be exercised is under the law of eminent domain. In the former case, no restrictions or requirements are to be added to those made in the statutory authorization.³

Lands were condemned for street uses in New Jersey, and notice given as required by statute. It was held that the proceedings for condemnation could not be successfully objected by a notified property holder after the improvement had been completed.⁴

If property owners are to be accorded the privilege of improving a street by their own work, they should be notified of the opportunity.⁵

1. It has been *held* that notice need not be given when not required by statute or ordinance; that the liability of the property holder to pay is not affected by want of notice in such case. *City of Galveston v. Heard*, 54 Tex. 420.

Since the charter of Galveston required no notice of the intention of the city council to pass an ordinance for paving a street, such announcement is not a prerequisite essential to the validity of the ordinance and order. *Adams v. Fisher*, 63 Tex. 651; s. c., 533; *Finnell v. Kates*, 19 Ohio St. 406.

2. *Contra: Held* that the silence of the statute and ordinance relative to notice, rendered the assessment restrainable by injunction. *Gatch v. Des Moines*, 63 Ia. 718.

3. *Baltimore v. Johns Hopkins Hospital*, 56 Md. 1.

4. *State v. City of Passaic*, 45 N. J. L. 146.

5. The opportunity to fronting lot owners to improve a street by doing the work themselves, and their right to notice so that they may avail themselves of this privilege, cannot be disregarded. They must have notice

Though property owners whose property is to be taken for public use may not have been notified as the statute required, yet a beneficiary cannot complain that this omission was violative of the constitutional provision against taking property without due process of law. He is not cut off from any legal right, or from the pleading of any defence by lack of the notice to such property holders. His right of defense is confined to showing that some essential affecting himself has been omitted.¹

(4) *Newspaper Advertisement*.—Constructive notice is sufficient when that is the form of information adopted by statute. It must be made in as many papers, and inserted as many times, as the statute or ordinance may require.² Even when no advertisement is required, an assessment may be opposed, and payment, under a contract which would evidently have been taken at a lower figure had there been notice and competitive bidding, may be resisted on the ground of its injustice, and the city may be restrained from collecting the assessment—at least, the excess above the sum that is just.³

The newspapers themselves, containing the required advertisements, may be filed as evidence of notice.⁴

The court will consider the circumstances of the newspaper advertisement, its character as to the information conveyed, and what rights remain in the interested property holders to contest

within reasonable time, and the authorities are to judge what that is when the statute is no more definite than this phrase. *Fass v. Seehauer*, 60 Wis. 525; *Barker v. City of Omaha*, 16 Neb. 269.

Proceedings to Collect—Notice.—If the transcript shows some notice, in a proceeding to collect a street assessment, it is good on demurrer. *Taber v. Ferguson*, 109 Ind. 227. If the action is to enjoin the collection of a street assessment, it has been held that questions as to the taking of the yeas and nays on the passage of the ordinance, the amount of the estimate, and a mistake in the description of the property, cannot be raised. *Balfe v. Lammers*, 109 Ind. 347.

If notice is required by statute before municipal improvements are commenced, a failure to give it is enough to enable an opponent to have proceedings set aside on *certiorari*. *State v. Paterson*, 47 N. J. L. 15.

In statutory proceedings, where a certificate, describing the property to be changed by the proposed improvement, is made necessary by statute, such certificate must substantially follow the statute. *State v. Head*, 34 Kan. 419. Description in words current in the

community satisfies the statute. *Levy v. Chicago*, 113 Ill. 650.

1. One assessed for benefits cannot object on the ground that the constitutional prohibition of taking property without compensation was violated by failure to give him notice. He has his hearing when sued on the tax bill and may plead all that he could have offered if notified of the original proceeding. *City of St. Louis v. Richeson*, 76 Mo. 470.

2. **Newspaper Advertisement.**—When the ordinance requires that proposals for contracts for a street improvement shall be advertised in more than one newspaper, the insertion in one is not a compliance, and property holders may enjoin the city from making them pay the sum due on a contract made without the advertising required in two or more papers. Mayor etc. of Baltimore v. Johnson, 62 Md. 255.

3. And where advertisement and letting to the lowest bidder is not expressly required, injunction will lie to prevent the collection of an assessment inordinately high to pay for a contract privately made for work at an exorbitant price. *Cook v. City of Racine*, 49 Wis. 243.

4. **Newspaper advertisements made**

payment.¹ Whether there should be any notice at all, when the statute does not prescribe it; whether it may be effected by mailing the necessary information, are questions not answered by any universal rule. In Illinois, all ordinances need not be published.² Wherever constructive notice is statutorily prescribed, an assessed lot owner is cut off from complaining of the lack of personal notice.³

5. City Contracts for Improvements—(1) *Charter Authorization.*—Though the mayor and aldermen of a municipal corporation may have authority to make contracts which shall be binding upon the land owners who are to be assessed for the cost of an improvement, they cannot afterwards alter their contract so as to render it more advantageous to the contractor. They would trespass upon the rights of the land owners by doing so, and their attempt at modification would be futile, and the emendation void.⁴

The contract must be made in conformity to the city charter, or it will not bind the land owners.⁵ Certainly, it will be void if made in contravention of the charter.⁶ If not preceded by an

pursuant to statute are sufficient evidence of constructive notice. *State v. City of Elizabeth*, 42 N. J. L. 56.

1. When the notice was indefinite, confined to the publication of the ordinance for only two days in one paper, and only the right to contest the appraisal of lots for assessment purposes was accorded so far as the notice showed, it was held that the tax could be contested on any substantial ground, though the notice itself might be sufficient to the validity of the ordinance. *Gilmore v. Kentig*, 33 Kan. 156.

2. Ordinances for levying special taxes for improvements of streets on property abutting on or contiguous to the street, need not be published, in Illinois; there only those making monetary appropriations need be published. *Enos v. Springfield*, 113 Ill. 65. Notice of a proposed confirmation of assessment may be mailed to the property holders who are to pay the assessment. *Murphy v. Peoria*, 119 Ill. 509.

3. Want of personal notice that an assessment is to be made gives the lot owner no ground to resist his apportionment of the expense. Constructive notice by advertisement is sufficient, when the statute has fixed upon that as the method of informing him (*Stuart v. Palmer*, 74 N. Y. 183, distinguished). *Petition of De Peyster*, 80 N. Y. 565.

Notice in some way is required in Nebraska to be given to the person whose property is specially assessed

for an improvement. He may enjoin for want of notice, after having paid the amount to which he has been benefited. *Barker v. City of Omaha*, 16 Neb. 269.

If the object of the statute is to notify the public as well as interested property holders, a private citizen may set proceedings aside on *certiorari* for want of the general notice. *State v. Mayor etc. of City of Paterson*, 47 N. J. L. 15.

4. Paving Contracts.—Contracts lawfully made at the discretion of city authorities, for street paving, are obligatory upon land owners who are charged with the payment of the cost of the work, though the contracts may have been made injudiciously. But the authorities cannot change contracts to the benefit of the contractors and to the injury of the property owners. *Pepper v. Philadelphia*, 114 Pa. St. 96.

5. If, before contracting, the proposed terms must be submitted to a committee of the city council, in conformity to a provision of the city charter, a contract without such reference is invalid, and a property owner may resist his assessment on that ground. *Worthington v. Covington*, 82 Ky. 265.

6. A contract made by a town with its treasurer for the improvement of streets is in contravention of the spirit of Ind. Rev. Stat., § 2049, which the act of March 19, 1885, does not change in this regard. An assessment for improvements under such a contract is

advertisement for sealed proposals, and made with the lowest bidder, the contract for a work of city improvement will be a nullity in all cases where the charter prescribes this method of letting contracts.¹

Not merely for work done, but for land taken in the making of public improvements (such as the opening of a street), the adjoining property may be assessed, and the owners have a right to hold the city to its responsibilities under the charter. The owner of the land appropriated should not be paid its full value, and exempted from bearing any part of the burden of the improvement at the same time. This is the view in several States, but Ohio seems exceptional.² The loss and the benefit may be assessed simultaneously.³

When large tracts are to be appropriated for the purpose of making a city park there are different methods of raising the money to pay for the land. Sometimes it is done by a general levy, as the park is to be the property of the city. Sometimes taxing districts are created with power to levy and collect the tax. Such district cannot be created beyond city limits for a park within them.⁴

invalid. *Benton v. Hamilton*, 110 Ind. 294.

1. Contracts not let by competitive bidding are void and the assessment void, if the statute requires that method of letting contracts. *Re Manhattan R. R. Co.*, 102 N. Y. 301.

2. **Land Taken for Streets.**—To obtain money to indemnify owners whose land is appropriated for the public purpose of opening a new street, an assessment of the adjoining property may be made. *Matter of Pittsburgh District*, 2 W. & S. (Pa.) 320; *Pittsburgh v. Scott*, 1 Pa. St. 309; *McMasters v. Com.*, 3 Watts (Pa.) 292; *Matter of 26th St.*, 12 Wend. (N. Y.) 203; *Matter of De Graw St.*, 18 Wend. (N. Y.) 568; *Nichols v. Bridgeport*, 23 Ct. 189; *Trinity College v. Hartford*, 32 Ct. 452; *Dorgan v. Boston*, 12 Allen (Mass.) 223. If the loser of the ground is benefited in the advantage to his remaining land to an amount in excess of the damage, he may be assessed for the difference. *Holton v. Milwaukee*, 31 Wis. 27. See *Powers' Appeal*, 29 Mich. 504; *Alexander v. Baltimore*, 5 Gill (Md.) 383; *Hammett v. Philadelphia*, 65 Pa. St. 146. In Ohio, by the constitution, it seems that owners have full compensation for land taken, regardless of benefits to themselves. *Cleveland v. Wick*, 18 Ohio St. 303.

3. A jury may assess the value of land taken and the benefits at the same time. *Litchfield v. Vernon*, 41 N. Y.

123; *Livingston v. New York*, 8 Wend. (N. Y.) 85; *Goodrich v. Turnpike Co.*, 26 Ind. 119; *State v. Dean*, 23 N. J. 335; *Holmes v. Jersey City*, 12 N. J. Eq. 299; *Cooley on Taxation*, 612, 613.

4. **Parks.**—"City and town parks are sometimes purchased, improved and embellished under special legislative authority by means of general levies on the municipalities that are to own and have the benefit of them (See *Matter of Central Park*, 50 N. Y. 493; *Matter of Flatbush Lands*, 60 N. Y. 398; *People v. Salomon*, 51 Ill. 37). But sometimes special taxing districts, composed of several municipalities, or of parts of several, are created for the purpose, and a corporation is chartered with power to lay and collect taxes. But for the purpose of a city park there cannot be created outside the city a district upon which the cost of the park, situated within the district, shall be imposed (*State v. Leffingwell*, 54 Mo. 458). Where by the constitution only municipal bodies are authorized to levy taxes, if a park district is created embracing several towns, all of which accept the act creating it, the towns may afterwards be required to levy taxes in accordance with the act; to be expended within the limits of the town levying them (See *People v. Breslin*, 80 Ill. 423; *Halsey v. People*, 84 Ill. 89; *Wright v. People*, 87 Ill. 582)." *Cooley on Taxation* (2nd ed.), p. 615.

How contracts for work shall be let depends of course upon statutes and ordinances. Ordinarily a contract is let as a whole, under sealed proposals, to the highest bidder. But in the absence of statutory restraint it may be otherwise agreed upon, and a work may be even parcelled out to several different contractors, each taking a part. Where skilled labor is requisite this may be the better way. If, however, the statute limits the city to one method, such as letting by contract to the lowest and best bidder, no other method can be legally employed. And in such case the work cannot be divided so as to contract for a part by one method and a part by another. Nor can the city evade the law by requiring all bidders to agree upon a stated price for one part of the work, leaving the other parts to competition.¹

(2) *Unauthorized Contracts*.—If, without power to do so, a city contracts with a person that he shall make street improvement and collect his compensation from the abutting property owners, it seems that the contractor cannot obtain judgment allowing him to remove his improvements until he shall have restored what money he has already received from some of the property owners and shall have reimbursed the city of its outlay in connection with the improvement.²

A city cannot contract legally for an improvement before those who have to pay for it have been offered to contract for it themselves, when the law provides that they shall first have that opportunity.³

1. *Contracts, Sub-divisions, etc.*—The work of making an extensive city improvement may be sub-divided and let out in parcels to different contractors. *Eyerman v. Blakesley*, 13 Mo. App. 407; *Kemper v. King*, 11 Mo. App. 116.

The statute requiring that work on improvements be let by contract, and the work being done by days' work rendering the assessment illegal, it was held that the court cannot determine from testimony the difference between the cost of the two methods, and cannot affirm the assessment in part and set it aside in part. *Matter of Stephens*, and *matter of Wakeman*, both cases 26 Hun N. Y. 22; *Matter of Merriam*, 84 N. Y. 596; *Matter of Casey*, 5 Hun (N. Y.) 463; *Matter of N. Y. Prot. etc. School*, 75 N. Y. 324; *Matter of the Presbytery of New York*, 9 Daly (N. Y.) 116; *In re Blodgett*, 91 N. Y. 116; *Re Orphan Home*, 92 N. Y. 116.

2. A town agreed with a contractor for the improvement of streets that he should look to the abutting proprietors for his pay. Some of them refusing to pay, and being sued, it was held that the town had no right to make such a

contract. Then the contractor sued the town and asked to be permitted to remove the improvements made by him. It was held that if he had tendered back the money he had received from the paying proprietors, and also what the city had paid for intersections, etc., he could have recovered. *Hahn v. Trustees of Bellevue (Ky.)*, 3 S. W. 132, citing *Marsh v. Fulton Co.*, 10 Wall. (U. S.) 676.

3. Under a city charter requiring that adjacent proprietors should have the right of contracting directly for street improvements for which they are liable, it was held *ultra vires* for officers to contract for the work when the proprietors had not refused to do so. *Newberry v. Fox (Minn.)*, 33 N. W. 333. The city council should have first notified the proprietors. Those with whom the officers prematurely contracted were legally charged with notice that they could not lawfully make the contract till the proprietors had been afforded the opportunity. *McDonald v. Mayor etc.*, 68 N. Y. 23; *Schumm v. Seymour*, 24 N. J. Eq. 143. The doctrine of *ultra vires*

An injudicious contract by the city for an improvement is binding on the property holders, if it is otherwise proper and legal.¹

(3) *Certificates*.—It was stipulated in a contract that the work should be approved by the street commissioner; that his certificate of approval should be conclusive, and that payment should not be due till the apportionment and assessment of the expense should have been approved by the council. The certificate was given and the apportionment and assessment approved, but the approval by the council was afterwards set aside. Then the statute was changed so as to lodge the approval of the apportionment and assessment in a board of apportionment. The board declined to make another assessment, declaring that the work had not been performed as the contract required. It was held, under these circumstances, that the city could not withhold payment on the ground that there had been no apportionment and assessment.²

(4) *Letting Contracts to Lowest Bidder*.—Contracts must be let in accordance with the statutes and ordinances governing. If the bid on which work is let proves to be fraudulent, if the work is not let to the lowest and best bidder when so required, if the contract is not submitted to such investigation as the conditions of

is applied with great strictness to municipal corporations. *Mayor v. Ray*, 19 Wall. (U. S.) 468; *Brady v. Mayor of New York*, 20 N. Y. 312; *Hague v. City of Philadelphia*, 48 Pa. St. 527; *Nash v. City of St. Paul*, 8 Minn. 172.

1. That a contract for improvements made by city authorities is injudicious, constitutes no ground for resisting the assessment. *Pepper v. Philadelphia*, 114 Pa. St. 96.

A property holder, one of the petitioners for street-paving, was held estopped from opposing the work as done by the contractor, though the city had no power to have the grading done, for the latter work was not objected to while progressing. *McKnight v. Pittsburgh*, 91 Pa. St. 273; *Bidwell v. City of Pittsburgh*, 4 Norris (Pa.) 412. *Compare Addis v. City of Pittsburgh*, 4 Norris (Pa.) 379.

A contractor cannot recover for his outlay for having dirt hauled, on the promise of the city surveyor, when his contract with the city for the improvement of a street contained a reservation by the city of the right of laying water pipes or making sewers, which caused the accumulation of dirt to be hauled. Had the surveyor possessed authority to make the promise, there would have been no consideration, the court said.

Rens v. City of Grand Rapids (Mich.), 41 N. W. 263.

A contract for macadamizing a street may be made before a contract for grading it, or both may be made at the same time, although a petition must precede the latter. *Gafney v. San Francisco*, 72 Cal. 146, 151; s. c., 13 P. 467; *Dyer v. Hudson*, 65 Cal. 374; *Emery v. San Francisco Gas Co.*, 28 Cal. 375.

Separate parts of a street may be macadamized under one contract. *Alameda Macadamizing Co. v. Williams*, 70 Cal. 534; s. c., 12 P. 530.

If the jurisdiction of a city to order certain work is conditional under the statute, and the condition has been disregarded, an order for such work is illegal. A contractor cannot maintain an action to recover for such work from the city or county, when the assessment to defray the expense has been held illegal. *Daly v. San Francisco*, 72 Cal. 154; s. c., 13 P. 321; act of April 4, 1870 (Cal.).

Patented material may be used in constructing a municipal improvement by a contractor when the contract is silent on that subject. *Dunne v. Alt-schul*, 57 Cal. 472.

2. *Reilly v. City of Albany (N. Y.)*, 19 N. E. 508.

the statutory authorization impose, if persons chargeable with the cost do not have the opportunity of contracting for or doing the work themselves when such is their legal privilege, the contract will not hold good so far as to create an obligation upon the property holders to bear the pecuniary burden of the improvement.¹

(5) *Assessment Lien*.—To file the claim with the prescribed legal time is essential in order to perfect a lien for work done or material supplied in the construction of public improvements; and, in a proceeding to vindicate the lien, the fact that it was duly filed must be averred.²

If the claim be not duly filed when the law renders the act essential, the lien cannot be enforced.³ The proceeding to enforce it is *in rem*; it is not against any person, and it is not essen-

1. A fraudulent bid renders a contract with the bidder thereon, for the construction of a city improvement, null and void. *Brady v. Bartlett*, 56 Cal. 350.

If the law requires letting upon contract after competitive bidding, it cannot be successfully evaded by having the work of improvement done by day's work. *Petition of the Manhattan R. Co.*, 102 N. Y. 301; *Mappa v. City of Los Angeles*, 61 Cal. 309.

If reference of contracts to a committee of the city council, or board of public works, is required by the charter, its omission will relieve the property holder from the duty of paying his assessment, it has been held. *Worthington v. City of Covington*, 82 Ky. 265; *Wilkins v. Detroit*, 46 Mich. 120.

If notice that a street is to be grubbed and graded is not given to the chargeable lot owners that they may do the work themselves if they choose, the omission will prove fatal to any contract for the work. *Rork v. Smith*, 55 Wis. 67.

Improvement Contracts Let to Lowest Bidder.—In New York city, contracts for improving streets must be let to the lowest bidder by the surveyor. He made a proposal under a misapprehension, but the contract was held valid and the contractor recovered according to its terms, there being no fraud or collusion. *Reilly v. City of New York* (N. Y.), 18 N. E. 623.

To prevent fraud in bidding, a price was fixed upon "rock excavation" at which each bidder for the construction of a sewer was required to agree. This, being in violation of the statute which required that such jobs be let to the

lowest bidder, vitiated the assessment. In the *Matter of Manger*, 23 Hun (N. Y.) 658. See *Matter of Paine*, 26 Hun (N. Y.) 431.

2. **Lien for Work—Notice.**—To perfect a lien for work or material under a contract with the Milwaukee Board of Public Works, the claim must be filed in the city clerk's office within twenty days of its maturity. *Thompson v. City of Milwaukee* (Wis.), 34 N. W. 402. And such filing must be alleged in the complaint. *Benware v. Town of Pine Valley*, 53 Wis. 527; s. c., 10 N. W. 695; *Wentworth v. Town of Summit*, 60 Wis. 281; s. c., 19 N. W. 97; *McArthur v. Slauson*, 60 Wis. 293; s. c., 19 N. W. 45; *Reining v. City of Buffalo*, 102 N. Y. 308; s. c., 6 N. E. 792.

A borough may file a municipal lien for the cost of relaying a worn-out sidewalk that had been first laid by the city, when relaid by it, after the front proprietor has refused to do it. *Smith v. Borough of Kingston* (Pa.), 14 A. 170. It has no power to require the building of a walk within the right of way of a turnpike company, though outside of the artificial roadbed, by virtue of the Pa. act of May 22, 1883. *Borough of Milesburg v. Green* (Pa.), 14 A. 256.

By a New Jersey statute, a lien can be created on land for the cost of the improvement of the street on which it lies, if it is a specific improvement required by ordinance. But no lien is imposed when the ordinance is of general application to all streets. *State v. Borough of Commission* (N. J.), 15 A. 529.

3. *City of Pittsburgh v. Knowlson*, 92 Pa. St. 116.

tial that the name of the owner of the property should be stated when it is unknown. Such is the law in Pennsylvania,¹ and there seems no reason why, in such proceedings, the names of known owners should be inserted for any other purpose than the identification of the property. It is important that the particular property liable for a particular tax or assessment should be identified with it.²

Bonds executed by contractors, payable to the city, can be sued upon only by the payee, though the conditions of the contract required them to pay for all labor and materials, and the bonds were to secure the performance of the conditions.³

6. Special Assessments for Special Benefits.—(1) *The Principle of the Imposition.*—There is mutuality between special benefits and special assessments. It is because the value of certain property is enhanced by municipal improvements beyond the good done to property in general, that the corporation may legally assess it specially and require it to bear a relatively greater portion of the burden or expense of the improvement.⁴ On this principle, property which is proven not to have been benefited at all, but rather injured by a public work, cannot be made to pay its assessment; and this has been held even when a scheme or *bilan*, with

1. *Emrick v. Dicken*, 92 Pa. St. 78.

2. Collection warrants for drainage taxes must be put upon the roll of assessment so as to show the drain for which each tax is levied. Each fund must be separate and each warrant paid from its particular fund. *Dunning v. Calkins*, 51 Mich. 557.

Lien—Board of Assessors' Report.—The charter of New Haven makes assessments of benefits a lien on the property benefited, and deems them made when the report of the board of compensation is accepted by the city council. It is *held* that the lien attaches when the report is accepted, not when the improvement is ordered. *Dann v. Woodruff*, 51 Ct. 203.

In New Jersey, the township trustees cannot arbitrarily increase the assessments reported by the board of assessments, under act of April 4, 1872. *Souther v. South Orange*, 46 N. J. L. 317.

When judgment had been rendered against the defendants who had been served, in a suit to enforce a street assessment, it was reversed because another defendant had not been served and made subject to the judgment with the rest—all the parties being necessary to a valid enforcement of the statutory lien. *Diggins v. Reay*, 54 Cal. 525.

If the suit to enforce the lien is

against several defendants, and should be dismissed as to one of them, it falls as to all the rest. *Driscoll v. Howard*, 63 Cal. 438.

Judgment for the enforcement of an assessment should be against the owner, and not the lessee in possession, according to the Municipal Code of Ohio, § 626. *Davis v. Cincinnati*, 36 Ohio St. 24.

3. *State Bank of Duluth v. Heney* (Minn.), 41 N. W. 411.

Street Improvement Bonds.—Supervisors may issue bonds to raise money for street improvements, under a New York statute. *Hubbard v. Sadler* (N. Y.), 10 N. E. 426.

4. Special assessments can be made on no other ground than that they specially benefit the property assessed, and only to the extent of the benefit attributable to the improvement, by statute of Minnesota relative to grading streets, etc. *State v. Cunningham*, 29 Minn. 62; S. P., *State v. Commrs. of New Brunswick*, 38 N. J. L. 190; *State v. Mayor of Jersey City*, 40 N. J. L. 485; *Johnson v. City of Milwaukee*, 40 Wis. 315; *Watkins v. Zwiebusch*, 47 Wis. 513; *Chamberlain v. City of Cleveland*, 34 Ohio St. 551.

Special Benefits Defined.—Special benefits, as the term is used in cases of assessments for improvements, are

the property list and amount assessed or charged against each, had been homologated by the court prior to the performance of the work.¹

When the expense of a work is distributed without regard to what the assessed lots are worth by reason of the improvement, but only the prior worth, the tax may be sustained.²

Where extensive improvements have their cost put upon benefited property exclusively, the fees of officers were held properly included in the cost; that is, those of engineers and surveyors whose services were necessary to the work.³

(2) *How Differing from General Assessment.*—When the imposition of an assessment is not limited to the special benefits to the property assessed, it cannot be sustained as a special assessment. Annual water rents charged against vacant lots abutting on streets under which water pipes are run cannot be supported as special assessments where the benefits are not special.⁴

When general benefit or public convenience is stated in the ordinance as the object of an improvement, it cannot be inferred that any of the benefits from the improvement are special. In such case, the expense must be borne by an appropriation from the public treasury so that it shall fall upon property holders in general. In the absence of such declaration in the ordinance, however, there may be a presumption that special as well as general benefits were designed.⁵

If a lot, or any particular property, receive an advantage beyond that generally conferred on other property by an improvement, the benefit is special. And it has been held that this fact may appear otherwise than by formal finding in the assessment proceedings, so that a lien will be created upon such lot from the time of the acceptance and recordation of the assessment.⁶

If there is benefited land which has not been laid out in lots, it may be assessed to the usual depth of lots from the street front, just as though it had been laid out, so as to carry out the spirit of the statute authorizing the assessment and do justice to all the beneficiaries.⁷

benefits which exceed the general benefit to the public. *Mittel v. Chicago*, 9 Ill. App. 534.

1. When property was injured instead of being benefited by "alleged" drainage, it was held that a judgment for the drainage tax could not be enforced, since the consideration of the judgment, prospectively rendered, had failed. *Davidson v. New Orleans*, 34 La. Ann. 170. Compare *Schertz v. Taylor*, 105 Ill. 27.

2. *Mason v. Spencer*, 35 Kan. 512.

3. *Petition of Lowden*, 89 N. Y. 548.

Ad Valorem Assessments.—In Arkansas municipal assessments are not according to the frontage of streets to be

improved, but according to the value of the property. It must be laid on vacant and improved lots similarly situated. The uniformity required by the constitution would be disregarded were a single lot, situated where it should be assessed, be omitted from the assessment. *Town of Monticello v. Banks*, 48 Ark. 251; *Peay v. Little Rock*, 32 Ark. 31.

4. *State v. Jersey City*, 43 N. J. L. 135.

5. *Baltimore v. Hanson*, 61 Md. 462.

6. *Dann v. Woodruff*, 51 Ct. 203.

7. *Parmele v. Youngstown*, 43 Ohio St. 162.

If the improvement is one that can enure to the special good of only front proprietors on a street, the special levy must be confined to them.¹ Even the building of a bridge over a river at the foot of a street has been held to benefit lot owners specially.²

While the question, whether benefits are general or special, may arise in relation to various kinds of improvements, and while it is difficult to lay down a rule that will relieve of all difficulty as such questions arise, it is an established principle that special assessments must be confined to the extraordinary good conferred; they must be laid with reference to this rule of justice, and every individual property holder specially assessed has the right to test his assessment by this principle.³

If the good done is ordinary, that is, general to all property, the expense must be generally distributed.⁴

(3) *Who may Assess.*—While assessment should be made by persons duly authorized to do so, it is not absolutely necessary that a statute or a city ordinance should entrust this duty to public officers only. Persons actually officiating as officers, though not duly elected or appointed, agents chosen for the purpose by proper authority, commissioners empowered to assess or even to exercise for the city the right of taking property for the public use of opening or widening a street, have been held competent for the purpose. And even their failure to qualify before acting when the law required their oaths, has been held not to

1. *Kendig v. Knight*, 60 Ia. 29.

2. *Dickson v. City of Racine*, 65 Wis. 306.

3. *Special Assessments.*—Special assessments must be measured by the benefits received, and cannot exceed them, when the statutory authorization so provides, with respect to improvements by street grading. The distribution of the cost must be in accordance with this rule, in respect to each property holder. *State of Minnesota v. District Court*, 29 Minn. 62. *State v. Commissioners of New Brunswick*, 38 N. J. L. 190; *State v. Mayor of Jersey City*, 40 N. J. L. 485; *Johnson v. Milwaukee*, 40 Wis. 315; *Watkins v. Zwietusch*, 47 Wis. 513; *Chamberlain v. City of Cleveland*, 34 Ohio St. 551. See *Dickinson v. City Council of Worcester*, 138 Mass. 555, as to disproportion between assessments by linear foot and by lot, etc.

Foot front rule. *Moale v. Mayor etc. of Baltimore*, 61 Md. 224.

4. *General Improvement.*—A water main laid in front of rural property for the benefit of residents of another part of the city—not of the owners of the rural property—it is a general improve-

ment and the cost is to be borne by general taxation. *Crawford's estate*, 14 Phila. (Pa.) 323; *State v. Reed*, 43 N. J. L. 186.

Distinction is made between special taxation and special assessment for improvements, and where proceedings are had under the one when they should have been under the other, they are void. *Galesburg v. Searles*, 114 Ill. 217; *State v. Butler*, 11 Lea (Tenn.) 418.

Where lots were omitted from an improvement assessment when they were to be equally benefited with those charged, the proceeding was held void. *Dyer v. Harrison*, 63 Cal. 447. *Compare Application of Churchill*, 82 N. Y. 288.

A cemetery, exempt from taxation by law, was held exempt from assessment for a sewer improvement on the ground that the latter was local taxation. *Olive Cemetery Co. v. Philadelphia*, 93 Pa. St. 129; s. c., 39 Am. Rep. 732.

But when not deemed taxation, an assessment against a cemetery thus exempt was held good. *Lima v. Lima Cemetery Association*, 42 Ohio St. 128; s. c., 51 Am. Rep. 809.

invalidate their certificates to contractors or to affect the legality of assessment based upon their decisions.¹

(4) *Requisites of Special Levy*.—When a city, under statutory authorization, decides to make any street improvement it proceeds to make a special assessment to accomplish the purpose.² And the description of the proposed improvement must be specific.³ It must be sufficiently so to enable those who will have to bear the cost to guard their rights and defend against anything wrong.⁴ They cannot be deprived of their right to notice and to their opportunity of a day in court.⁵

Under an assessment for the cost for a sidewalk, it is held that the grading of it so as to conform with the street grade is not included—the latter being not specially ordered.⁶ But reasonable latitude is given to the city when paving, grading or making

1. Assessments by Agents Not Officers.—*De facto* officers may lay a lawful assessment. *Dows v. Village of Irvington*, 66 How. (N. Y.) 93; *The Matter of the Petition of Kendall*, 85 N. Y. 362. See *In re Burneister*, 76 N. Y. 174; *Morley v. Weakley*, 86 Mo. 451.

It has been held that power may be delegated to officers or agents, by a city council, to establish street grades, etc. *Mayor etc. of Chattanooga v. Geiler*, 13 Lea (Tenn.) 611.

Though commissioners who are not city officers are entrusted to a limited extent with the taking of land for widening a street, this exercise of the right of eminent domain is for a municipal purpose and not for a state enterprise. *Sage v. City of Brooklyn*, 8 Abb. New Cas. (N. Y.) 279. See *Cahill v. Dist. of Columbia*, 3 McArthur (U. S.) 419; *State v. Passaic*, 4 N. J. L. 524; *Foster v. Board of Park Commissioners*, 131 Mass. 225.

2. Improving Streets.—Assessments for paving streets and for planking and other improvements, are specially made. Leading authorities: *Indianapolis v. Mansur*, 15 Ind. 112; *Lafayette v. Fowler*, 34 Ind. 140; *Morrison v. Hershire*, 32 Iowa 271; *People v. Brooklyn*, 4 N. Y. 419; *In re Dugro*, 50 N. Y. 513; *Cleveland v. Wick*, 18 Ohio St. 303; *State v. Christopher*, 12 Wis. 627; *Williams v. Detroit*, 2 Mich. 560; *Chambers v. Satterlee*, 40 Cal. 497; *People v. Austin*, 47 Cal. 353; *Macon v. Patty*, 57 Miss. 378; *Gozzler v. Georgetown*, 9 Wheat. (U. S.) 593; *Willard v. Presbury*, 14 Wall. 676.

Grading.—Special assessments are levied to pay for the grading of streets. *Wray v. Pittsburgh*, 46 Pa. St. 365. The

cost of changing a grade may be assessed upon the adjoining land. *Lafayette v. Fowler*, 34 Ind. 140. Not in Nebraska, if already paid by the city. *Goodrich v. Omaha*, 10 Neb. 98.

3. Street Grading.—A requirement in a city ordinance that a street shall be filled up to the "highest grade," is not sufficiently specific. *State v. Hoboken*, 47 N. J. L. 268.

4. Damages from the establishment of the grade of a street do not run with the land. They are a personal claim of the owner of the land at the time of the injury. *Campbell v. Philadelphia*, 108 Pa. St. 300.

A city is responsible, if a contractor, under the supervision of the city surveyor raises the grade of a street so as to cause unnecessary injury to adjoining property. *Seattle v. Buzby*, 2 Wash. (Ter.) 25.

In grading a street, if a city dams a natural watercourse so as to flood land, the owner has a right of action—the statute authorizing the grading not providing a mode of compensation. *Conniff v. San Francisco*, 67 Cal. 45.

5. Parties liable to assessment for the cost of a change of grade are entitled to notice and a hearing. If the statute does not provide that the consent of abutters to a change of grade must be written, it may be proven by parol testimony. *State v. Hoboken*, 47 N. J. L. 268.

6. Paving—Grading.—The expense of grading a sidewalk in uniformity with the established grade of the street cannot be included in the assessment, under an ordinance for assessing abutters for the cost of the sidewalk, but not for grading the street, paving the gutters and setting the curbstones.

street improvements generally, if no wrong is done to interested parties, and if the work, though not specially mentioned, may be considered a component part of the improvement expressly ordered.¹

Lots must be separately assessed in order to create a lien upon them, though they may be all under the same ownership, in Missouri, and in some other States.²

"Gutters" and "curbstones," as the terms are employed in the ordinance, were *held* to refer to those lying between the sidewalk and the carriage way. *Dickinson v. Worcester*, 138 Mass. 555.

No paving assessment can be made against abutters when no paving has been done; only grading preparatory thereto. Iowa Code, § 466. *Bucroft v. Council Bluffs*, 63 Iowa 646.

There must be a notice pursuant to a resolution adopted by the city for the paving of a street, or publication of a petition of abutters, to enable the city to recover the cost of the improvement from the front owners on street. La. acts 1876, 73; *Fayssoux v. De Chaurand*, 36 La. Ann. 547.

1. Paving and Grading.—One assessed for the benefits of paving was *held* to have no cause to complain that the city had paved between the outer rails of a street horse car track and the edge of the ties when the railroad company might have been compelled to do the work. *O'Reilly v. Kingston*, 39 Hun (N. Y.) 285.

A space in the middle of the street was first left unpaved, that trees and shrubbery might grow there. Afterwards, when it was paved upon a change of plan by the city, the improvement was *held* an original one, and the abutters adjudged liable therefor. *Alcorn v. Philadelphia*, 112 Pa. St. 494.

The excavations necessary in the reconstruction of a graded street were *held* to be not "grading" within the meaning of the charter which makes the city responsible for the cost of "grading." *Gibson v. Kayser*, 16 Mo. App. 404.

Local assessment may be made for filling, grading and bridging on one street, and grading others connected with it, as one entire improvement. *State v. Ramsey Co.*, Dist. Ct., 33 Minn. 295.

An assessment on each lot for the entire expense of the grade of a street in its front is erroneous, as wanting in

uniformity of assessment and apportionment of the cost according to the value of the lot. *Seattle v. Yesler*, 1 Wash. (Ter.) 571.

When a city is generally authorized to pave and repave its streets, it may have the work done by the day or by job. The courts will not review its decision, whether to pave or not. One assessed cannot be heard to complain because the paving was done with part of material which composed a larger quantity than the particular work required. *Alberger v. Baltimore*, 64 Md. 1.

Property owners had constructed a street which was afterwards brought within the city by extension of the corporate limits. The city top-dressed the street and pieced out the sidewalk, but this work was not *construction* in such sense as to render the property holders liable to pay for it. *O'Meara v. Green*, 16 Mo. App. 118.

Paving—Assessing City Authority.—The decision of a city council, duly authorized to pave streets and levy assessments therefor, when the public interest requires it, is conclusive in Texas. Though the abutting proprietors have paid their assessment for filling and grading a street, the council there may charge them afterwards for subsequent improvements—at least for a part. *Adams v. Fisher* (Tex.), 6 S. W. Rep. 722.

A city council, authorized to pave and otherwise improve one side of a street after the other had been finished, was *held* not bound to make the second half, or side, like the first, either as to character or cost. *O'Brien v. Markland* (Ky.), 6 S. W. Rep. 713.

Repairing Streets.—Where a company agreed with a town to grade and gravel streets, the repeal of the ordinance granting the right of way did not relieve the company from the duty. The town may sue the company for failure to grade and gravel. *Cincinnati etc. v. Carthage*, 5 Am. & Eng. R. R. Cases, 306; s. c., 36 Ohio St. 631.

2. Gross Assessment for Improvements.—Under the charter of St. Louis,

A demand for the assessment due on two lots was held not sufficient. The court held that there should be a separate demand for the sum due on each lot.¹

(5) *Special Benefits*.—If the law requires a majority of owners to petition for an improvement, a life-estate proprietor cannot be one of the signers. He is not to be benefited like a fee-simple owner.² Special benefits, however, are not essential to the right of assessing, when a municipal government has the choice between special assessment and taxation.³ A special tax may be assessed upon property adjoining a street, not only for the "local improvement" of the street proper, but also for sidewalks and curbstones.⁴ It seems that such property is not liable for repaving, after having borne the expense of the first laying of the pave.⁵ One assessment for the cost of improving two streets, when the law authorized the improvement of "any street," was set aside.⁶ There should have been separate assessments. This was so because the statute was peculiar. It is certainly competent for the legislature to empower a city to improve many streets

several lots being owned by one proprietor, benefits from the opening of a new street cannot be assessed upon all the lots together, but must be done upon them separately, to create a lien upon each. *City of St. Louis v. Provenchere* (Mo.), 4 S. W. 410. *Charter of St. Louis*, art. 6, § 5; *Kefferstein v. Holliday*, 3 Mo. App. 569; *Miller v. Anheuser*, 4 Mo. App. 436; *Christian v. Haussig*, 8 Mo. App. 602; *Kemper v. King*, 11 Mo. App. 116; *Nason v. Ricker*, 63 Me. 381; *County Commissioners v. Mining Co.*, 61 Md. 545; *Bruce v. McBee*, 23 Kan. 379; *Hapgood v. Morten*, 28 Kan. 764.

An assessment lien for improvements is of higher rank than a subsequent mortgage. *Hand v. Jersey City* (N. J.), 7 A. 565. And holds good notwithstanding a subsequent sale. *In re Report of Commissioners* (N. J.), 10 A. 363. See *Borough of Freemansburg v. Rogers* (Pa.), 8 A. 872; *Folkenson v. Borough of Easton* (Pa.), 8 A. 869.

1. *Schirmer v. Hoyt*, 54 Cal. 280; *Spangler v. City of Cleveland*, 35 Ohio St. 469; *Younglove v. Hackman*, 43 Ohio St. 69.

2. *Abutters*.—A tenant for life is not an owner within the provision of a statute authorizing paving, grading, etc., whenever a majority of the owners of abutting lots petition for such improvements. *Baltimore v. Boyd*, 64 Md. 10.

3. Under its general power "to make local improvements by special assess-

ment, or by special taxation of contiguous property, or otherwise," special benefits are not a necessary condition of the city's right to assess. *Galesburg v. Searles*, 114 Ill. 217.

4. Under the term "local improvement," are included street paving and laying edgestones for the sidewalk, for which a special tax may be assessed on abutters. Ill. Rev. Stat. 1874, ch. 24, § 132; *Enos v. Springfield*, 113 Ill. 65.

5. A street paved at the expense of the abutters, was torn up in the construction of a sewer, and was afterwards repaved. The abutters were not chargeable for the relaying; it was part of the expense of making the sewer. *Burlington v. Palmer*, 67 Iowa 681.

6. *Sidewalks—Two Streets—One Assessment*.—A statute authorized a city council to construct sidewalks in any street, proportionally assessing the abutters for the cost; and, under this, the expense of sidewalks on two streets was levied under one assessment. The court held that this was not authorized by the statute. *Arnold v. Cambridge*, 106 Mass. 352. Compare *Hager v. Burlington*, 42 Iowa 661; and *Cuming v. Grand Rapids*, 46 Mich. 150; *Grimmell v. Des Moines*, 57 Iowa 144; *Kendig v. Knight*, 60 Iowa 29; *Matter of Ingraham*, 64 N. Y. 310 (respecting two sewers under one assessment); *Mayall v. St. Paul*, 30 Minn. 294; *Stoddard v. Johnson*, 75 Ind. 20—all cited in *Cooley on Taxation* (2nd ed.), p. 643.

under one assessment.¹ And the cost is not always borne by those only who are specially benefited.²

(6) *Decisions of Councils as to Benefits.*—Courts will not question the decision of a city council that a proposed improvement will prove beneficial to the property holders who are made to pay for it. At least the practice of courts very generally is to follow the council, and accede to the reason given for the assessment.³ If a city council has declared the benefit in the past tense, the assessment is not therefore assailable. Nor is it because the actual cost of the improvement does not appear of record. But if the council has assessed for an expenditure not mentioned in the ordinance, or in the assessment in any way, that fact may be shown by a contestant. No legal presumption will save such wrongful assessment, so far as the illegal item is concerned.⁴ An assess-

1. It is *held* in Kansas that several streets may be comprised in one assessment district, and that the cost of improving them may be apportioned by frontage along all the streets. *Parker v. Challis*, 9 Kan. 155; *Challis v. Parker*, 11 Kan. 394.

2. *Sidewalks.*—It has been *held* that the expense of constructing a sidewalk may be assessed upon the front lots regardless of the absolute benefit to their owners. *Van Tassel v. Jersey City*, 37 N. J. 128. The cost may exceed the benefit to the lot owner. It may be collected before the sidewalk is laid. *Mix v. Shaw*, 106 Ill. 425. The construction of it may be ordered before the street has been graded. *Parker v. Challis*, 9 Kan. 155; s. c., 11 Kan. 384. The owner may also be obliged to make a gutter beside the walk, though the street be yet unpaved. *Robins v. New Brunswick*, 44 N. J. 116. And to build a railing on the inner side of the walk. *Williams v. Bruce*, 5 Ct. 190. A corner lot owner may be required to make paved walks both in front and on the side next the street. *Sands v. Richmond*, 31 Gratt. (Va.) 571. *Compare Wolf v. Keokuk*, 48 Iowa 129. It is not legal, in Illinois, to charge the cost of a sidewalk to the owner personally—it is a charge against his lot. *Craw v. Tolono*, 96 Ill. 255; *Virginia v. Hall*, 96 Ill. 278. *Cooley on Taxation*, 589 (2nd ed.).

Sidewalk Assessments.—Rules applicable to street improvements generally include those of sidewalks. *Sloan v. Beebe*, 24 Kan. 343; *Kemper v. King*, 11 Mo. App. 116; *Flint v. Webb*, 25 Minn. 93. *Compare Himmelman v. Satterlee*, 50 Cal. 68; *Dyer v. Chase*, 52 Cal. 440.

Power to improve sidewalks does not include that of building them. *Fairfield v. Ratcliff*, 20 Iowa 396. Assessment for a sidewalk need not be confined to the benefits conferred on the front lot proprietors. *State v. Fuller*, 34 N. J. 227; *White v. People*, 94 Ill. 604. It may be levied on a homestead. *Lufkin v. Galveston*, 58 Tex. 545. *Cooley on Taxation*, 615 (2nd ed.).

3. *Legislative Action Conclusive.*—Where a legislature has declared that a district will specially be benefited by a proposed improvement, and has ordered forced contributions or taxes to be levied therefor, its opinion and action have been generally considered beyond question. *Bigelow v. Chicago*, 90 Ill. 49; *Baltimore v. Hughes*, 1 Gill & G. (Md.) 480; *Kelly v. Cleveland*, 34 Ohio St. 468; *Litchfield v. Vernon*, 41 N. Y. 123, 133; *People v. Lawrence*, 41 N. Y. 140; *Macon v. Patty*, 57 Miss. 378; *St. Louis v. Eters*, 36 Mo. 456; *Philadelphia v. Field*, 58 Pa. St. 320.

An improvement judged by the mayor and council of Baltimore, to be beneficial, will be *held* by the courts to preclude property holders from contesting that fact in the courts. *Baltimore v. Johns Hopkins Hospital*, 56 Md. 1.

The city council of Racine may conclusively decide what property shall be assessed for benefits, but in proportioning the assessment its decision may be appealed from and submitted to a jury. *Teegarden v. City of Racine*, 56 Wis. 545.

4. *Defective Assessments.*—An assessment for street betterment is not assailable on the ground that the adjudication of the aldermen was merely that the estates "have been

ment is not wholly void because illegal in part. More work than that authorized may be made the object of the assessment, yet the levy be good to pay for the work which has been duly authorized.¹ It has been held that purchasers at sales made to enforce defective assessments must be presumed to know of the defects.²

Though a court of equity will interfere to prevent a manifest wrong, yet courts of law will hold the determination of incidental matters, connected necessarily with the exercise of powers conferred, to be exclusively with the special tribunal to whom those powers were confided by the legislature. Under this principle it was held that a city council could decide whether certain real estate within its jurisdiction was rural or urban.³

When the legislature has provided for the hearing of interested persons, with respect to improvement assessments, before a court, their complaint that they should have been first heard before the court commissioners was held untenable.⁴

benefited." Illegality is not presumed. The failure to show, by record, the actual expense of widening a drain does not render the assessment assailable. *Foley v. Haverhill*, 144 Mass. 352.

If a municipal assessment is based on an item of expenditure which was for a purpose different from that shown on its face, a party contesting the assessment may show that fact. *Ex parte Johnson*, 103 N. Y. 260.

1. Such assessment is not necessarily void because it includes items which should have been excluded. It may be valid, in part. *Cincinnati v. Anchor White Lead Co.*, 44 Ohio St. 243.

Although a city may assess vacant lots for laying lateral service pipes for water, when there is no express statutory authorization, yet if some of the lots are greatly wider than others—some forty-five and others twenty-five feet wide—an assessment based on two services for the larger and one of the narrower lots is illegal. *Warren v. Chicago*, 118 Ill. 329.

A street assessment which includes the cost of more work than had been authorized is not wholly void. It is good for the cost of the work properly included. The assessment may be corrected by the board of supervisors, on appeal to it. *Dyer v. Scalmanini*, 69 Cal. 637.

2. It was held in Indiana, that the maxim *caveat emptor* is applicable when a purchaser has bought property sold under an erroneous and irregular assessment, and that, therefore, a city

thus selling cannot be made to return the purchase money to him. The maxim was held "to apply to this class of sales as to sales for taxes generally." It does not seem that the court had in view the character of the delinquent's title, which is not warranted to the purchaser, but the defect of the assessment; and held that the purchaser was bound to be aware of that. *Churchman v. Indianapolis*, 110 Ind. 259. The reasoning is, that as money voluntarily paid under an erroneous assessment cannot be recovered of a city in the absence of statutory authorization, so money paid by a purchaser at a sale under such assessment cannot be.

Vacating Assessment After Payment.

—Land owners petitioned to vacate an assessment. One of them afterwards paid his rate, but filed a separate petition to vacate, after an order allowing the petitioners to sever. His payment was held to be no bar to relief. *Re Mehrbach*, 97 N. Y. 601, reversing s. c., 33 Hun (N. Y.) 136. But when assessments had been paid in the erroneous belief that the payment ended the proceedings, those paying should not be allowed to file separate petitions ten years afterwards—having joined in proceedings to vacate the assessment. *Re Wood*, 33 Hun (N. Y.) 4.

3. *City of Erie v. Reed's Exrs.*, 113 Pa. St. 468.

4. *Wilson v. State*, 42 N. J. L. 612.

In some States appeals may be taken from a city council to the circuit court on the assessment of damages for street improvements; as in Indiana. *Hamilton v. City of Fort Wayne*, 73 Ind. 1.

(7) *Benefits to Railway Property.*—As a general rule railway property is assessable for local improvements like any other, if it is benefited or may be benefited like other real estate. Unless there is some constitutional impediment, in any State such property is liable. It may be assessed for the purposes of a park or a boulevard in the city.

Where a special assessment of railroad property, as benefited by such an improvement, has been confirmed by judgment of court, it is then too late for objections and defences that might have been pleaded before judgment. It cannot then be shown that the railroad property was exempt from assessment, or that it was not benefited, or that the ordinance under which the assessment was laid is invalid. Whatever might have been pleaded and decided is now held to have been finally settled.¹

Such judgment is conclusive against the owners of all assessed lots, as to all matters which might have been adjudicated had they been set up in defence to defeat the confirmation of the assessment. This effect is confined to those in court at the time of the confirmation, or who were duly notified to be there—just

Where this is the rule, an action brought directly in the circuit court for damages was *held* to be a waiver of the right of appeal from the city council (*Owens v. City of Milwaukee*, 47 Wis. 461, distinguished). *Benton v. Milwaukee*, 50 Wis. 368.

And in Missouri, where an appeal from a city council was taken to the circuit court, and thence to the supreme court, where the decision was reversed and a new trial ordered, it was *held* that, though only two had appealed, the new trial must be with respect to all the defendants. *State v. Gill*, 84 Mo. 248.

Courts are not controlled by the construction which is put on a statute by the public officers who execute it. *Matter of Manhattan Savings Institution*, 82 N. Y. 142.

They will not be governed by the views of appraisers or commissioners of assessment on the validity of proceedings or the constitutionality of the statute under which the proceedings are had. *Matter of the Department of Public Parks etc.*, 85 N. Y. 459.

I. C. & N. W. Ry. Co. v. People, 120 Ill. 104; *citing*, *Le Moyne v. West Chicago Park Comm'rs*, 116 Ill. 41; *Kedzie v. West Chicago Park Comm'rs*, 114 Ill. 280; *Riverside Co. v. Howell*, 113 Ill. 263; *Schertz v. People*, 105 Ill. 27; *Gage v. Parker*, 103 Ill. 528; *Andrews v. People*, 83 Ill. 529; *People v. Brislin*, 80 Ill. 423, and others.

Railroad Rights and Property.—A railway company's right of way across a street is not "property abutting on a street," to be taxed as such for a street improvement. *Chicago etc. Ry. Co. v. South Park Comm'rs*, 11 Ill. App. 562.

Failure to compel a railroad company to pave the part of streets occupied by its tracks when it was obligated to do so by contract, gives the property owner the right of having his assessment reduced so far as the failure caused its increase. *Matter of Appleby*, 26 Hun (N. Y.) 427.

Such company may have its land, which is held by it in fee, assessed to pay its quota of the cost of a sewer, though used only for railroad purposes. *N. Y. etc. R. Co. v. City of New Britain*, 49 Ct. 40. See for further on this subject, *First Ec. Society v. Hartford*, 35 Ct. 66; *City of Bridgeport v. N. Y. etc. R. Co.*, 36 Ct. 255; *N. Y. etc. R. Co. v. New Haven*, 42 Ct. 279; *City of Hartford v. West Middle District*, 45 Ct. 462; *Park Ec. Society v. Hartford*, 47 Ct. 91.

Statute of Limitations.—When assessment is for public improvements the statute of limitations is not applicable to them. *District of Columbia v. Washington etc. R. R. Co.*, 4 Am. & Eng. R. R. Cases 161.

A lot owned and used by a railroad company is liable to assessment for local purposes. *Ludlow v. Cin. S. R. Co.*, 7 Am. & Eng. R. R. Cases 232.

as in any case. There must have been jurisdiction in the court as well as an opportunity for defence.¹

(8) *Improvements by Private Persons*.—What a citizen may build at his own option and expense, as a municipal improvement, the city is not bound to maintain when it has not accepted the work.²

When he has done necessary work which the city has been benefited by, and his improvement is still in good condition, there is no justice in replacing it by another and requiring him to bear the expense of the change.³

The expense of repair may be put upon property owners specially benefited, when the work was originally constructed at their cost under city order.⁴

(9) *Assessing for Old Works*.—A city council cannot couple works long ago finished with new improvements in making an assessment in the absence of legislative authorization so to do.⁵ But those who have been made to pay for an old work may be assessed for the new, if they would be further benefited by it.⁶

When, three years after an improvement was ordered by a town, a city corporation, succeeding the town, by resolution directed the execution of the order, it was held that the assessment was invalid by reason of uncertainty arising from the circumstances stated.⁷

(10) *Reassessment*.—It requires statutory authorization to enable a municipal council or board to assess those a second time who have already paid their *quota* under an assessment. The repaving of a street, when the first one paid for has been worn out, is not the same local improvement that has been charged to the abutting proprietors, but a new one, therefore no reason seems to exist why beneficiaries should not pay for it, notwithstanding their former payment for a former pavement.⁸

1. *Murphy v. People*, 120 Ill. 234. "If, upon an application for the confirmation of an assessment, the court has jurisdiction, its judgment will conclude the land owner from questioning the legality, validity or regularity of any of the proceedings had prior thereto, on application for judgment of sale of the premises."

2. *Village of St. Albans v. Noble*, 56 Vt. 525.

3. *Wistar v. Philadelphia*, 111 Pa. St. 604.

4. *Estes v. Owen*, 90 Mo. 113.

5. *Brown v. Mayor etc. of Fitchburg*, 128 Mass. 282.

6. *Park Ecclesiastical Society v. City of Hartford*, 47 Ct. 89.

7. *Shehan v. City of Fitchburg*, 131 Mass. 523. But see *Roosevelt Hospital v. New York*, 84 N. Y. 108; *Alcorn v. Philadelphia*, 112 Pa. St. 474.

8. *Reassessment*.—There can be none for a local improvement, unless there is statutory authorization to that effect. *Tingue v. Port Chester*, 101 N. Y. 294. Where there is such authorization (as in New Jersey), in case the first assessment proves invalid, it is *held* constitutional, though the reassessment retract to the date of the first one, and notwithstanding *mesne* incumbrances. It was so *held* in exposition of Act of Mar. 12, 1878. *N. J. Sinking Fund Comm'rs v. Linden*, 40 N. J. Eq. 27.

The right to assess for repaving a street has been generally sustained. *Gurnee v. Chicago*, 40 Ill. 165; *Municipality v. Dunn*, 10 La. Ann. 57; *Bradley v. McAtee*, 7 Bush (Ky.) 667; *Broadway Church v. McAtee*, 8 Bush (Ky.) 508; *McCormick v. Patchen*, 53 Mo. 33; *Williams v. Detroit*, 2 Mich. 560; *Sheeley v. Detroit*, 45 Mich. 425; *Wil-*

Beneficiaries.—The paving of a street above does not benefit the owners of an underground railroad and they cannot be made to pay for it.¹ If absence of benefit because the property is rural be made a ground of resisting an assessment, it should be set up before opposing the ordinance therefor on a ground inconsistent.²

Reassessment must be effected under proper statutory warrant as well as the original.³ When it is subject to ratification by an authority constituted for the purpose it cannot be changed by such authority so as to put the benefits of certain persons at a higher estimation, as a part of the ratification proceeding, but, if valid at all, it must be done after a hearing of those interested.⁴

A borough may order the relaying of a sidewalk (originally constructed according to law) and, on disobedience of any lot owner, it may do it at his cost and create a lien upon his lot for the debt thus created.⁵

kings v. Detroit, 46 Mich. 120; *Petition of Grube*, 81 N. Y. 139. Compare *Hammett v. Philadelphia*, 65 Pa. St. 146, in which the right to reassess the abutting lot owners, who paid their first assessment, is combated and denied.

Reassessment for improvement may be made by the St. Paul city council, under their charter, if judgment be denied on the original assessment, or if the contract for the work has been illegally made and the first assessment thus vitiated. Necessary expenses, incidental to the improvement, such as advertising, engineering, etc., though not mentioned in the contract for the work, may be incurred without violation of the constitution, Art. 9, § 1. *City of St. Paul v. Mullen*, 27 Minn. 78. The same and other sections further construed. *Cook v. Slocum*, 27 Minn. 509.

Lands may be reassessed for a sewer which has proved ineffectual, that it may be continued to a river and thus rendered available. *State v. Hotaling*, 44 N. J. L. 347. Reassessment is based upon the first assessment. "Without the first, I do not perceive in what way the second can be supported." *Anderson v. City of Passaic*, 44 N. J. L. 580-3.

The city of Newark directed that a sum be raised by taxation for street repaving, by authority of an act of the legislature of New Jersey, Mar. 27, 1882. The direction was by a published ordinance, providing that the assessment be laid on the property benefited. Under it a street was repaved. The court held that the assessment could not be defeated because the tax ordinance did not name the particular streets

to be improved, and the amount to be expended on each; that the fact of prior assessments to pay for the original paving was immaterial. It was held further that the provision of the act, directing that money realized from assessments for street improvements, first paid for by general tax, should be used in making other street improvements, was immaterial. *Jelliff v. Newark*, 48 N. J. L. 101.

1. An underground railroad not benefited by paving improvements of the street above, is not assessable therefor. *People v. Gilon*, 41 Hun (N. Y.) 510.

2. *Laches of Persons Assessed.*—Rural owners will be estopped from defending against an assessment on the ground that their property is rural, after having first protested against an ordinance for paving a street through their property at their expense, yet not then setting up this ground. *Pepper v. Philadelphia*, 114 Pa. St. 96.

Changing Grade.—Where a city changes the established grade of a street or alley without having the damages to abutters assessed and tendered, as required by Ind. Rev. Stat., § 3073, an action for the damages is maintainable, although the abutter made no attempt to compel the city to desist, or to proceed according to law. *Lafayette v. Wortman*, 107 Ind. 404.

3. *Tingue v. Village of Port Chester*, 101 N. Y. 295.

4. *Souther v. South Orange*, 46 N. J. L. 317.

5. *Smith v. Borough of Kingston (Pa.)*, 14 Atl. Rep. 170.

7. Frontage Assessments—(1) Linear Rule.—The burden of a street's improvement may be assessed upon those whose property borders on the street, or rather upon the property itself according to the lineal measure of the abutting lots. Some of the lots may be more highly improved than others of equal measurement; they may, with elegant mansions upon them, be worth a hundred times as much as vacant lots of equal front, yet the burden is borne by all alike in proportion to the frontage. Unequal and wanting in uniformity as this method is, the courts hold it not unconstitutional, on the ground that it is not a tax. The decisions agree very generally upon the rightfulness of frontage assessments.¹

The rule is different with respect to farms and all rural grounds. This the courts hold;² yet they deny that they have jurisdiction to interfere with the frontage rule in cities when authorized by statute.³ The former is put on constitutional grounds, and if there are constitutional impediments to cities' charging by the foot, the statutory provision would not be in the way of the courts' saying so.

1. Front Foot Assessments and Benefits.—The authorities are well united in the conclusion that frontage may lawfully be made the basis of apportionment. *Cooley's Taxation* (2nd ed.), p. 644, citing *Pennock v. Hoover*, 5 Rawle (Pa.) 291; *McGonigle v. Allegheny City*, 44 Pa. St. 118; *Magee v. Com.*, 46 Pa. St. 308; *Spring Garden v. Wistar*, 18 Pa. St. 195; *Stroud v. Philadelphia*, 61 Pa. St. 255; *Covington v. Boyle*, 6 Bush (Ky.) 204; *State v. Elizabeth*, 30 N. J. L. 365; s. c., 31 N. J. L. 547; *State v. Fuller*, 34 N. J. L. 227; *Ernst v. Kunkle*, 5 Ohio St. 520; *Upington v. Oviatt*, 24 Ohio St. 232; *Wilder v. Cincinnati*, 26 Ohio St. 284; *Barnes v. Atchison*, 2 Kan. 455; *Parker v. Challis*, 9 Kan. 155; *St. Joseph v. Anthony*, 20 Mo. 537; *Fowler v. St. Joseph*, 37 Mo. 228; *Neenan v. Smith*, 50 Mo. 525; *Chambers v. Satterlee*, 40 Cal. 497; *Whiting v. Quackenbush*, 54 Cal. 306; *Whiting v. Townsend*, 57 Cal. 515; *White v. People*, 94 Ill. 604; *Sheley v. Detroit*, 45 Mich. 431, and others.

The assessment on fronting lots must be uniform in rate upon all the property charged with the expense of the improvement. *Jaeger v. Burr*, 36 Ohio St. 164; *Siebert v. Tiffany*, 8 Mo. App. 33.

2. It is held unconstitutional to assess the cost and benefits on rural lands by their frontage. *Philadelphia v. Rule*, 93 Pa. St. 15, and cases therein cited.

Seely v. Pittsburgh, 82 Pa. St. 360.

3. It has also been held that courts cannot interfere with the frontage rule, if adopted by a city authorized by statute to do so, unless there is statutory authority given them to thus interfere. *Baltimore v. Johns Hopkins Hospital*, 56 Md. 1. (*Baltimore v. Scharf*, 54 Md. 499, overruled.)

Rural Improvements by City.—"The real test of liability for paving is not whether the property in question would properly be called either rural or suburban, but whether the work done was required or justified by the locality of the property and the character of the surrounding improvements." *Stewart v. City of Philadelphia* (Pa.), 7 A. 192.

When water pipe is laid in front of farm land and suburban property by municipalities in Pennsylvania the assessment cannot be according to the foot front rule. *City of Allentown v. Adams* (Pa.), 8 A. 430.

Such rule has been held unconstitutional because unjust and unequal when applied to rural property. *City of Philadelphia v. Rule*, 93 Pa. St. 15; *City of Scranton v. Pennsylvania Coal Co.*, 105 Pa. St. 445.

If rural property owners make objection to levying frontage assessment on other grounds than that the land is rural, they cannot afterwards oppose the collection of the assessment on that ground. *Pepper v. Philadelphia*, 114 Pa. St. 96.

A statute authorizing the foot front rule in the country has been held void: why could not such a statute be so declared for granting such power to the city if it were unconstitutional?¹

Authorizations must be construed in connection with conditions imposed. If a notice should appear in three newspapers, publication in one will not be sufficient, and the city may be enjoined and forbidden to assess for the proposed improvement.² If only a "condemned" street could be curbed under the authorization, the city would be restrained from curbing a different one.³

The abutters having borne the expense of a new improvement to a street, may be made to keep it in order; for it is held that the power to compel them to pay for the construction in the first instance covers that of compelling them to pay for repairs. This is not universally accepted. Distinction is drawn between the repair and the reconstruction of a street; and, in some cities, repairs cannot be assessed to the abutters.⁴

(2) *Apportionment of Cost of Drainage Improvements—What Is Liable.*—A sewer is a covered ditch. It is not confined, in its use,

1. Rural Property.—A city cannot assess farm land under the "foot front rule" for municipal improvements. A statute authorizing it is void. *Scranton v. Pa. Coal Co.*, 105 Pa. St. 445.

2. Notice of Proposals.—An ordinance required ten days' notice to be given of proposals for grading a street. The notice was to be inserted by the city commissioners in the newspapers. The contract was to be given to the lowest bidder. Property owners could enjoin if there was publication in but one paper, and prevent the collection of the assessment. *Baltimore v. Johnson*, 62 Md. 225; *Brown v. Denver*, 7 Colo. 305.

3. Condemned Street.—A city could not assess for curbing, it was held, when the statute provided for the curbing of any street then "condemned, ceded or opened as a public highway;" and the street had not been "condemned." *Baltimore v. Hook*, 62 Md. 371.

Compensation.—A statute providing for compensation when property is damaged by the change of a street grade, should be construed so as to include "sidewalk" with "street." *Kokomo v. Mahan*, 100 Ind. 242. A city is liable for injuring a house by raising a street grade—the house being previously erected. *Harmon v. Omaha*, 17 Neb. 548; s. c., 52 Am. Rep. 420.

Property fronting on two streets, both to be improved by grading, etc., cannot be justly assessed to its full value for each of the improvements; and such

double assessment cannot be sustained unless the charter or statute clearly demands it. *Halpin v. Campbell*, 71 Mo. 493. Compare *Dyer v. Martinovitch*, 65 Cal. 365.

Certificate.—A presumption that assessment was made according to frontage and not according to benefits, may be removed by the commissioners' certificate and affidavit. *State v. City of Trenton*, 43 N. J. L. 166. Certificates required in the changing of lot frontage must conform particularly to the statute requiring them, and be duly filed. *Norwich Savings Society v. Hartford*, 48 Ct. 570; *Re Metropolitan Gas Light Co.*, 85 N. Y. 526; *Petition of Hearn*, 96 N. Y. 378.

4. The power to pave or macadamize a street at the cost of the abutters, includes the power of compelling them to repair it—under the charter of the city of St. Joseph. *Estes v. Owen*, 90 Mo. 113. Whether a given improvement is a repair or a reconstruction of a street, was held a mixed question of law and fact, when the improvement was made in St. Louis. If it was a repair, the city was liable for the cost; if a reconstruction, the abutters. The city council cannot settle such a question by designating the improvement as "reconstruction" in the ordinance, so as to charge the owners of the abutting property, if the work is of a different character. *O'Meara v. Green*, 25 Mo. App. 198.

to the conveyance of filthy water, but may be made to carry any stream and yet properly retain its name. It does not necessarily belong to a street or highway. Its construction or repair is not always chargeable to the proprietors of lands abutting on the street above.¹

When such proprietors are charged, they ought to have the benefit of being allowed to drain into the sewer. Persons who own lands which do not front the street under which the sewer runs should not be charged, not being benefited. They would be liable to pay for a like improvement under the street which they do front, and therefore should not be charged for a sewer away from them. A statute authorizing such improvements and subjecting land owners to repeated assessments without corresponding benefits, would not be equal and just.² Statutes must observe a just rule of proportionment,³ and must be strictly followed.⁴

State Property.—Contractors' certificates against State property being void, the city issuing them is liable for the amount. *Polk County Sav. Bank v. State*, 69 Iowa 24.

1. Every subterranean ditch is not to be considered as belonging to a highway because it crosses the same tract of land. It is disconnected as plainly as any structure crossing the road at an elevation is separate from the road itself. While a necessity may arise for going below the street to repair it, yet "where the main purpose of the work is to put in order and improve some permanent structure beneath the street, it is an abuse of words to confound such structure with the common highway above it."

"There is nothing in the nature of a sewer which excludes it from being made, in whole or in part, out of a natural waterway. Such is a very common practice." Difference between "building a sewer" and "repairing a street," illustrated. *Clay v. Grand Rapids*, 60 Mich. 451.

2. Assessment for Sewerage—Statute Construed to be Unjust.—A legislative act conferred upon a city in terms authority to assess, for a sewer, property supposed to be benefited in proportion to area—not confining the assessment to contiguous lots near the sewer. The court held the statute unjust, unless the assessment should be "limited to lands directly and peculiarly benefited," and further said: "This act makes no provision by which parties assessed may of right drain into the sewer, so as to be enabled to reap the benefits they ought to derive from the expenditure. It makes no distinction between property

actually occupied or capable of being occupied for city purposes, and that of an agricultural nature, of which there must be some within the city limits, upon which the burden would fall with great severity and injustice. Nor does it confine the assessment to lands upon the streets in which the sewer is laid; and in the assessment before us, lots on a parallel street are assessed. These lots, it is to be presumed, will be assessed again if a sewer is constructed in the street on which they front, and there is nothing in the act or in the nature of things to prevent a lot being assessed several times in different districts, as often as a sewer is constructed, which, in the opinion of the common council, is productive of benefit to the neighborhood. . . . It is not, therefore, legally possible that such an apportionment of the cost of sewers can be just or equal, or in proportion to benefits." *Thomas v. Gain*, 35 Mich. 155. See (in accord) *Kennedy v. Troy*, 14 Hun (N. Y.) 308; *Preston v. Roberts*, 12 Bush (Ky.) 570. The assessment should have been restricted, at least, to the adjacent lots. *Gillette v. Denver*, 21 Fed. Rep. 822; *Grinnell v. Des Moines*, 57 Iowa 144.

3. There must be a just and definite rule of apportionment laid down in a statute. Delegating the making of such rule to the commissioners, who were to assess for a sewer on benefited lands, was held invalid. *New Brunswick Rubber Co. v. Comm'rs*, 38 N. J. L. 190. In *Barnes v. Dyer*, 56 Vt. 469, same principle applied to an assessment for a sidewalk.

4. The authority to a city to lay tax for a sewer must be strictly followed.

The expense of diverting a stream from its course cannot be properly charged as part of the cost of constructing sewers, when such diversion forms no part of a general drainage system.¹

White v. Stevens (Mich.), 34 N. W. Rep. 255.

The construction of a sewer in a street existing only on a map or plat is not authorized by statute, and it will not be validated by the subsequent laying out of the street. An assessment to pay for the sewer, made after the laying out, is, therefore, illegal. *Bishop v. Tripp* (R. I.), 8 A. Rep. 692.

Drains and Sewers.—General municipal power to maintain streets includes the construction of sewers. *Leeds v. Richmond*, 102 Ind. 372. The cost of them are apportioned to the value of the lots, irrespective of the improvements thereon, in Kansas. *Mason v. Spencer*, 35 Kan. 512.

Residents owning front lots on a city street cannot enjoin the city from making drains along the side or culverts across the street or other streets in the vicinity; nor can they restrain the city from grading the street or from improving it otherwise, on the ground that such improvements would greatly increase the flow of surface water upon their lots. *Heth v. Fond du Lac*, 63 Wis. 228; s. c., 53 Am. Rep. 279.

Where a statute does not provide for assessing consequential and indirect damages for land taken for a sewer, and does not determine the elements of the damage, only the actual taking can be made the subject of the award. *Stewart v. Rutland*, 58 Vt. 12.

"Under Mass. Pub. St., ch. 50, § 4, where a common sewer is intended not only to serve as an outlet for other common sewers, but also to benefit lands abutting on it, no part of the cost need be assessed on the owners of the lands along the lines of the tributary sewers." *Ayer v. Somerville*, 143 Mass. 585.

Under the constitution of New Jersey, art. 4, § 7, sewer assessments based on the linear frontage, instead of the value of the land assessed, are invalid. *State v. Paterson*, 48 N. J. L. 435.

Power to change the channel of a brook for sewerage purposes includes that to change its outlet. *Morse v. Worcester*, 139 Mass. 389.

A sewer assessment does not depend necessarily upon the accuracy of the description of the lot assessed, for its

validity—no injustice resulting from the description. *Morse v. Buffalo*, 35 Hun (N. Y.) 613.

Notice is essential to its validity, though neither the statute nor the ordinance prescribe it. *Gatch v. Des Moines*, 63 Iowa 718.

1. *Sherwood v. Judge of District Court* (Minn.), 41 N. W. 234.

A city having power to make sewers and assess benefits, take and divert the waters of a stream and devote them to sewerage purposes, may pass an order for a structure to serve as a conduit, and also as a sewer, and assess benefits, although the statute authorizing the diversion is silent on the subject. *Gray v. Boston Aldermen*, 139 Mass. 328.

The provisions, giving the right to adopt a sewerage system to towns and to assess owners uniformly, are not limited to persons who enter drains into the sewer or otherwise receive benefit from it. *Leominster v. Conant*, 139 Mass. 384.

Inaccuracy in the description of an assessed lot, not resulting in injustice to the proprietor or others, does not necessarily render a sewer assessment invalid. *Morse v. Buffalo*, 35 Hun (N. Y.) 613.

Sewer Assessments.—They are often called taxes. *Philadelphia v. Tryon*, 35 Pa. St. 401; *Stroud v. Philadelphia*, 61 Pa. St. 255; *Boston v. Shaw*, 1 Met. (Mass.) 130; *Hildreth v. Lowell*, 11 Gray (Mass.) 345; *Cone v. Hartford*, 28 Ct. 363; *State v. Jersey City*, 29 N. J. 441; *State v. Charleston*, 12 Rich. (S. Car.) 702. They are a charge upon real estate. *Boston v. Shaw*, 1 Met. (Mass.) 130. *Cooley on Taxation* (2nd ed.), 590, citing above cases. *Wright v. Boston*, 9 Cush. (Mass.) 233; *Cone v. Hartford*, 28 Ct. 363; *People v. Brooklyn*, 23 Barb. (N. Y.) 166; *Philadelphia v. Tryon*, 35 Pa. St. 401; *Lipps v. Philadelphia*, 38 Pa. St. 503; *Wolf v. Philadelphia*, 105 Pa. St. 25; *St. Louis v. Eters*, 36 Mo. 456.

Enforcement of Assessments for Improvements.—Under a statute for improvements to be made by a county board, on the Connecticut river, the expenses of which were to be borne by towns, persons and corporations, apportioned by commissioners, it was held

8. Vacating Assessments—(1) When Proper.—The proper time for the abandonment of an improvement is before the compensation for property taken for its use has been paid.¹

And the proper time for recovering payments wrongfully exacted from property holders is after the vacation of the illegal assessment, where such recovery is allowed.² Mere allegation of illegality has been held not sufficient pleading for the vacation on the part of one who has acquired title to the land assessed after the assessment was made; and the court will not take judicial notice of grounds not alleged.³ If the ground of objection is to defects in the ordinance directing the improvement, it should be averred prior to the completion of the improvement.⁴ If the order was by resolution, that may be good ground, but not the want of equality and uniformity as in case of a tax.⁵

that an appeal by a city from the commissioners' report, did not draw the rights of other municipalities into question; that the city's liability was not affected by delay on the part of the county board; that trustees of railroad property were properly charged, and that interest on its disbursements were due to the county. *Ex parte Hampshire Co. Comm'rs*, 143 Mass. 424; Mass. St. 1875, ch. 200.

When land had been taken for a park, it was *held*, at the trial of a petition for the assessment of damages, that evidence of the sales of lots situated like that of the petitioner is not incompetent because those were small and his large. *Sawyer v. Boston*, 144 Mass. 470.

An action to recover an assessment for drainage, involving neither the title to the land nor the legality of the assessment, may be brought in the court for the trial of small causes—the action being under N. J. Acts 1883, p. 234. *State v. Mackey*, 48 N. J. L. 363.

1. Abandonment.—"It is the settled law in this State [Ill.], that the applicant for condemnation, at any time before payment of the compensation or the property by taking and retaining possession, may discontinue and abandon the improvement and all the proceedings to carry it into effect." *City of Chicago v. Shepard*, 8 Ill. App. 602; *St. L. & S. E. R. v. Teters*, 68 Ill. 144; *Chicago v. Barbican*, 80 Ill. 482; *Village of Hyde Park v. Dunham*, 85 Ill. 570.

2. After proceedings for the imposition of the assessment have been vacated, a party who has paid may recover back the amount. *Jones v. Mayor etc. of New York*, 37 Hun (N. Y.) 513, 514;

Peyser v. Mayor etc., 70 N. Y. 497; *Purcell v. Mayor etc.*, 85 N. Y. 330.

No action to vacate an assessment can be brought in Brooklyn. *Knapp v. City of Brooklyn*, 28 Hun (N. Y.) 500.

3. Vacating Assessments.—A purchaser of land subject to assessment for improvements cannot vacate the assessment on mere allegation that it is illegal: "We have *held* in several cases of a similar character that such purchase does not establish the fact that the vendee is an aggrieved party," said the court: *Matter of Gantz*, 23 Hun (N. Y.), *citing* *Matter of Moore*, 8 Hun (N. Y.) 513; *Matter of Saunders*, 10 Weekly Dig. (N. Y.) 351.

Motion to vacate denied on the ground of laches, when property had changed hands and years intervened, etc. *Matter of Brady*, 48 N. Y. Sup. Ct. 36.

Petition must aver all objections to be made to an assessment for improvement, as the court cannot notice any not alleged in it. *Matter of Clark*, 31 Hun (N. Y.) 198.

4. A mistake in the construction of an ordinance, which could have been remedied prior to the completion of the work done under the ordinance, should be made ground of objection before the completion, if at all. It was *held* too late to object afterwards, with the purpose of vacating the assessment. In the *Matter of Pinckney*, 22 Hun (N. Y.) 474.

An assessment may be partly vacated. In the *Matter of Trustees of the Leake and Watts Orphan Home*, 92 N. Y. 116.

5. Assessments for street improve-

Irregularities in proceedings after a board of county drainage commissioners have acquired jurisdiction by the filing of the petition, were held in Indiana to be insufficient to sustain a collateral assailment of the order directing the construction of the improvement.¹ And in Michigan, that only substantial defects can avail an interested person, duly notified, in an attempt to set the proceedings aside, if he has acquiesced in them by taking part up to the time when the condemnation of land for the purpose of the improvement was being effected.²

(2) *Effect of Vacating*.—While it is well settled that the power to levy assessments for improvements is derived wholly from statute, and that not only the power but the mode of its exercise is thus derived, the question whether there has been substantial compliance is for the courts. While non-compliance with essential requirement will vitiate an assessment, it has been held that an erroneous assessment is of such importance that one who has voluntarily paid his *quota* cannot recover it; that the maxim *caveat emptor* is applicable to such case; that a purchaser of land sold under such an assessment may be met by that maxim, though the deed by the city had averred that the land was "legally liable for such assessment."³

The better opinion seems to be that an innocent contributor, paying more promptly than his fellows, and not intending a donation but meaning to comply with what he thinks a legal requirement, ought to have his own again as a matter of simple justice, when the assessment has proved illegal. In New York it was held, in exposition of statute, that one from whom money had been wrongfully extorted under color of an assessment when the city was without jurisdiction to impose it, could recover his

ments are not taxes within the requirement of the constitution of Texas that all taxes shall be equal and uniform. *Taylor v. Boyd*, 63 Tex. 533.

Such assessments cannot be levied under a mere resolution of the city council. *Newman v. Emporia*, 32 Kan. 456.

1. *Cauldwell v. Curry*, 93 Ind. 363.

2. *Dunning v. Township Comm'rs*, 44 Mich. 518.

An assessed property holder does not forfeit his right of attacking an ordinance as invalid because he has previously insisted upon the improvement being made by the contractor in accordance with the contract. He was not cognizant of the defects of the ordinance when so insisting. *Parkinson v. McGrath*, 9 Mo. App. 26.

One of several petitioners for the vacation of an assessment paid his *quota* of the expense while the petition was yet pending. The petitions were severed afterwards—each containing the same averments; and then the one who

had paid was permitted to plead again, and his payment held to be no estoppel. *Petition of Mehrbach*, 97 N. Y. 601 (reversing *In re Mehrbach*, 33 Hun (N. Y.) 136).

If a payment has been made on an assessment subsequently vacated, and succeeded by a second assessment at less cost, it may be recovered as to the excess paid. *Mayor etc. of Jersey City v. Green*, 42 N. J. L. 627 (*Edwards v. Jersey City*, 11 Vroom N. J. distinguished).

If the payment be under protest, that is held no ground to recover it back upon tendering evidence to prove that the assessment was partly invalid. *Fuller v. City of Elizabeth*, 42 N. J. L. 429.

3. Courts have sometimes so assimilated improvement assessment to taxation as to hold that payments made by those assessed cannot be recovered by them, though the assessment prove to be invalid, and the payments were made

money; and that he need not await the vacation of the assessment before asserting his claim and obtaining judgment. Or he may have relief granted him in the same proceeding by which the assessment is vacated.¹

Any person aggrieved by an unauthorized assessment may take measures to vacate it.²

It is not proper to enter continuances *nunc pro tunc* between the issuing and the quashing of a writ of *certiorari* in proceedings to lay off a street.³

Such proceedings may be reviewed on that writ, notwithstanding the charter of the city declaring that the judicial confirmation of the assessment shall be *res adjudicata*.⁴

9. Damages—(1) *Measure of*.—The measure of damage is the depreciation of property, in market value, by a public improvement. One may have his common law remedy for private property taken for public use in making improvements, if no other remedy has been provided by statute.⁵ Where there is a statutory

on demand. The reason given is that there is no statute authorizing the refunding of the money thus ill gotten, and that the maxim *caveat emptor* is applicable. *Churchman v. City of Indianapolis*, 110 Ind. 259.

1. But it was *held* in New York that an action would lie to recover payments wrongfully extorted from property holders where the city had no jurisdiction to make the assessment; that recovery may be had before the assessment has been vacated; that the levying of an assessment without the required petition renders the proceeding void so as to allow recovery of forced payments thereon. *Jex v. Mayor etc. of New York*, 103 N. Y. 536.

2. The right of demanding restitution of money unlawfully exacted on a void assessment is not confined to the owners of the property assessed, but extends to all persons who are "aggrieved thereby," as the statute provides. *Schultze v. Mayor etc. of N. Y.*, 103 N. Y. 307.

When an assessment had been paid on a lot without the knowledge of its owner, and was subsequently set aside, it was treated as a collection from him under legal process, since it had been paid from his funds and by order of court. He was therefore awarded restitution, though the judgment of foreclosure under which the judicial order for payment issued had not been annulled. *Brehm v. Mayor etc.*, 104 N. Y. 186.

In New Jersey, when a paving assess-

ment had been set aside on *certiorari*, a prior payment was recovered. *City of Elizabeth v. Shirley*, 35 N. J. Eq. 515. See *Kahl v. Love*, 8 Vroom (N. J.) 5.

3. *In re East Grant Street (Pa.)*, 16 A. 366.

4. *Sherwood v. Judge of District Court (Minn.)*, 41 N. W. 234.

5. **Damages—Special**.—A person specially damaged by the building of a viaduct should be compensated accordingly. The measure is, the amount in which his property has been depreciated in market value. *Lehigh Valley Coal Co. v. Chicago*, 26 Fed. Rep. 415.

For changing a street grade, a city was *held* liable in damages and subject to a common law action. Property had been taken without compensation, and there was no statutory remedy against the city. The constitution prescribed that property should not be taken or damaged for public use without compensation, to be ascertained by a jury of commissioners in such manner as may be prescribed. The failure of the legislature to prescribe the manner was *held* not fatal to the injured party. *Householder v. Kansas*, 83 Mo. 488.

A city is liable for "such special consequential damages as the adjoining proprietor receives" beyond that common to the other abutters and the public, caused by making improvements. This under the constitutional provision that "private property shall not be taken," etc. *Reardon v. San Francisco*, 66 Cal. 492; s. c., 56 Am. Rep. 109.

remedy, the wronged complainant is ordinarily confined to that.¹ Anyone wronged may sue, whether he be the legal owner of the property injured, or hold it by some less right. Money extorted for an improvement ordered without authority by a city may be recovered.²

(2) *Remedy*.—In New York, statutory remedies for injuries by improvements are exclusive.³ Injuries should be considered in a reasonable spirit. It is not every change from the original plan, nor every extension beyond the mere letter of the authorization describing the improvement, that will give rise to an action in damages.⁴

1. Remedy of the Property Holder.—Statutory remedy is the only one accorded a property holder, aggrieved by assessment of damages resulting from a change of grade in Minnesota. *Genois v. St. Paul*, 35 Minn. 330.

2. Under a statute conferring a remedy upon any person aggrieved by local improvements, the petitioner need not be the legal owner of the property assessed. "The right of restitution extends to all in whose behalf the proceedings were instituted." N. Y. Laws 1858, ch. 338. *Schultze v. New York*, 103 N. Y. 307. This statute takes away the remedy to vacate the assessment by action; but the provision to that effect is held inapplicable when the lien, by payment or other means, has been removed. The injured party still has his action to recover money extorted from him under color of an assessment where there was no jurisdiction to impose it. *Jex v. New York*, 103 N. Y. 536.

For a coercive assessment afterwards vacated, but paid meanwhile from the proceeds of a mortgage foreclosure under judicial order, the mortgagor may recover from the city, to the amount of the payment. *Brehm v. New York*, 104 N. Y. 186.

3. Remedy for Injury.—In New York the method of compensation provided by statute is exclusive of other remedies by persons injured by public improvements. They have no action at law against the city of New York for damages incidentally occasioned to land by changes in a street grade. *Heiser v. New York*, 104 N. Y. 68.

4. Alterations Without Liability.—It was held that the extension of the footway of the New York and Brooklyn bridge, being merely the completion of the original plan, and causing no injury to the complainant as to light, air or approach, gave no cause of action to

him as the owner of the abutting property. *Ottendorfer v. Agnew*, 13 Daly (N. Y.) 16.

"A city may elevate the grade of a street without becoming liable to an abutter, who is thus compelled to maintain a wall and is incommoded in obtaining access to his lot." [Dissent.] *Kehrer v. Richmond*, 81 Va. 745.

For reasonable and ordinary changes, presumably contemplated in the original undertaking, a city is not liable by reason of the constitutional requirement to "make just compensation for the property taken, injured or destroyed by the construction or enlargement of its works, highways or improvements." *Montgomery v. Townsend*, 80 Ala. 489.

The owner of improved property beyond the city limits may recover of the city for knocking down his fences, and causing water to overflow and injure his property, by grading a street made necessary in extending the city limits. *Gray v. Knoxville*, 85 Tenn. 99.

To proceed on a different basis of assessment in one district from that in another, both within the benefited territory, is reversible error. *Elwood v. Rochester*, 43 Hun (N. Y.) 102.

Market property owned by a city cannot be improved at the expense of the property of abutters. They may enjoin the city from collecting assessments on their property for such purpose. *Fort Wayne v. Shoaff*, 106 Ind. 66.

Damages Caused by Improvements.—In a suit against a city for damages to private property from street improvement, the jury should weigh the benefits conferred on the plaintiff by the improvement, discriminating between the special benefit to him and the general benefit to the public, in which he shares in common with the community. *Geneva v. Peterson*, 21 Ill. App. 454.

An abutter may recover damages for injury received by changing the grade of a street, though the city may have failed to assess them under the law. For running a street through his lot, the owner has an action on the case in West Virginia.¹ One who had paid his assessment, recovered the payment by suit; but the court thought the payment would have been a bar to his prior suit to vacate the assessment, had it been pleaded.²

Damages for changing a street grade ought to be assessed and paid—tendered at least—before the change is made. Damages under the drainage acts of New York need not be paid before the assessment is levied. Whoever is injured by public improvements has the right to claim reparation as a general rule.³

A mortgagor may successfully sue a city, after the vacation of an assessment, to recover what he has paid under it, when the payment was made in obedience to a judicial order of foreclosure.⁴

If a house on land needed for widening a street is a serious obstruction, damages for it must be assessed. If it is not, damages are confined to the land and the city acquires a right to that only. *St. Louis v. Ct. Ins. Co.*, 90 Mo. 135.

Evidence of the prices at which neighboring lands were sold was *held* inadmissible when the question was upon the value of land taken for a public park. *Kerr v. South Park Comm'rs*, 117 U. S. 379.

A reversioner, suing a city for damages for taking land, must aver and prove injury permanent—such as would affect the reversion. If the evidence offered is so broad as to include injury to the estate in possession, it may be objected to specifically, not generally. *Chicago v. McDonough*, 112 Ill. 85.

1. Damages Against City.—A plaintiff had built a dwelling on a turnpike beyond city limits. It was afterwards permanently injured by the extension of the city bounds so as to include his building lot, and the running of a street through it. It was decided that he could recover compensatory damages by an action on the case. *Hutchinson v. Parkersburg*, 25 W. Va. 226.

2. An owner paid his assessment and then sued to vacate it, and succeeded; and it was *held*, in a subsequent suit for the money, that he could recover the sum paid, though the fact of payment would have afforded ground for refusing to vacate the assessment. [Dissent.] *Jones v. New York*, 37 Hun (N. Y.) 513. If a town receives part of the pro-

ceeds of a foreclosure sale under an invalid assessment, it may be recovered in an action for "money had and received." [Dissent.] *Day v. New Lots*, 36 Hun (N. Y.) 263.

3. When land is taken for street extension, its value may be estimated with due allowance for the effect of building restrictions in a deed. *Allen v. Boston*, 137 Mass. 319.

The damages to land, under the general drainage acts of New York, need not be paid before the levy of the assessment. *Re Swan*, 35 Hun (N. Y.) 625.

Cities, either under special charters or general law, must assess damages to abutting lot owners, and pay or tender them, before changing a street grade. *Phillips v. Council Bluffs*, 63 Iowa 576.

One buying land abutting on a street where the natural grade is undergoing alteration, though no specific grade has been adopted by the town, may recover for any further changes to his injury. *New Brighton v. Piersol*, 107 Pa. St. 280.

Assessments — Action — Damages.—Assessment of betterments, under the charter of Kansas City (art. 7, § 3) is a "single proceeding." On a new trial granted on motion of one party, the whole assessment must be "gone into *de novo*." [Dissent.] *State v. Gill*, 84 Mo. 248.

4. "Where a judgment foreclosing a mortgage directs payment of a municipal assessment from the proceeds of a referee's sale, and payment is made accordingly, the payment is made under coercion in the sense that the mort-

The *onus* is on an opponent of an assessment who appeals from it on the ground that he is too highly charged, or that the levy is arbitrary.¹ The burden of proof is on the plaintiff when the defendant denies ownership of the property assessed to him in a personal suit to recover the assessment.²

Statutory forms of suits should be observed. A suit should not be in the name of a city when the prescribed form requires that the people must be the plaintiff in a suit to foreclose a street assessment.³

In the tax bill, incidentals may be included, such as the charge for curbing, crosswalks, bridges, etc., not mentioned specially in the ordinance for the improvement.⁴

Assessment for land not sub-divided into lots, which is city property and fronting on a street, may be recovered at the same rate at which city lots are assessed.⁵ The mere appraisal of property to be taken for public use gives no cause of action for its value as appraised.⁶

gagor may maintain an action against the city for the recovery of the amount, after the assessment is vacated." *Brehm v. N. Y.*, 39 Hun (N. Y.) 533.

1. An assessment conclusive on the city, but not on the lot owner, may be proved, on appeal, to be beyond his proportion. The burden of proof is on him. *Dickson v. Racine*, 65 Wis. 306. So, the burden of proving an assessment to be arbitrary is on the party complaining. *Wright v. Forrestal*, 65 Wis. 341.

2. In a suit to recover a street assessment, if the defendant denies ownership of the property assessed, the plaintiff must prove his ownership or be non-suited. *Harney v. McLeran*, 66 Cal. 34.

3. A suit for foreclosing a street assessment, brought in the name of a city when the statute requires that it should be in that of the people of the State, cannot result in a valid judgment for the plaintiff, though it be rendered in favor of the people of the State as well as of the city. *Sullivan v. Meir*, 67 Cal. 264.

Sidewalk.—If a city charter authorizes the compulsion of abutters to grade their land and construct sidewalks as the council may require, when land is taken for a street and the damages are assessed, the expense of grading for the sidewalk and making the sidewalk cannot be included in the damages. *Lewis v. New Britain*, 52 Ct. 568.

An additional width to a sidewalk is

a "repavement" within the meaning of the term as used in the laws relating to sidewalks in New York city. *Re Smith*, 99 N. Y. 424.

4. **Crosswalk—Bridge.**—The cost of crosswalks, curbing, etc., were charged in a tax bill for street reconstruction, though the ordinance made no provision for them; and this was *held* allowable. *Gibson v. Kayser*, 16 Mo. App. 404.

The cost of a bridge, consequent upon the opening of a new street, may be assessed on the land. *Dickson v. Racine*, 65 Wis. 306.

5. **Land Not in Lots.**—It is *held* fair to assess land which is benefited by a street in front of it, at the rate and depth of contiguous lots, though the land has never been divided into lots. *Parmelee v. Youngstown*, 43 Ohio St. 162.

6. **Appraisal.**—A borough possessing the power of condemning property for water works, appraised it for the purpose, but afterwards abandoned the design. The owner could not recover the appraised value nor expenses incurred by the appraisal. *Stevens v. Danbury*, 53 Ct. 9.

Where, under a statute, expenditures beyond five hundred dollars require a vote of the taxable inhabitants, it was *held* that damages awarded for taking land for a highway do not require such vote. *N. Y. Laws* 1870, ch. 291, tit. 4; 1884, ch. 34. Exception under tit. 7. *Allen v. Northville*, 39 Hun (N. Y.) 240.

Removal of Earth, etc.—While a city may take dirt from one of its streets to fill or repair another, it cannot do so to the injury of private property fronting the street from which the earth is taken, and then tax that property for consequential expenses.¹

It has no right to gather dirt, stones, gravel or anything from a private lot and carry it away as material for the construction of an improvement. This would be a wrong done to the proprietor for reparation of which he could resort to his legal remedy against the city.²

(3) *Proceedings in Rem.*—The action to condemn property of non-residents to pay assessments for drainage is *in rem* under the Indiana statute of March 13, 1879, so that publication notice is sufficient.³ So, also, under the Pennsylvania act of 1871.⁴

The report and assessment of benefits made by the commissioners of drainage and the entry made by the plaintiff as drainage commissioner were held admissible to prove the amount due.⁵

(4) *Liability for Changing Street Grades.*—In the absence of statutory provision, it seems that a city is not liable for damages for changing the grade of streets. Such liability may be created by statute.⁶ The confirmation by a city council of a report awarding damages gives the party aggrieved a personal claim.⁷

Change of grade may render the city liable in damages to the party injured, if recognized by the city officers and the public, though not authorized or sanctioned by an ordinance. *Chattanooga v. Geiler*, 13 Lea (Tenn.) 611.

An action will lie against a city for injury caused by deferring the opening of a street when it has become the duty of the corporation to proceed with the work. And if the property holders have remonstrated against the delay, there can be no presumption that they have consented to it. *Mayor etc. of Baltimore v. Black*, 56 Md. 333.

1. *Armstrong v. City of St. Paul*, 30 Minn. 299.

2. *Gravel, etc., Taken for Streets.*—A city, or city contractor, in making street improvements, cannot take earth, gravel, stones, etc., from land belonging to others, and would be liable to an action for so doing in New York. *Robert v. Sadler* (N. Y.), 10 S. E. 428.

On this subject: *Higgins v. Reynolds*, 31 N. Y. 156; *Niagara Falls Sus. Bridge Co. v. Bachman*, 4 Lans. (N. Y.) 423; *Fisher v. City of Rochester*, 6 Lans. (N. Y.) 225; *Williams v. Kenney*, 14 Barb. (N. Y.) 631; *Denniston v. Clark*, 125 Mass. 216; *City of New Haven v. Sargent*, 38 Ct. 50; *Bissell v. Collins*, 28 Mich. 277; *Jackson v. Hathaway*, 15 Johns. (N. Y.) 452; *Pumpelly v. Green Bay Co.*, 13 Wall. (U. S.) 181.

But a city may take dirt, stones, etc., from one street to fill or repair another. *Huston v. City of Fort Atkinson*, 56 Wis. 350.

3. *Otis v. De Boer* (Ind.), 19 N. E. 317.

4. *Wolf v. Philadelphia*, 105 Pa. St. 25; *White v. Ballantine*, 96 Pa. St. 186.

5. *McKinney v. State* (Ind.), 19 N. E. 613.

6. *Damages for Grading Streets.*—The general rule is that public corporations cannot be sued for raising or grading streets, but under a statute of New Jersey an action will lie when there is no charter provision for assessing damages caused by it. *Vorrath v. Mayor etc. of Hoboken* (N. J.), 8 A. 125.

The general rule: *Freeholders of Sussex v. Strader*, 18 N. J. L. 108; *Pray v. Jersey City*, 32 N. J. L. 394; *Town of Union v. Durkes*, 38 N. J. L. 21; *Marvin Safe Co. v. Ward*, 46 N. J. L. 19; *Condict v. Jersey City*, 46 N. J. L. 157; *Little v. Dusenberry*, 46 N. J. L. 636; *Wild v. Paterson*, 47 N. J. L. 406; s. c., 1 A. 490. See *Reock v. Mayor etc. of Newark*, 33 N. J. L. 129; *Town of Lambertville v. Clevinger*, 30 N. J. L. 53. Damages not sustained till the street is opened. *Borough of Easton v. Rinek* (Pa.), 9 A. 63.

7. When the commissioners' report awarding damages to a property holder,

The injury done to a property owner by reason of a street improvement (like that done him by taking his land for street purposes) must be assessed according to the loss sustained by him at the time it occurred.¹ The action for such damages lies at law.² They need not be paid till the sum due the city on assessment of benefits has been collected, if they arise under the drainage acts of New York.³ Whether damage caused by street grading is due before the work has been done, is subject to different rules in different States.⁴

caused by the grading of a street, has been confirmed by the city council, the owner's claim is complete and personal. *Conklin v. City of Keokuk*, 73 Iowa 343; s. c., 35 N. W. 444; *Hempstead v. City of Des Moines*, 63 Iowa 36, distinguished.

1. "While the petitioner was entitled to 'all the damages done to' him, 'whether by taking his property or injuring it in any manner' (a street having been laid out over his premises), yet the value of the land taken and the damages to the remaining estate were to be assessed according to the injury done at the time of the taking." *Cushing v. Boston*, 144 Mass. 317; s. c., 11 N. E. 93; *Parks v. Boston*, 15 Pick. (Mass.) 198; *Dickenson v. Fitchburg*, 13 Gray (Mass.) 546; *Fairbanks v. Fitchburg*, 110 Mass. 224.

Remedy for damages in grading: *Sullivan v. City of Fall River* (Mass.), 12 N. E. 553.

2. If a town changes the street grade without assessment of damages to adjoining property, action at law lies against it to recover the damages. Ia. Code, § 469. *Noyes v. Mason City*, 53 Ia. 418.

3. Damages due to property holders need not be paid prior to the collection of the assessment for benefits in order to render drainage improvements valid under the New York drainage acts. *Matter of Swan*, 35 Hun (N. Y.) 625.

Where one claims share in the benefit wholly claimed to another, he may file his claim with the department of finance, etc., of the city of New York, and be made a party defendant. *Barnes v. Mayor*, 27 Hun (N. Y.) 241. See *De Peyster v. Mall*, 27 Hun (N. Y.) 439.

4. Damages for change of an established street grade should be awarded before the change, as required by statute. *City of Lafayette v. Wortman*, 107 Ind. 404.

Change of grade by cutting and

filling give rise to damages, not when the work is ordered but when it has been done, in Wisconsin under the charter of Milwaukee. *Tyson v. Milwaukee*, 50 Wis. 78; *Goodrich v. Milwaukee*, 24 Wis. 439. See *Church v. Milwaukee*, 31 Wis. 512; *Stowell v. Milwaukee*, 31 Wis. 523.

It was held that in an action to enjoin a tax collector from collecting assessments for a city improvement, the city was not a necessary party, since its charter shielded it from liability for damages. *Cohn v. Parcels*, 72 Cal. 367; s. c., 14 P. 26. Compare *Gilmore v. Fox*, 10 Kan. 509.

A property holder cannot oppose the confirmation of an assessment for street improvement on the ground that the village did not own the soil that was to be graded and paved. *Holmes v. Village of Hyde Park*, 121 Ill. 128.

A town bought land for sewerage purposes, and its title was held to be in fee simple, not a mere easement. *Page v. O'Toole*, 144 Mass. 303; s. c., 10 N. E. 851.

Land was taken to widen a street. The benefit may be set off against the damages. The fact that lands on the other side of the street were equally benefited, yet not taken, does not prevent the complainant's benefit from being special. *Abbott v. Cottage City*, 143 Mass. 521; s. c., 10 N. E. 325.

One cannot complain that the description of his lot to be assessed did not cover the whole of it. Ill. Cent. R.Co. *v. City of Decatur* (Ill.), 18 N. E. 315.

Interest.—Interest on a reduced assessment can be charged only from the date of the order directing the reduction. "It would seem to be only equitable to charge interest from the time when the assessment shall be definitely ascertained in its amount. This, as a general rule, was considered to be a fair and proper exposition of the law in the case of *The People v. New York*, 5 Cow. (N. Y.) 331, 334." In the *Matter*

That an ordinance was not passed by the required two-thirds vote of the city council was held one good ground of action (among others) against the city for damages in grading.¹

(5) *Estimation of Damages*.—When land is to be condemned for street extension or opening, it is usual to submit the matter to a jury to estimate the damages. Disinterested persons should be chosen exclusively and they are subject to the right of challenge. The qualifications of the jurors, their powers and the manner of selecting them are prescribed by statute. Whether any property is to be condemned for the purpose; that is, whether the opening or widening of the street is necessary or desirable as a public convenience, is the first question for the jury to settle. The condemnation proceedings should be preceded by notice and followed by the right of appeal.²

Even after an appeal and a verdict on it, a city may abandon the enterprise of opening and widening a street, pay the costs incurred and restore the land taken to the owners, under statutory authorization.³

of Miller, 24 Hun (N. Y.) 637; In the Matter of St. Joseph's Asylum, 69 N. Y. 353, 357.

An assessment will be set aside in New York because excessive interest is included, however small the amount. Matter of Willis, 30 Hun (N. Y.) 13.

Held, that one is not "entitled to a reduction of interest in excess of the interest due upon the sum, by the amount of which his assessment had been reduced." Mayer v. Mayor etc. of N. Y., 28 Hun (N. Y.) 587.

Under the constitution and laws of Pennsylvania, a property owner, injured by the change of grade of a street from the natural grade, may recover damage from the borough. He may recover with the same effect as though the change had been made from a grade previously established by the authorities. The borough of Norristown was *held* within this rule, though not directly invested with the right to take private property for public use. Hendricks Appeal, 103 Pa. St. 358.

A street grade having been permanently fixed, but not recorded (the law requiring it to be), it was *held* that an abutting land owner could not maintain an action for damages, nor enjoin for changing. Moore v. Atlantic, 70 Ga. 611.

Under Iowa Code, section 460, providing for a recovery of damages upon the altering of the 'established' grade of a street by a city, it was *held* that the establishment must be by ordinance or

proper legislative action, and not simply by improvements of the street. Keple v. Keokuk, 61 Iowa 653.

1. Trustees of P. E. Church v. City of Anamosa (Iowa), 41 N. W. 313.

For rulings as to damages caused by grading streets, and construction of various statutes and ordinances on this subject, see Moore v. Albany, 98 N. Y. 396; Heiser v. Mayor etc. of New York, 104 N. Y. 68; Petition of Cruger, 84 N. Y. 619; Hatch v. New York, 82 N. Y. 436; Healey v. City of New Haven, 47 Ct. 305; Anness v. City of Providence, 13 R. I. 17; Aurora v. Fox, 78 Ind. 1; City of Wabash v. Alber, 88 Ind. 428; Brighton v. Piereson, 107 Pa. St. 280; Borough of Brighton v. United Presbyterian Church, 96 Pa. St. 331; City of Philadelphia v. Wright, 100 Pa. St. 235; Harmon v. City of Omaha, 17 Neb. 548; s. c., 52 Am. Rep. 420; Phillips v. Council Bluffs, 63 Iowa 576; Kelly v. Mayor etc. of Baltimore, 65 Md. 171; Kehrer v. Richmond City, 81 Va. 745; City Council of Montgomery v. Townsend, 80 Ala. 489; French v. City of Milwaukee, 49 Wis. 584; Stickford v. St. Louis, 75 Mo. 309; Methodist Church v. City of Wyandotte, 31 Kan. 721; Hutchinson v. City of Parkersburg, 25 W. Va. 226; Henderson v. City of Minneapolis, 32 Minn. 319; City of Denver v. Vernia, 8 Colo. 399.

2. Kundinger v. City of Saginaw, 59 Mich. 355.

3. Brokaw v. Terre Haute, 97 Ind. 451.

When the right of appeal within a given time is not asserted, errors by the jury, such as a failure to apportion the damages in the proper and legal way, may be considered as waived. Rightly, such damages should be apportioned between property holders of different classes, such as owners, lessees and mortgagees in possession, that each may take his certificate for the sum due him.¹

(6) *Suits by Owners*.—That less than the statutory majority signed a petition may be made ground for ejecting a purchaser who bought at an assessment foreclosure. The fact that the county court had acted upon the petition and ordered the improvement was disregarded.²

What a city may have saved from the expense of an improvement as estimated, imposed and collected, may be recovered by a payer in proportion to the payment made by him.³ And for altering grades, and for so constructing public works as to render them deleterious, a city is liable to any one injured.⁴ Not however for consequential injury caused by lawfully changing a grade, it has been held in Minnesota.⁵

1. *Rentz v. City of Detroit*, 48 Mich. 544.

Jurors.—Authorization to open streets is valid in a city charter, although it restrict jurors to persons disinterested in the opening. Interested jurors could be challenged for cause. A provision authorizing the jury to condemn the lands of different persons was held allowable. But the charter was condemned as "fatally defective" for lack of the requirement of the personal service of notice upon resident owners. *Kundinger v. Saginaw*, 59 Mich. 355.

Juries Award.—Where the highway department has widened a street, paved it and torn down the improvements, "the damages should not be referred to another jury" incapable of determining the former condition and value of the premises eradicated by viewing them in their altered state. *Re Market Street*, 11 Phila. (Pa.) 409.

Costs do not follow a verdict in favor of a land owner for damages, from the changing of the grade of a highway, assessed by a jury under Mass. St. 1873, ch. 261. *Gifford v. Dartmouth*, 129 Mass. 135.

Court's Discretion.—A street will not be widened at the instance of a few petitioners, under an order of the court of quarter sessions, when, in the judgment of the court, the improvement is not demanded by the public interest. *Re Chestnut Street*, 11 Phila. (Pa.) 411.

2. **Actions by Owners—Assessments**.

When a petition of a majority of owners of front lots is required in order to make an improvement, under statute, it is held that an owner whose land is sold for failure to pay his assessment, bringing an action of ejectment to regain the property, may show that the petition was not signed by the required majority, notwithstanding the order of the county court for the improvement, based on the petition. *Zeigler v. Hopkins*, 117 U. S. 683.

3. A street having been opened at the expense of the city and of the benefited property owners, and the city having succeeded in reducing the expenses of the improvement, an owner could maintain a suit in equity to have the benefit of his proportion of the expenses saved by the city's action. *Mayer v. New York*, 101 N. Y. 284.

4. An injured lot owner was held entitled to damages for the altering of an established grade, when a bridge was constructed twenty feet above it which closed the street to travel except across the bridge, though the street itself had been previously open to travel in a width of thirty-six feet. *Wilkin v. St. Paul*, 33 Minn. 181.

5. **Consequential Damages**.—No action lies against a city for consequential injury to property adjacent to a street caused by a lawful change of grade. Though the property had been improved with reference to the existing

Owners of land assessed for improvements, who have neglected the opportunity of doing the proposed work themselves, cannot complain that contractors are behind time in finishing it.¹

Prior to payment, the person erroneously assessed has his remedy. He may enjoin the collection, on proper allegations. Whether the vote was properly taken on the passage of the ordinance ordering the assessment, whether the description of the contemplated improvement was erroneous, or the estimate of the cost, are questions that may not be entertained on the trial of the injunction, but such vital ones as involve the authority of the city to lay the tax or assessment go to the heart of the issue.²

When an injured party has the right to this or other legal remedy, and exercises it in time, he is awarded the further right of appeal when he deems himself aggrieved by the judgment, if the amount involved, etc., bring him within the rule of appeals in general.³

(7) *Recovery of Payments in Error*.—It was denied that a litigant, who had payed an assessment for a betterment two years before, could recover the sum thus paid on discovering and pleading that the ordinance ordering the work had not been submitted to the mayor for his approval so far as the record of the laying out of the street or roadway disclosed.⁴

The *onus* is on the party who assails an assessment as arbitrary and disproportionate to benefits.⁵ And, in the absence of allegations to that effect, he cannot have an assessment set aside as void on the ground that it is disproportionate or that the city assessors did not expressly claim that it was proportionate to the benefits, in their report.⁶

A contractor seeking to enforce an assessment upon a town lot by suit against its owner, should allege the extent and cost of the improvement. Attached exhibits will not eke out the complaint if it is deficient on demurrer.⁷ He should plead the contract under which he did the work and set it forth if it is in writing.⁸

grade, and though the change cuts off access to the property from the street, no consequential damages can be recovered, under the above rule; and there is nothing in the charter of Minneapolis to change the rule. *Henderson v. Minneapolis*, 32 Minn. 319.

1. If the law makes it the duty of abutting lot owners to improve a street when ordered to do so by the city, and authorizes the city to contract for the work when such order is not obeyed, and such order is issued, and, on non-compliance, the work is done on contract, the abutters cannot defend against an action to collect the cost of the work of them, on the plea that the contractor failed to finish the work on contract time, unless they show that

they were injured by the delay. *Fass v. Seehawer*, 60 Wis. 525.

Before enjoining a betterment assessment for want of notice, the abutting owner who has not objected to the improvement while it was in progress must pay for the benefit he has received. *Barker v. Omaha*, 16 Neb. 269.

2. *Balfe v. Lammers*, 109 Ind. 347.

3. *County Commissioners of Hampshire, Petitioners*, 143 Mass. 424.

4. *Taber v. City of New Bedford*, 135 Mass. 162.

5. *Wright v. Forrestal*, 65 Wis. 341; *Dickson v. Racine*, 65 Wis. 306.

6. *Re Roberts*, 81 N. Y. 62.

7. *Mendenhall v. Clugish*, 84 Ind. 94.

8. *Budd v. Kraus*, 79 Ind. 137.

Such statutory requirements as form the basis of jurisdiction, such as notice for a designated time, must be alleged to have been observed in a suit to recover an assessment for draining swamp land in California.¹

A summary proceeding for the collection of assessments cannot be sustained where all the statutory requirements are not strictly observed; and all the particulars of an ordinance passed pursuant to such statute must be followed.²

The voluntary payment of an assessment, by which is meant a payment without duress of person or distraint of goods, was held in New York to be not recoverable.³ As such assessments are exactions and the payments forced contributions rather than donations, and are thus nominally distinguished from taxes, it seems unjust to deny a citizen the right to take back what he paid under a mistaken sense of duty.

Acquiescence in an assessment is waiver of notice.⁴

IMPROVIDENCE.—Want of care or foresight in the management of property.⁵

1. *People v. Haggin*, 57 Cal. 579.

2. *State v. Taylor*, 59 Md. 338.

Overcharging an assessment is fatal to an action to enforce the assessment lien, when pleaded in defense to the action, though no appeal to the supervisors had been made. *Donnelly v. Howard*, 60 Cal. 291. Merely technical pleas in defense will not avail after neglect to appeal to the supervisors. *Dyer v. Parrott*, 60 Cal. 551.

3. *Phelps v. City of New York* (N. Y.), 19 N. E. 408.

4. *State v. District Court* (Minn.), 41 N. W. 235.

If an assessment is *prima facie* legal, though really otherwise in some respects, one who has paid his quota without knowledge of the defects is entitled to sue in equity to recover that portion of his payment which was illegally exacted. *Strusburgh v. Mayor etc. of New York*, 87 N. Y. 452.

The burden of proof, as to matters *dehors* the record, would be upon him. As a general rule, the burden is always on the petitioner seeking to vacate an assessment—the presumption is that the assessment and record are valid and true. *Petition of Brady*, 85 N. Y. 268; *State v. Mayor etc. of Jersey City*, 44 N. J. L. 136.

The burden is on the city, however, to show by its council proceedings that the assessment which it is attempting to collect was duly laid and was approved by the council. *Lufkin v. City of Galveston*, 56 Tex. 522. See *Petition of Gantz*, 85 N. Y. 536.

Authorities for Improvements.—Angell & Durfee on Highways, 2nd ed.; Cooley on Taxation, 2nd ed.; Ewell on Fixtures; Taylor's Landlord and Tenant, 7th ed.; Wood's Landlord and Tenant; Washburn's Real Property, 4th ed.

5. In an act providing that letters of administration shall not be granted to, *inter alios*, anyone who shall be adjudged incompetent by the surrogate to execute the duties of such trust by reason of improvidence, this word means "that want of care or foresight in the management of property which would be likely to render the estate and effects of the intestate unsafe and liable to be lost or diminished in value by improvidence, in case administration thereof should be committed to such improvident person." "The fact that a man is dishonest and seeks to obtain the possession of the property of others by theft, robbery or fraud is not evidence either of his providence or of his improvidence." The record of a recovery in an action of *crim. con.* against the applicant for letters is inadmissible as evidence of improvidence, but his examination upon an application for the benefit of the insolvent laws is admissible. *Coope v. Lowene*, 1 Barb. Ch. (N. Y.) 45. That a man is a professional gambler furnishes a presumption of his improvidence. *McMahon v. Harrison*, 6 N. Y. 443.

In an act authorizing the superseding of an executor upon the ground of improvidence, mismanagement or miscon-

IMPUNITY—IMPUNITIVE.¹**IMPUTED NEGLIGENCE.**—See { CONTRIBUTORY }
{ NEGLIGENCE; } NEGLIGENCE.**IN.**—Inside of;² within;³ upon;⁴ at;⁵ of.⁶ For its use adjunctively, in connection with other words, see note 7.

conduct in his trust is not improvidence, nor is illiteracy, nor the fact that he is of small pecuniary means. Improvidence "evidently refers to habits of mind and conduct which become a part of the man and render him generally and under all ordinary circumstances unfit for the trust or employment in question." *Emerson v. Bowers*, 16 N. Y. 449, reversing s. c., 14 Barb. N. Y. 658.

1. A new trial should have been granted in this case. The verdict of the jury was unintelligible. Our English word impunity, which applies to something which may be done without penalty or punishment, comes from the Latin word *impunitus*, which is a derivative from the word *pæna* with the prefix *in*, and means without punishment or penalty. We have no such word in our language as "impunitive"; it cannot then be a proper finding for the jury to say, "We, the jury, find for the plaintiff one hundred dollars impunitive damages." *Dillon v. Rogers*, 36 Tex. 152.

2. A policy of fire insurance to a railway company on two cars "contained in car house No. 1," and on an engine "contained in engine house No. 2," covers them only when actually inside the houses specified; and the insurer is not liable for a loss occurring to the engine and cars while outside making a regular trip. *A. & E. R. Co. v. Balto. F. I. Co.*, 32 Md. 37; s. c., 3 Am. Rep. 112. But see some cases *contra*, under title FIRE INSURANCE, vol. 7, pp. 1005-1006. Where an act makes it penal to erect to any building an addition having *in* it a chimney or fire place, an addition warmed from a chimney or fire place, built solely in the old part of the building, but for the exclusive accommodation of the new part, is not within the inhibition. *Daggett v. State*, 4 Conn. 60.

3. A mortgage payable in five years is payable at any time within five years. *Horstman v. Gerker*, 49 Pa. St. 283; *contra*, *In re* Petition of Hoffmann, 14 W. N. C. (Pa.) 563. A bond payable "in 25 years after date" is payable at the expiration of that period, and cannot be paid before. "It is contended the word 'in' is used in the sense of

'within,' or 'at any time during,' etc. While it may be sometimes employed in that sense, we do not think it was so intended in the bonds under consideration; but if there should be any uncertainty as to the sense in which it was used, the doubt should be resolved in favor of the obligee." *Allentown Sch'l Dist. v. Derr*, 115 Pa. St. 439; s. c., 6 Cent. Rep. 887; 9 Atl. Rep. 55; 17 Pitts. L. J. 489.

4. *In* any street, means *upon* any street. *C. & W. I. R. Co. v. Dunbar*, 100 Ill. 137. See *infra*: but standing erect *upon* the pillory is not being set *in* it. *Rex v. Beardmore*, 2 Burr. 795.

5. It is immaterial whether *in* or *at* is used in the allegation of place in an indictment. *Bishop's Div. and Forms*, 80; 1 *Bishop's C. P.* 378; *Augustine v. State*, 20 Tex. 450. But where a statute required notice of the sales to be posted "in at least four public places" in the county, an affidavit that notice had been posted "at," etc., was insufficient to show a compliance with the requirement. *Hilges v. Quinney*, 51 Wis. 62.

6. The "waters, rivers, bays in the State of New Jersey," is equivalent to "the waters, etc., of the State of New Jersey." *Kean v. Rice*, 12 S. & R. (Pa.) 205.

7. In an indictment under an act punishing embezzlement by certain officers employed in the Bank of the United States, "being a bookkeeper in, etc.," is an insufficient description. *U. S. v. Forrest*, 3 Cr. C. C. 56.

An indictment charging that the defendant "feloniously took and carried away from" a dwelling house, does not charge larceny *in* a dwelling house, but being mere matter of description, it does not affect the sufficiency of the indictment. *Moore v. State*, 40 Ala. 49.

In and About.—(See BUSINESS). In a contract by a street railway company to pave the streets whereon its tracks were laid, "in and about the rails," and keep the same in repair, "in and about" the rails means at least within the two rails of each track, and some space outside of each rail. Beyond doubt it means so far outside as the street surface was dis-

turbed in the act of laying the track.' In the absence of evidence, a space one foot outside was *held* to be covered by this expression and the railway company liable for damages occurring by reason of a defect within that distance. *McMahon v. Second Ave. R. Co.*, 75 N. Y. 231.

Exploding torpedoes in a completed oil well, to quicken the flow, gives a lien under statute as labor "in and about the sinking, drilling or completing" an oil well. *Gallagher v. Karns*, 27 Hun (N. Y.) 375.

The statement that a bastard was born "in or about 1833" is not sufficient where it was material that the birth should have been before August 14, 1834. The use of "in or about" signifies that "about" does not mean "in" and may mean in 1832 or 1834. *Reg. v. Inhab. of St. Paul*, 7 Q. B. 232.

In Action.—See *CHOSE IN ACTION*.

In Addition.—(See *ADDITION*). Where a statute gives a civil remedy "in addition to" a criminal one, these words "do not carry with them any idea of sequence or order of time;" they are "synonymous with 'also,' 'moreover,' 'likewise.'" *Com. v. Avery*, 14 Bush (Ky.) 636.

"The words 'in addition' do not in themselves add anything to the effect of a simple bequest without these words. The legacies would be additional without them." And it is doubted whether the use of these superfluous words in a bequest requires less than its proper operation to be given to another bequest in the same will wherein they are not used. *Lee v. Pain*, 4 Hare 218.

In Arms.—We think that every artilleryman in charge of a gun, though carrying no arms upon his person, may properly be said to be in arms; that two persons, though having only one rifle between them, may, although one of them alone is carrying it, be said to be in arms; that an officer commanding a number of men who are armed, may, although he carry no arms himself, be considered to be in arms." *Reg. v. Slavin*, 17 U. C., C. P. 210.

In Bales.—See *BALE*.

In case (see *CASE*), in a bequest, implies a condition as explicitly as "if," "upon," and the like. *Robert's App.*, 59 Pa. 70; s. c., 98 A. D. 312.

In Cash.—See *CASH*.

In Charge (See *CHARGE*).—Horses driven before one who has no control

over them by bridle or the like, are not in the charge of anyone. *Cooley v. Grand Trunk Ry. Co. of Canada*, 18 U. C., Q. B. 96.

In the City.—Shares of stock owned by a resident are property in the city for purposes of taxation. *Ogden v. St. Joseph (Mo.)*, 3 S. W. Rep. 25.

In the Clear.—See *CLEAR*.

In Commission.—One provisionally appointed colonel by the war department, who does not pass the examining board and is not confirmed by the senate, is neither "in commission" nor "in service," though under such appointment he awaited the order of discharge for several weeks. *Greer v. United States*, 3 Ct. Cl. Rep. 182.

In Confidence.—See *TRUSTS, PRECATORY WORDS*.

Representative in Congress is synonymous with member of congress. *Butler v. Hopper*, 1 Wash. C. C. 501.

Deal in, etc.—See *DEAL*.

In Default of Issue.—See *DEFAULT; ISSUE*.

Defect in Highway.—See *DEFECT*.

Deficiency in Quantity.—See *DEFICIENCY*.

In Employ.—See *EMPLOY*.

In the field, in reference to the military service, means in the service for the purpose of carrying on war. *Sargent v. Ludlow*, 42 Conn. 726.

In the first place, in the next place, etc., in a will, mark only the order in which the items occurred to the testator, and not the order of the payment of legacies. They do not, in the absence of a contrary intent, create a preference. *Beeston v. Booth*, 4 Madd. 161; *Wells v. Borwick*, 17 Ch. D. 805; *Blower v. Morret*, 2 Ves. 420; *Perrin v. Perrin*, 1 Halst. (N. J.) 137; *Duncan v. Alt*, 3 P. & W. (Pa.) 386. Otherwise of "to be paid in the first place." *Duncan v. Alt*.

In Following Form.—The words "in following form" are used in the records, civil and criminal, and all writs of error, as representing the record of the court of original jurisdiction. They do not imply a copy or secondary evidence of the thing, but the body of the writing itself. *Gardner v. State*, 25 Md. 151.

In Fraud.—In an act punishing the removing of revenue stamps from tobacco, "in fraud of the revenue laws," means "in violation of;" etc. A quantity of tobacco. 5 Ben. (C. C.) 407.

In Full.—(See *FULL; PAYMENT; RECEIPT*).—The words "in full com-

pensation" have a clear, distinct and well understood signification, and cannot be overlooked or argued out of the statute. They "were introduced into these appropriation acts for the very purpose of reducing, for the respective years for which the appropriations were made, the compensation of those officers for whom the appropriations were less than the salaries established by previous laws." *Fisher v. United States*, 15 Ct. Cl. Rep. 323.

In Gross.—In bulk or by the quantity. As applied to a right, this phrase means that it is annexed to the person, and not appendant, appurtenant, or otherwise annexed to land. *Repalje & L. Law Dict.*; 2 Bl. Com. 34.

In the Name of.—A man invests in his own name when he invests openly for himself, though he only receives the investment by manual delivery. A written transfer is not necessary to such an investment. *Carpenter v. Carpenter*, 12 R. I. 548.

"'In the name of his master' (in an embezzlement act) is a very curious expression," and, "although inserted with a desire to obviate difficulties, seems to me likely hereafter to raise them." *BRAMWELL, B.*, in *Reg. v. Cullom, L. R.*, 2 C. C. R. 32.

In Office.—(See OFFICE).—*Rowland v. Mayor etc. of New York*, 83 N. Y. 372.

In Pais.—(See ESTOPPEL).—In the country, this phrase, as applied to a legal transaction, primarily means that it has taken place without legal proceedings. "*Matters in pais*" is used sometimes in distinction from "matters of record," sometimes from "matters in writing." *Repalje & L. Law Dict.*

Assurance by matter *in pais* is assurance transacted between two or more private persons *in pais* in the country; that is (according to the old common law), upon the very spot to be transferred. It includes all manner of alienation of real estate by deed or parol, except by matter of record, by special custom, and by devise. 2 Bl. Com. 294.

In Personam and In Rem.—(See ESTOPPEL; EVIDENCE; JUDGMENTS; RES ADJUDICATA).—These terms have been adopted from the terminology of the Roman law. There an *actio in personam* was an action against a particular person to enforce the plaintiff's right to an act or forbearance on the part of the defendant. An *actio in rem* was either an impersonal action

or an action against a thing. In the former sense, it is an action which is not based on a mere claim against the defendant personally; which does not raise the question of the existence of an *obligatio* between plaintiff and defendant, and therefore of a personal duty of action or forbearance on the defendant's part for the plaintiff's satisfaction. As meaning an action against a thing, it is an action wherein the plaintiff claimed some corporal thing as his own, or made a direct claim to one of those rights, other than *obligatio*, called *res incorporales*. 4 Law Q. Rev., 394 *et seq.* The English division of actions into real and personal is derived from this, but is based upon a different principle of classification, viz., the nature of the remedy sought. See ACTIONS.

The terms are used in something of their original meaning to describe rights, proceedings and judgments. As applied to rights, they signify the distinction between those which are available against particular persons and those which are available against the world at large. *Repalje & L. Law Dict.* And judicial proceedings are said to operate *in rem* or *impersonam*. Chancery acts only *in personam*, because its decrees operate by compelling defendants to do what they are ordered to do, and not by producing the effect directly. *Penn. v. Ld. Baltimore*, 3 Ldg. Cas. in Eq.; *Bispham's Eq.* 47. Judgments *in personam* are adjudications of individual rights pronounced against particular persons upon whom alone they are binding. Judgments *in rem* are adjudications pronounced upon the status of some particular subject matter by a tribunal having competent authority for the purpose. Notes to *Duchess of Kingston's Case*, 2 Sm. Ldg. Cas.; *Best's Evidence*, § 593. They decide and determine a status or make a final and conclusive transfer of property. *State v. R. R. Co.*, 10 Nev. 47. Among them are decrees in divorce, *Cheever v. Wilson*, 9 Wall. (U. S.); *Hood v. Hood*, 110 Mass. 463; Probate decrees, *Grignon v. Astor*, 2 How. (U. S.) 319; *Thompkins v. Thompkins*, 1 Story (C. C.) 547; Decrees in admiralty, *The Mary*, 9 Cr. (U. S.) 126; *Magoon v. New Eng. Ins. Co.*, 1 Story (C. C.) 157; *The Slavers*, 2 Wall. (U. S.) 383.

In Pursuance.—(See ACT).—"In pursuance and execution of," in an indictment for conspiracy under statute,

INABILITY—INADEQUATE CONSIDERATION.

INABILITY.—See note 1.

INADEQUATE CONSIDERATION.

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| I. Definition, 325. | IV. In Fraudulent Conveyances, 331. |
| II. As Affecting Validity of Contracts, 326. | V. In Suits for Specific Performance, 333. |
| III. As Evidence of Fraud, 327. | |

I. Definition.—The term “inadequate consideration” is used only where there is some consideration for the contract, and may be defined to mean such consideration as, without being illusory, is not deemed, by those having knowledge of the subject-matter of the contract, a fair value for the benefit obtained.² The present article does not profess to treat of the question of what consideration will support a contract, but is confined solely to those cases where contracts have been questioned by reason of discrepancy between the value of the obligation undertaken, or the benefit conferred, and the value of the benefit obtained.

means “to effect the object of.” *United States v. Nunnemacher*, 7 Biss. (C. C.) 129; *United States v. Boyden*, 1 Low. (C. C.) 266.

In Rem.—See **IN PERSONAM**.

In Service.—See **IN COMMISSION**.

In Session.—See **SESSION**. *People v. Faucher*, 50 N. Y. 288.

In the State.—A statute taxing the gross receipts of railroads “doing business in this State” includes a road only a small part of which is within the State. It is to that extent in the State. *Erie Ry. Co. v. Pennsylvania*, 21 Wall. (U. S.) 492.

In Store.—A written instrument acknowledging the receipt of a quantity of wheat “in store” imports a bailment and not a sale. *Goodyear v. Ogden*, 4 Hill (N. Y.) 104. But see *Isaac v. Andrews*, 28 U. C., C. P. 40.

In Any Street.—In a municipal charter which prohibited the granting of the privilege to lay tracks in any street to railway companies, except upon petition, “the words ‘in any street’ plainly mean the same thing as upon any street. . . . The word ‘across’ is not found in the phrase in question in addition to the word ‘in,’ and this is because the clause has no reasonable application to the mere crossing of a street. Obviously this clause has reference only to cases where the city may propose to grant the privilege to a railroad company to run along a street for a given distance.” *C. & W. I. R. Co. v. Dunbar*, 100 Ill. 137.

In Substance.—A statement of libelous language is not a literal copy, but

only is general import and effect. A description, in a declaration for libel, of language “in substance as follows,” etc., does not profess to set out the very words of the libel, and is bad on arrest of judgment. *Wright v. Clements*, 3 B. & Al. 503.

1. The Stat. 9 & 10 Vict., ch. 95, § 24, authorizes the judge of a county court, subject to the approval of the lord chancellor, to remove the clerk of the court “in case of inability or misbehaviour.” It was held that pecuniary embarrassment or insolvency does not in itself constitute “inability” within the meaning of the act. *Queen v. Owen*, 15 Q. B. 476.

A charter party of affreightment provided that in case of the “inability of the ship to execute or proceed on the service,” certain persons should be at liberty to make such abatement out of the freight as they should think reasonable. It was held that an inability of the ship to proceed to sea for want of men to navigate her, was within the proviso, even though such want of men arose from no fault or neglect of the shipowner, but from an act of God. *Beakon v. Schank*, 3 East 233.

A justice of the peace was authorized to take jurisdiction of an action only in case of the “absence, sickness or other inability” of a municipal judge. It was held that the fact that such judge declined to act in the cause did not give the justice jurisdiction. *Klaise v. State*, 27 Wis. 462.

2. “Inadequate price” is “a term applied to indicate the want of a sufficient

II. As Affecting Validity of Contract.—If the parties to a contract have dealt at arms' length, and the contract entered into is the result of a mutual agreement based upon the independent judgment of each, any valuable consideration—no matter how inadequate or disproportionate to the benefit obtained it may be—is sufficient, in the absence of fraud, to sustain the contract;¹ and

consideration for a thing sold, or such price as under ordinary circumstances would be considered insufficient." 1 Bouv. Law Dict., 15th ed. 783.

1. *Judge v. Wilkins*, 19 Ala. 765; *Juzan v. Toulmin*, 9 Ala. 662; *Hardy v. Heard*, 15 Ark. 184; *Sammis v. Matthews*, 19 Fla. 811; *Comstock v. Purple*, 49 Ill. 158; *McMullen v. Gable*, 47 Ill. 67; *Baker v. Roberts*, 14 Ind. 552; *Witherwax v. Riddle* (Ill.), 9 West Rep. 794; *Wolford v. Powers*, 85 Ind. 294; *Brown v. Budd*, 2 Ind. 442; *McCormick v. Malin*, 5 Blackf. (Ind.) 509; *Talbott v. Hooser*, 12 Bush (Ky.) 408; *Nash v. Lull*, 102 Mass. 60; *Newhall v. Paige*, 76 Mass. (10 Gray) 366; *Haines v. Haines*, 6 Md. 435; *Stewart v. State*, 2 Har. & G. (Md.) 114; *Williams v. Jensen*, 75 Mo. 681; *Morriso v. Philliber*, 30 Mo. 135; *Shields v. Hickey*, 26 Mo. App. 194; *Earl v. Peck*, 64 N. Y. 596; *Worth v. Case*, 42 N. Y. 362; *Parmelee v. Cameron*, 41 N. Y. 392; *Dunn v. Chambers*, 4 Barb. (N. Y.) 376; *Knobb v. Lindsay*, 5 Ohio 471; *Graham v. Pancoast*, 30 Pa. St. 97; *Davidson v. Little*, 22 Pa. St. 245; *Hind v. Holdship*, 2 Watts (Pa.) 104; *Whitefield v. McLeod*, 2 Bay (S. Car.) 380; *Goree v. Wilson*, 1 Bailey (S. Car.) 597; *Coffee v. Ruffin*, 1 Coldw. (Tenn.) 487; *Merriman v. Lacefield*, 4 Heisk. (Tenn.) 209; *White v. Flora*, 2 Tenn. 426; *Moore v. Lowery*, 27 Tex. 541; *Tebbs v. Lee*, 76 Va. 744; *Mayo v. Carrington*, 19 Gratt. (Va.) 74; *Bryant v. Pember*, 45 Vt. 487; *Kidder v. Chamberlin*, 4 Vt. 62; *Howard v. Edgell*, 17 Vt. 9; *Harrington v. Wells*, 12 Vt. 505; *Wood v. Boynton*, 64 Wis. 265; s. c., 54 Am. Rep. 610; *Keulkamp v. Hidding*, 31 Wis. 503; *Lawrence v. McCalmont*, 43 U. S. (2 How.) 426; *Follett v. Rose*, 3 McLean, C. C. 332; *Wann v. Coe*, 31 Fed. Rep. 369; *Waterman v. Waterman*, 27 Fed. Rep. 827; *Cockell v. Taylor*, 15 Beav. 103; *Griffith v. Spratley*, 1 Cox 383; *Fox v. Mackreth*, 2 Dick. 689; *Borell v. Dann*, 2 Hare 440; *Peacock v. Evans*, 16 Ves. 512; *Gibson v. Jeyes*, 6 Ves. 266.

No Standard by Which Value Tested.—In *Earl v. Peck*, 64 N. Y. 596, the

court say: "There is no standard whereby courts can limit the measure of value in such a case, and an obligation is not wanting, even partially, in consideration because its value is less than the obligation. A note for a thousand dollars, given for a horse confessedly worth but one hundred, cannot be successfully defended, in whole or in part, on the ground of a want or failure of consideration."

Mutual Ignorance of Value.—In the case of sales, when the value of the thing sold is open to the inspection of both parties, but neither knows its intrinsic value, and both suppose that the price paid is adequate, no fraud can be predicated upon such sale, even though after investigation shows that the intrinsic value of the thing sold was immensely greater than the price paid. Accordingly it was *held* that where a person agreed to sell a small stone for \$1, neither the seller nor the purchaser having any idea of its true nature and value, and such stone afterwards proved to be an uncut diamond of the value of \$700, the inadequacy, though arising from mutual ignorance of value, could be no ground for an action to recover the value of the stone. *Wood v. Boynton*, 64 Wis. 265; s. c., 54 Am. Dec. 610.

Value of Property Sold.—In sales, the value of the property sold, as compared with the price paid, is no ground for rescission in the absence of fraud or warranty. *Bryant v. Clark*, 45 Vt. 487; *Wood v. Boynton*, 64 Wis. 265; *Kuelkamp v. Hidding*, 31 Wis. 503, 511. See also *Wheat v. Cross*, 31 Md. 99; *Lambert v. Heath*, 15 Mees. & W. 487.

Court Will Not Weigh Consideration.—"The law does not undertake to determine the adequacy of a consideration. That is left to the parties, who are the sole judges of the benefits or advantages to be derived from their contracts. It is sufficient if the consideration be of some value, though slight, or of a nature which may enure to the benefit of the party making the promise. *Haigh v. Brooks*, 10 Ad. & El. 320, and 2 P. & Dav. 484; *Lawrence v.*

even a court of equity will refuse relief.¹

III. As Evidence of Fraud.—Although not of itself sufficient to invalidate a contract, any gross inadequacy in the consideration may always be shown as tending to prove fraud.² And if the inadequacy be coupled with other circumstances, such as weakness of the mind, a confidential or fiduciary relation or pecuniary distress, such a command over the mind of one party by the other may, in many cases, be inferred as will amount to fraud which will justify the setting aside of the contract,³ and it would appear:

McCalmont, 2 How. (U. S.) 452; Hubbard v. Coolidge, 42 Mass. (1 Met.) 92. Where such a consideration exists, a contract cannot be said to be *nudum pactum*." Newhall v. Paige, 76 Mass. (10 Gray) 366.

Obligations for Stated Sums.—In Schnell v. Nell, 17 Ind. 29, it was held that the doctrine that inadequacy of consideration will not vitiate an agreement, does not apply to a mere exchange of sums of money whose value is exactly fixed, but to the exchange of something in itself of indeterminate value for money, or perhaps for some other thing of indeterminate value. Accordingly, a consideration of one cent will not support a promise to pay \$100.

1. Weld v. Rees, 48 Ill. 428; Shepherd v. Bevin, 9 Gill (Md.) 32; Delafield v. Anderson, 15 Miss. (7 Sm. & M.) 630; Barnett v. Spratt, 4 Ired. (N. Car.) Eq. 171; Green v. Thompson, 2 Ired. (N. Car.) Eq. 365; Bedel v. Loomis, 11 N. H. 9; Shaddle v. Disborough, 30 N. J. Eq. 370; Ready v. Noakes, 29 N. J. Eq. 497; Weber v. Weitling, 18 N. J. Eq. 441; Wintermute v. Snyder, 3 N. J. Eq. (2 Gr. Ch.) 489; Worth v. Case, 42 N. Y. 362; Seymour v. Delancy, 3 Cow. (N. Y.) 445; Osgood v. Franklin, 2 Johns. Ch. (N. Y.) 1; Steele v. Worthington, 2 Ohio 182; Scovill v. Barney, 4 Or. 288; Cumming's Appeal, 67 Pa. St. 404; Harris v. Tyson, 24 Pa. St. 347; Davidson v. Little, 22 Pa. St. 245; Butler v. Haskell, 4 Dessaus. (S. Car.) 651; Birdsong v. Birdsong, 2 Head (Tenn.) 289; Mayo v. Carrington, 19 Gratt. (Va.) 74; Cribbins v. Markwood, 13 Gratt. (Va.) 495; Slater v. Maxwell, 73 U. S. (6 Wall.) 268; Eyre v. Potter, 56 U. S. (15 How.) 42; Collier v. Brown, 1 Cox 428; Harrison v. Guest, 6 De G. M. & G. 424; 8 H. L. Cas. 481; Fox v. Mackreth, 2 Cox 322; 2 Dick. 689; Merediths v. Saunders, 2 Dow 514; Curson v. Belworthy, 3 H. L. Cas. 742; Wood v. Abrey, 3 Madd.

417; Copis v. Middleton, 2 Madd. 410; Murray v. Palmer, 2 Sch. & Lef. 474.

2. Mahon v. Reeves, 11 Ala. 345; Juzan v. Toulmin, 9 Ala. 662; Gainer v. Russ, 20 Fla. 157; Barrow v. Bailey, 5 Fla. 9; Hoyt v. Pawtucket Savings Institution, 110 Ill. 390; Bay v. Cook, 31 Ill. 336; Witherwax v. Riddle (Ill.), 9 W. Rep. 794; McCormick v. Malin, 5 Blackf. (Ind.) 509; Herron v. Herron, 71 Iowa 428; Boyd v. Ellis, 11 Iowa 97; Talbott v. Hooser, 12 Bush (Ky.) 408; Havlin v. Reed (Ky.), 5 S. W. Rep. 554; Case v. Case, 26 Mich. 484; Simonton v. Bacon, 49 Miss. 582; Chouteau v. Nuckolls, 20 Mo. 442; Caloway v. Witherspoon, 5 Ired. (N. Car.) Eq. 128; Barnett v. Spratt, 4 Ired. (N. Car.) Eq. 171; Whelan v. Whelan, 3 Cow. (N. Y.) 537; Harris v. Tyson, 24 Pa. St. 347; Davidson v. Little, 22 Pa. St. 245; Hamet v. Dundass, 4 Pa. St. 178; Butler v. Haskell, 4 Dessaus. (S. Car.) 651; Coffee v. Ruffin, 4 Coldw. (Tenn.) 487; Birdsong v. Birdsong, 2 Head (Tenn.) 289; Bryant v. Kelton, 1 Tex. 415; Sutherland v. March, 75 Va. 223; George v. Richardson, Gilm. (Va.) 230; McKinney v. Pinckard, 2 Leigh (Va.) 149; Kidder v. Chamberlin, 41 Vt. 62; Kulkamp v. Hidding, 31 Wis. 503; Jenkins v. Einstein, 3 Bliss, C. C. 128; Warner v. Daniels, 1 Wood. & M. C. C. 90; Cockell v. Taylor, 15 Beav. 103; Heathcote v. Paignon, 2 Bro. Ch. 167; Gartside v. Isherwood, 1 Bro. Ch. 558; Wood v. Abrey, 3 Madd. 417; Murray v. Palmer, 2 Sch. & Lef. 474; Peacock v. Evans, 16 Ves. 512; Morse v. Royal, 12 Ves. 355.

Inadequacy at the time of a sale must exist to warrant the refusal of specific performance. The court will not consider any supervening inadequacy. Hall v. Wilkinson, 21 Gratt. (Va.) 75; Boosen v. Scheffer, 21 Gratt. (Va.) 474.

3. Kelly v. McGuire, 15 Ark. 555; Sammis v. Mathews, 19 Fla. 811; White-

that any unfairness in a transaction obtained over one who is of a feeble mind by a person in whom he trusted, will raise a pre-

v. White, 89 Ill. 460; *McCormick v. Malin*, 5 Blackf. (Ind.) 509; *Willcox v. Jackson*, 51 Iowa 208; *Butler v. Duncan*, 47 Mich. 94; s. c., 41 Am. Rep. 711; *Simonton v. Bacon*, 49 Miss. 582; *Mitchell v. Jones*, 50 Mo. 438; *Callo-way v. Witherspoon*, 5 Ired. (N. Car.) Eq. 128; *Barnett v. Spratt*, 4 Ired. (N. Car.) Eq. 171; *Gifford v. Thorn*, 9 N. J. Eq. (1 Stock.) 702; *Whelan v. Whelan*, 3 Cow. (N. Y.) 537; *Scovill v. Barney*, 4 Oreg. 288; *Brown v. Hall*, 14 R. I. 249; s. c., 51 Am. Rep. 273; *Butler v. Haskell*, 4 Dessaus. (S. Car.) 651; *Tally v. Smith*, 1 Coldw. (Tenn.) 290; *McKinney v. Pinckard*, 2 Leigh (Va.) 149; *Conaway v. Sweeney*, 19 W. Va. 643; *Howard v. Edgell*, 17 Vt. 9; *Cockell v. Taylor*, 15 Beav. 103; *Murray v. Palmer*, 2 Sch. & Lef. 474; *Gibson v. Jeyes*, 6 Ves. 266.

Inadequacy as Evidence of Fraud.—

In the case of *Heathcote v. Paignon*, 2 Bro. Ch. 167, 175, LORD ELDON said: "If the court should take such a ground as to rest the case upon the market price, every transaction of this kind would come into a court of equity. If mere inadequacy is the ground, it would seem that it is scarcely sufficient; but there is a difference between that and evidence arising from inadequacy. If there is such inadequacy as to show that the person did not understand the bargain he made, or was so oppressed that he was glad to make it, knowing its inadequacy, it will show a command over him which may amount to fraud. If the transaction be such as marks over-reaching on one side and imbecility on the other, it puts the parties in such a situation as to show that it could not have taken place without superior powers on the one side over the other."

Taking Advantage of Persons' Necessities.—

A bill which prays for relief on the ground that the defendant, who was agent of complainant's mortgagor, knew complainant's necessities and that he was greatly in need of money at the time, refused to pay the mortgage and forced complainant to accept a smaller sum, and to deliver up the mortgage to the defendant, does not state a ground for relief. A transfer of a security for less than its face value because made reluctantly and when one is greatly in need of money, is not a ground upon which a court of equity will decree payment

of the difference between the face value of the security and the sum received for it. *Sammis v. Matthews*, 19 Fla. 811. See also *Warm v. Coe*, 31 Fed. Rep. 369.

Deed by Party Not Competent to Protect Himself.—In *Evans v. Lewellin*, 1 Cox 333, the court set aside a deed which was improvidently granted for a grossly inadequate consideration by persons in low circumstances and unapprised of their right until the time of the transaction on the ground that the parties were not competent to protect themselves, although no misrepresentation or actual fraud whatever appeared to have been made use of.

Loan on Condition of Purchase.—In *Cockell v. Taylor*, 15 Beav. 103, 115, the plaintiff being desirous of raising money to enable him to prosecute his claim to a fund in court, had applied to a solicitor for that purpose. An agreement was executed by which the solicitor agreed to lend £1,000 and the plaintiff agreed to purchase some land from him for £6,000 (ten times its value). The land was conveyed and the funds in court mortgaged by the plaintiff for £6,000, but the £1,000 was not advanced at the time. The court, on the ground of the gross inadequacy of the price, coupled with the fact that the plaintiff was an uneducated man of humble origin and that the defendant had evidently taken advantage of his necessities to force him into the transaction, set aside the whole transaction.

Sale by Aged Woman Without Legal Assistance.—

An old woman of eighty-eight was induced to sell an estate in possession for one-fourth of its value. The testimony showed that she was in distress and without legal assistance, and was also under the impression that she could not make out a good title, while the purchaser knew that she could and concealed the fact from her. It was held that the inequality was so great that, coupled with the other circumstances of the case, it was sufficient to prove fraud on the part of the purchaser. *Sommers v. Griffiths*, 35 Beav. 27.

Effect of Inadequacy in Sales by Cestui Que Trust to Trustee.—In *Morse v. Royal*, 12 Ves. 355, 373, LORD ERSKINE declared that, in the case of sales by *cestui que trust* to trustees,

sumption that the advantage was obtained by fraud.¹ If the inadequacy is so great as to strike the conscience so strongly as to shock it at the injustice of the transaction, the inadequacy of

"If the court can discover that some advantage has been taken, some information acquired, which the other did not possess, though it is not to be precisely discovered, inadequacy, without going to the length of requiring it to be such as shocks the conscience, will go a vast way to constitute fraud."

Inadequate Consideration for Sale of Expectant Estate.—In *McKinney v. Pinckard's Exr.*, 2 Leigh (Va.) 149, a young man of improvident and extravagant habits, sold a reversion in certain slaves to a sheriff who held an execution against him for \$156. The reversion was worth \$1,300, and the purchaser had at various times before levied executions upon the seller's estate and knew that he was in embarrassed circumstances. It was held that the great and unconscionable inequality between the value of the property and the consideration was sufficient, when taken in connection with the improvidence and distress of the vendor and the relationship of the parties, to justify a court of equity in setting aside the transaction.

Expectant Heir Selling His Expectancy.—In *Peacock v. Evans*, 16 Ves. 512, SIR WM. GRANT, M. R., held that in the case of an heir dealing with his expectancy during his father's life, the court of chancery had extended a degree of protection approaching nearly to an incapacity to bind themselves by any contract; and accordingly decreed a reconveyance of such expectancy upon payment of principal, interest and costs. He said: "Under the particular circumstances of this purchase, even upon the valuation of Peacock's (the purchaser's) surveyors, I must have it set aside, the inadequacy still being considerable; and, though inadequacy of consideration between persons who stand upon a precisely equal footing is in this court of no account, unless from its grossness it is of itself evidence of fraud, yet under the circumstances in which Evans (the heir) stood, anything that can be substantially considered as inadequacy is a ground for setting aside the contract." See also *Gwynne v. Heaton*, 1 Bro. C. C. 1, 9; *Coles v. Trecothick*, 9 Ves. 234, 246; *Gawland v. De Farid*, 17 Ves. 20; *Osgood v. Franklin*, 2 Johns. Ch. (N. Y.) 1, 25; *Parmelee v. Cameron*,

41 N. Y. 392; *McKinney v. Pinckard*, 2 Leigh (Va.) 230. The rule, as stated by SIR WM. GRANT, was doubted by *DESSAUSSE, J.*, in *Butler v. Haskell*, 4 Dessauss. (S. Car.) ch. 65, 687, who said: "I will remark that there is a distinction made between the cases of young heirs selling expectancies, and of other persons, which I am not disposed to support. It is said that the former are watched with more jealousy and more easily set aside than others on principles of public policy. This was certainly true at first, but the eminent men who have sat in chancery have gradually applied the great principles of equity, on which relief is granted to every case where the dexterity of intelligent men had obtained bargains at an enormous and unconscientious disproportion, from the ignorance, the weakness or the necessity of others, whether young heirs or not. This just principle, the safeguard of society and the tutelary genius of the court, watching over the imbecile and the needy, I adopt in all its extent." After an examination of many of the cases, most of them being sales of expectancies or reversions, he proceeds: "I consider the result of the great body of the cases to be, that wherever the court perceives that a sale of property has been made at a grossly inadequate price, such as would shock a correct mind, this inadequacy furnishes a strong, and in general a conclusive presumption, though there be no direct proof of fraud, that an undue advantage has been taken of the ignorance, the weakness, or the distress and necessity of the vendor; and this imposes on the purchaser a necessity to remove this violent presumption by the clearest evidence of the fairness of his conduct; and the relief is given by the court either by refusing to enforce the contract, or by setting it aside altogether, according to the circumstances of the case. The relief is extended not only to young heirs selling their expectancies, but to all who are weak, or necessitous, or not perfectly conscious of their rights, whether selling expectancies or absolute estates; more especially where the purchaser is very intelligent and acute, and avails himself of his superiority in an unreasonable manner." See also *Cribbins v. Markwood*, 13 Gratt. (Va.) 495.

1. Inference Arising from Unfair-

itself will be sufficient to establish the fraudulent character of the transaction.¹ In the case of sales by auction, the court will,

ness.—If one of feeble understanding enters into a contract with a person in whom he has such confidence that he trusts to that person to do right towards him and guard his interests, if there be any unfairness in the transaction, the inference is that it was obtained by fraud, circumvention or undue influence. *Bunch v. Shannon*, 46 Miss. 526; *Simonton v. Bacon*, 49 Miss. 582. In *Simonton v. Bacon*, *supra*, a bill was brought to set aside a conveyance of certain lands. The complainant's testimony showed that he was weak minded almost to insanity, that the grantee was his neighbor, and a man of tact and intelligence, who knew complainant's condition; and that the consideration for the conveyance was of the intrinsic value of \$360, whilst the lands conveyed were worth \$9,600. It was *held* that the fraud was fully made out.

1. Judge *v. Wilkins*, 19 Ala. 765; *Juzan v. Toulmin*, 9 Ala. 662; *Madison Co. v. People*, 58 Ill. 456; *Macoupin Co. v. People*, 58 Ill. 191; *Comstock v. Purple*, 49 Ill. 158; *Herron v. Herron*, 71 Iowa 428; *Tootle v. Taylor*, 64 Iowa 629; *Barnett v. Spratt*, 4 Ired. (N. C.) Eq. 171; *Eastman v. Plumer*, 46 N. H. 464; *Weber v. Weitling*, 4 N. J. Eq. (3 C. E. Gr.) 441; *Wintermute v. Snyder*, 3 N. J. Eq. (2 Gr.) 489; *Dunn v. Chambers*, 4 Barb. (N. Y.) 376; *Osgood v. Franklin*, 2 Johns. Ch. (N. Y.) 1; *Mitchell v. Jones*, 50 Mo. 438; *Morriso v. Philliber*, 30 Mo. 145; *Knobb v. Lindsay*, 5 Ohio 471; *Butler v. Haskell*, 4 Dessaus. (S. C.) Eq. 651; *Hardeman v. Burge*, 10 Yerg. (Tenn.) 202; *Dead-erick v. Watkins*, 8 Humph. (Tenn.) 520; *Coffee v. Ruffin*, 4 Coldw. (Tenn.) 487; *Merriman v. Lacefield*, 4 Heisk. (Tenn.) 209; *Burch v. Smith*, 15 Tex. 219; *Mayo v. Carrington*, 19 Gratt. (Va.) 74; *Veazie v. Williams*, 49 U. S. (8 How.) 134; *Jenkins v. Einstein*, 3 Biss. C. C. 128; *Sugret v. Byers*, *Hempst. C. C.* 715; *Follett v. Rose*, 3 McLean C. C. 332; *Godfrey v. Beardsley*, 2 McLean C. C. 412; *Warner v. Daniels*, 1 Wood. & M. C. C. 90; *Hume v. United States*, 21 Ct. of Cl. 328; *Summers v. Griffith*, 35 Beav. 27; *Cockell v. Taylor*, 15 Beav. 103; *Rice v. Gordon*, 11 Beav. 265; *Heathcote v. Paignon*, 2 Bro. Ch. 167; *Gartside v. Isherwood*, 1 Bro. Ch. 558; *Gwynne v. Heaton*, 1 Bro. Ch. 1;

Evans v. Llewellyn, 1 Cox 333; *Falcke v. Gray*, 4 Drew. 651; *Borell v. Dann*, 2 Hare 440; *Stilwell v. Wilkins*, Jac. 280; *James v. Morgan*, 1 Lev. 111; *Wood v. Abrey*, 3 Madd. 417; *Lowther v. Lowther*, 13 Ves. 95; *Underhill v. Horwood*, 10 Ves. 209; *Coles v. Trecothick*, 9 Ves. 234.

Unconscionable Price for Government Supplies.—In *Hume v. United States*, 21 Ct. of Cl. 328, an agreement was made on behalf of the government to pay 60 cents per pound, or \$1200 per ton, for "shucks," which were not worth more than \$35 at the most. There was no finding that there was any fraud, but it was *held* that the bargain was so grossly unconscionable that it could not be enforced.

Sale of Stock.—In *Macoupin Co. v. People*, 58 Ill. 191, proceedings were instituted to obtain a writ of mandamus to compel the issuance of the bonds of a county, in payment of a subscription to the stock of a railroad company. By the terms of the subscription the county agreed to take two hundred shares of \$100 each in the stock of the company, in payment of which it agreed to issue and deliver bonds for \$20,000. It was also agreed that "when said bonds shall be so delivered to said company, and the stock thereon shall be so delivered to said company, the said stock shall thereupon be sold, assigned and transferred to said railroad company at the rate of one dollar for each one hundred shares of stock." It was *held* that the agreement to sell and transfer stock to the amount of \$20,000 for \$2 was a fraud *per se*, and was a mere evasion which the court would not recognize or enforce as valid or obligatory. A contract in similar terms providing for the sale of \$50,000 of stock for \$1 was *held* to be fraudulent *per se* on account of the gross inadequacy of the price, in *Madison Co. v. People*, 58 Ill. 456.

Gross Inadequacy.—In *Stillwell v. Wilkins*, Jac. 280, 282, a bill was filed to set aside a conveyance to the defendant's testator of estates worth £180 a year. The price paid was £250, and an annuity of £52 10s. per annum for the grantor's life—or, capitalized, about £600. LORD ELDON declared the inadequacy to be greater than he ever remembered, and in view of the accom-

however, require even stronger proof of the fraud than in the case of the private transactions of individuals.¹

IV. In Fraudulent Conveyances.—If a conveyance by an insolvent be impeached on the ground of an intention to defraud his creditors, inadequacy of consideration is deemed to be a badge of fraud, and may always be established for the purpose of proving the fraudulent intent.² If the inadequacy of price is so great as to excite surprise, it would seem that it will operate as notice

panying circumstances set aside the conveyance.

Inadequate Price for Real Estate.—In *Morriso v. Philliber*, 30 Mo. 145, the owner of real estate of the value of \$3,500, but who had no knowledge of its value, and was illiterate, being able neither to read nor write, was induced by a person in whom she had great confidence and who acted in a double capacity as agent for both parties, to dispose of her real estate for \$75. *Held*, that the inadequacy was so gross and unconscionable as to stamp the transaction for fraud, and that the facts warranted a decree setting aside the conveyance.

Same.—At Partition Sale.—In a suit for partition a sale of lands worth \$1,600 was ordered. Some of the parties were infants, but a party to the suit who was *sui juris* engaged an agent to attend the sale to prevent a sacrifice of the property. By accident the agent was unable to be present, and the land was sacrificed for \$50. It was *held* that although there might not have been any actual fraud on the part of the purchaser, the inadequacy of price was so great as to shock the conscience, and, as infants were concerned, it was the duty of the court to set aside the sale. *Mitchell v. Jones*, 50 Mo. 438.

Inadequacy of Price at Auction Sale.—In *Boyd v. Ellis*, 11 Iowa 97, one hundred and fifty-nine acres were sold at auction under foreclosure proceedings. The property was worth several thousand dollars, and was bid in by the mortgagee for \$175. It was *held* that the gross inadequacy of the price was of itself a strong badge of fraud, and though not conclusive, yet, when coupled with the other circumstances of the case, was sufficient to warrant a decree setting aside the sale.

Half Value of Land.—Half the estimated value of land is not such a gross inadequacy as shocks the conscience, and forms ground of itself for setting aside a sale. *Conaway v. Sweeney*, 24 W. Va. 643, 650; *Bradford v. McConihay*, 15 W. Va. 732.

Inadequacy not Sufficient to Prove Fraud.—A price of \$1,500 for an interest in a decedent's estate worth \$6,000 or \$7,000 is not so grossly inadequate as of itself to establish fraud. *Herron v. Herron*, 71 Iowa 428.

Annuity on Life of Aged Person.—In *Knobb v. Lindsay*, 5 Ohio 471, an estate worth \$2,000 or \$2,500, and producing \$80 per annum, although in bad repair, was sold for an annuity of \$100 for the life of the owner, an intemperate man, who had passed the age of sixty. It was *held* that although the court could not but believe that the estate had been acquired for much less than its worth, that degree of inadequacy did not exist which was in itself sufficient to establish fraud.

1. *Ayres v. Baumgarten*, 15 Ill. 444; *Tootle v. Taylor*, 64 Iowa 629; *Livingston v. Byrne*, 11 Johns. (N. Y.) 556; *Tripp v. Cook*, 76 Wend. (N. Y.) 143; *Borell v. Dann*, 2 Hare 444; *White v. Damon*, 7 Ves. 30. See also *Burrows v. Lock*, 10 Ves. 474. But compare *Boyd v. Ellis*, 11 Iowa 97; *Mitchell v. Jones*, 50 Mo. 438.

Execution Sales.—In *Russell v. Stinson*, 3 Hayw. (Tenn.) 1, the court refused to set aside an execution sale on the ground simply of the inadequacy of the price, saying, "Inadequacy is the general consequence of execution sales."

2. *Seamens v. White*, 8 Ala. 656; *Trieber v. Andrews*, 31 Ark. 163; *Barrow v. Bailey*, 5 Fla. 9; *Monell v. Scherrick*, 54 Ill. 269; *Bay v. Cook*, 31 Ill. 336; *Trimble v. Ratcliff*, 9 B. Mon. (Ky.) 511; *Worrell v. Vickers*, 30 La. An. 202; *Robinson v. Robards*, 15 Mo. 459; *Kuykendall v. McDonald*, 15 Mo. 416; *Arnold v. Bell*, 1 Hayw. (N. Car.) 396; *Loeschigk v. Bridge*, 42 N. Y. 421; *Van Wyck v. Baker*, 16 Hun (N. Y.) 168; *Lee v. Hunter*, 1 Paige (N. Y.) Ch. 519; *Scoggin v. Schloath*, 15 Or. 380; *Kaine v. Weighley*, 22 Pa. St. 179; *Hartfield v. Simmons*, 12 Heisk. (Tenn.) 253; *Alley v. Connell*, 3 Head (Tenn.) 578; *Bryant v. Kelton*, 1 Tex. 45; *Jenkins v. Einstein*, 3 Biss. C. C. 128;

to the purchaser of the fraudulent character of the transfer.¹ When a grantee purchases without actual notice of the intent of the grantor to defraud his creditors, but for a consideration which is so inadequate that it would be inequitable to allow the deed to stand as a conveyance, a court of equity may set it aside so far as it purports to be an absolute conveyance, but permit it to stand as a security only for the moneys actually advanced.²

Norris v. McCanna, 29 Fed. Rep. 757; *Penhall v. Elwin*, 1 Sm. & G. 258; *Bump on Fraudulent Conveyances* 86.

Fraudulent Conveyance.—In *Scoggin v. Schloath*, 15 Or. 380, it was *held* that a conveyance of land worth two thousand dollars in consideration of a payment of one hundred dollars was, as against creditors, constructively fraudulent.

Presumption of Fraud.—A sale, or *dation in paiement*, by the debtor to a creditor of property of value largely in excess of the debt due from the one to the other is *prima facie* fraudulent, when made under an impending seizure of the same property by another creditor. *Worrell v. Vickers*, 30 La. An. pt. 1, 202.

Family Settlement.—Unless the rights of existing creditors are thereby directly affected, inadequacy of consideration will not be regarded as a badge of fraud in the case of family settlements honestly made. *In re Johnson*, L. R., 20 Ch. Div. 389; 51 L. J., N. S., Ch. 503. In that case J., in consideration of love and affection and of a covenant by her two daughters, granted a farm and premises in trust for them in equal shares. They covenanted to pay all just debts incurred by her up to the date of the deed of grant in connection with the working and management of the farm. This deed was a conveyance of all J's property. An action was brought by a creditor to set aside this deed under 13 Eliz., ch. 5. His debt was not incurred by J, but by her predecessor on the farm, with whom she had entered into a like covenant; but she had given a promissory note for the amount of the debt. One daughter was an infant at the date of the deed; the other daughter had carried on the farm since that date. FRY, J., in the course of his judgment, pointed out that the consideration was in part meritorious and in part valuable. He then reviewed the circumstances of the family at the time of the execution of the deed, and *held* that, independently of the result of the

deed, they led him to the conclusion that the intention of the parties was to make a perfectly honest family arrangement, under which the daughters were to undertake the burden of paying their mother's debts, and, in consideration of that, were to take immediately that farm which in all probability they would otherwise have received by will upon their mother's death. He then pointed out the favor shown by the courts as to the question of consideration in family settlements. "It appears plain that though valuable and good consideration was given by the daughters, that consideration cannot have been the full value of the estate. But it also appears to me to be plain that when a *bona fide* and honest instrument is executed for which valuable consideration is given, and the instrument is one between relatives, the court cannot say that the difference between the real value of the estate and the consideration given is a badge of fraud; and if it is not a badge of fraud, or evidence of an intention to defeat creditors, it has no relation to the case."

1. *Beadles v. Miller*, 9 Bush (Ky.) 405; *Eck v. Hatcher*, 58 Mo. 235; *Smith v. Schmitz*, 10 Neb. 600; *Peabody v. Fenton*, 3 Barb. (N. Y.) Ch. 457; *Hopkin v. Doty*, 25 Wis. 573; *DeWitt v. Perkins*, 22 Wis. 473. But see *Johnson v. Newman*, 43 Tex. 628, in which it was *held* that although to support a plea of *bona fide* purchaser it is necessary to prove the payment of a valuable consideration, it is not necessary that such payment should be adequate.

2. *Bigelow v. Ayrault*, 46 Barb. (N. Y.) 143; *Van Wyck v. Baker*, 16 Hun (N. Y.) 168; *Boyd v. Dunlap*, 1 Johns. Ch. (N. Y.) 478; *McArthur v. Hoysradt*, 11 Paige (N. Y.) 495; *Clements v. Moore*, 73 U. S. (6 Wall.) 312; *Grove v. Watt*, 2 Sch. & Lef. 492; *Bump, Fraud. Conv.* 564; *May, Vol. & Fraud. Alienations*, 235.

Rule in Court of Equity.—In *Boyd v. Dunlap*, 1 Johns. Ch. (N. Y.) 478, a son claimed property levied upon by his

V. In Suits for Specific Performance.—Although in the older cases it seems to have been held that a court of equity would refuse to decree specific performance, except when there were mutual agreements, fair, just and reasonable, and founded on good or valuable and adequate considerations,¹ it is now generally held that mere inadequacy in the consideration is not sufficient ground for refusing to enforce performance.² But if the inadequacy be so gross as to shock the conscience of a reasonable man, and the proof of

father's creditors by virtue of a bill of sale and deed by his father to him. KENT, Ch., in deciding the case, said: "The only question with me has been whether the plaintiffs ought to be left to their legal remedy, or whether the case affords sufficient ground for a limited interference by allowing the deed of the real estate to stand as a security only for such consideration as has been shown by the younger Dunlap. There appears to be a very considerable inadequacy of price, even admitting the consideration expressed in the deed; and to allow the deed to stand as security only for the true sum due would be doing justice to the parties and granting a relief which cannot be afforded at law. A court of law can hold no middle course. The entire claim of each party must rest and be determined at law on the single point of the validity of the deed, but it is an ordinary case, in this court, that a deed, though not absolutely void, yet, if obtained under unequitable circumstances, should stand only as a security for the sum really due."

Diverting Debtor's Property from Payment of Debts.—In *Clements v. Moore*, 75 U. S. (6 Wall.) 299, a suit was brought to set aside as fraudulent a sale of a stock of merchandise. SWAYNE, J., who delivered the opinion of the court, said: "A sale may be void for bad faith, though the buyer pays the full value of the property bought. This is the consequence where his purpose is to aid the seller in perpetrating a fraud upon his creditors, and where he buys recklessly, with guilty knowledge. Where the fact of fraud is established in a suit at law, the buyer loses the property without reference to the amount or application of what he has paid, and he can have no relief either at law or in equity. When the proceeding is in chancery, the jurisdiction exercised is more flexible and tolerant. The court of equity appealed to, while it scans the transaction

with the severest scrutiny, looks at all the facts, and, giving to each one its due weight, deals with the subject before it according to its own ideas of right and justice. In some instances it visits the buyer with the same consequences which would have followed in an action at law. In others it allows a security to stand for the amount advanced upon it. In others it compels the buyer to account only for the difference between the under price which he paid and the value of the property. In others, although he may have paid the full value and the property may have passed beyond the reach of the process of the court, it regards him as a trustee, and charges him accordingly. Where he has honestly applied the price to the liabilities of the seller, it may hold him excused from further responsibility. The cardinal principle in all such cases is, that the property of the debtor shall not be diverted from the payment of his debts to the injury of his creditors, by means of the fraud."

1. *Andrews v. Andrews*, 28 Ala. 432; *Lear v. Chouteau*, 23 Ill. 39; *Webb v. Alton etc. Ins. Co.*, 10 Ill. 223; *Clement v. Reid*, 17 Miss. (9 Sm. & M.) 535; *Powers v. Hale*, 25 N. H. 145; *Seymour v. Delancy*, 6 Johns. Ch. (N. Y.) 222; *Gasque v. Small*, 2 Strobh. (S. Car.) Eq. 72; *Clitherall v. Ogilvie*, 1 Dessaus (S. Car.) 257; *Carbeen v. Gordon*, 1 Hill (S. Car.) Ch. 51; *Day v. Newman*, 2 Cox 77; *Savile v. Savile*, 1 P. Wms. 745; *Tilly v. Peers*, cited 10 Ves. 301.

2. *Lee v. Kirby*, 104 Mass. 420; *Powers v. Mayo*, 97 Mass. 180; *Park v. Johnson*, 86 Mass. (4 Allen) 259; *Leach v. Fobes*, 11 Gray (Mass.) 506; *Shepherd v. Bevin*, 9 Gill (Md.) 32; *Young v. Frost*, 5 Gill (Md.) 288; *Burtch v. Hogge*, Harr. Ch. (Mich.) 31; *Harrison v. Town*, 17 Mo. 237; *Bean v. Valle*, 2 Mo. 126; *White v. Thompson*, 1 Dev. & B. Eq. (N. Car.) 493; *Shaddle v. Disborough*, 30 N. J. Eq. 497; *Ready v. Noakes*, 29 N. J. Eq.

it so clear as to lead to a reasonable conclusion of fraud or mistake, the court will refuse to decree specific performance;¹ or if the inadequacy be of such a nature, when connected with other

497; *Rodman v. Zillee*, 1 N. J. (Sax.) Eq. 320; *Viele v. Troy & B. R. R.*, 21 Barb. (N. Y.) 381; *Seymour v. Delancy*, 3 Cow. (N. Y.) 445; *Westervelt v. Matchson*, 1 Hoff. (N. Y.) Ch. 37; *Galloway v. Barr*, 12 Ohio 353; *Sarter v. Gordon*, 2 Hill (S. Car.) Ch. 121; *Tripp v. Tripp*, Rice (S. Car.) Ch. 84; *Russell v. Stinson*, 3 Hayw. (Tenn.) 1; *White v. Flora*, 2 Tenn. 426; *Curlin v. Hendricks*, 35 Tex. 225; *Hale v. Wilkinson*, 21 Gratt. (Va.) 75; *Conaway v. Sweeney*, 24 W. Va. 643; *Booten v. Scheffer*, 21 Gratt. (Va.) 474; *Byers v. Surget*, 60 U. S. (19 How.) 303; *Erwin v. Parham*, 53 U. S. (12 How.) 197; *Cathcart v. Robinson* (5 Pet.), 30 U. S. 364; *Garnett v. Macon*, 2 Brock. C. C. 185; *Callaghan v. Callaghan*, 8 Cl. & Fin. 374; *Bower v. Cooper*, 2 Hare 408; *Abbott v. Swoorde*, 4 De G. & Sm. 448; *Burrowes v. Lock*, 10 Ves. 470; *Mortlock v. Buller*, 10 Ves. 292; *Coles v. Trecothick*, 9 Ves. 246; *White v. Damon*, 7 Ves. 30; *Western v. Russell*, 3 Ves. & Bea. 188. But see *Margraf v. Muir*, 57 N. Y. 155; *Wistar's Appeal*, 80 Pa. St. 484.

Taking Advantage of Seller's Ignorance.—In *Falcke v. Gray*, 4 Drew 351, the court refused to decree specific performance of a contract which, although not actually fraudulent, was one in which the parties were not on an equal footing, the plaintiff knowing and the purchaser being ignorant of the value of the thing sold, and the price being wholly inadequate.

Worthless Corporate Stock.—In *Powers v. Mayo*, 97 Mass. 180, the court decreed specific performance of a contract for the sale of certain real estate, although stock which the seller had agreed to take in part payment of the price at par was in reality worth only ten cents on the dollar.

Enforcing Family Arrangement.—In *Leach v. Fobes*, 77 Mass. (11 Gray) 506, a bill was brought to enforce an agreement with reference to the distribution of the real estate of a testator. BIGELOW, J., who delivered the opinion of the court, said: "The agreement set out in the bill is of a nature which is entitled to the highest favor at the hands of a court of equity. It is the result of a family compromise of a controversy which had arisen between the

heir at law and the devisee of a testator concerning his sanity and free agency at the time of making his last will. Such contracts are not against public policy. On the contrary, as they contribute to the peace and harmony of families and to the prevention of litigation, they will be supported in equity without an enquiry into the adequacy of the consideration on which they are founded. *Stapilton v. Stapilton*, 1 Atk. 2; *Naylor v. Winch*, 1 Sim. & Stu. 565; *Westley v. Westley*, 2 Dru. & War. 503."

1. *Western R. R. Corporation v. Babcock*, 47 Mass. (6 Met.) 346; *Burtch v. Hogge*, Harr. Ch. (Mich.) 31; *Bean v. Valle*, 2 Mo. 126; *Shaddle v. Disborough*, 30 N. J. Eq. 370; *Viele v. Troy & B. R. R. Co.*, 21 Barb. (N. Y.) 381; *Seymour v. Delancy*, 3 Cow. (N. Y.) 345; *Tripp v. Tripp*, Rice (S. Car.) Ch. 84; *Hale v. Wilkinson*, 21 Gratt. (Va.) 75; *Conaway v. Sweeney*, 24 W. Va. 643; *Byers v. Surget*, 60 U. S. (19 How.) 303; *Callaghan v. Callaghan* 8 Cl. & Fin. 374.

When Performance Decreed.—In *Seymour v. Delancy*, 3 Cow. (N. Y.) 445, 521, the court said: "On the question of decreeing specific performance of executory contracts, the Court of Chancery must exercise its discretion—not an arbitrary, but a sound judicial discretion. If the contract be free from objection, it is the duty of the court to decree performance. But if there are circumstances of unfairness, though not amounting to fraud or oppression, or if the inadequacy of consideration be so great as to render the bargain hard and unconscionable; on either ground the court may refuse its aid to enforce the contract, and leave the parties to contest their rights in a court of law. If it is asked what degree of inadequacy is necessary to constitute the bargain a hard one, it might be asked, in answer, what degree of inadequacy is necessary to constitute fraud—to shock the conscience and produce an exclamation? The truth is, that neither the one nor the other admits of a definite answer. It must be determined by the judgment of the court, and as there is certainly a difficulty in ascertaining the precise point, there is much less danger in stopping short of it than in going be-

circumstances, as to prove that the contract was entered into by the parties without any intention of being carried into effect.¹

INADEQUATE PRICE.—See **ILLEGAL CONTRACTS**; **INADEQUATE CONSIDERATION**; **SALES**; etc.

INCEST.

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| I. Definition, 335. | 2. <i>The Carnal Knowledge</i> , 339. |
| II. Essentials of the Crime, 336. | III. Indictment, 341. |
| 1. <i>Relationship</i> , 336. | IV. Evidence, 344. |

I. Definition.—Incest is the carnal copulation of a man and a woman related to each other in any of the degrees within which marriage is prohibited by law.²

Incest is purely a statutory offence, being unknown to the com-

mon law. To me it seems a solecism in language to say that a party who has obtained an inequitable bargain shall be received in a court of equity to demand its performance."

Gross Inadequacy as Evidence of Fraud.—In *Byers v. Surget*, 60 U. S. (19 How.) 303, the court said: "To meet the objection made to the sale in this case, founded on the inadequacy of the price at which the land was sold, it is insisted that inadequacy of consideration, singly, cannot amount to proof of fraud. This position, however, is scarcely reconcilable with the qualification annexed to it by the courts, namely, unless such inadequacy be so gross as to shock the conscience; for this qualification implies necessarily the affirmation that if the inadequacy be of a nature so gross as to shock the conscience it will amount to proof of fraud. Again, in answer to the same objection, it is insisted that whatever presumption arising from inadequacy of consideration may be permitted with respect to transactions strictly limited to vendor and vendee, no unfavorable inference from that cause is permissible with respect to sales made under judicial process. Certainly the fact that sales are made by the officers or ministers of the law, and under its authority, may properly weaken the usual presumption arising from gross inadequacy; but to declare that such inadequacy, connected with other facts and circumstances evincing fraud or unfairness, could never be regarded as affecting sales under process, would be as rational as the assertion that process of law could never be abused and that the ministers of the law must necessarily be

intelligent and upright, and incapable of being ever willingly or unwittingly made the instruments of fraud or oppression." It was *held* in that case that a judicial sale of lands which amounted in quantity to over 14,000 acres and were worth at the time about \$70,000, at a price of only \$9.13½ must be set aside.

What Deemed Gross Inadequacy.—In *Westervelt v. Matheson*, Hoff. Ch. (N. Y.) 37, it was *held* in an action for specific performance that a purchase at the price of \$2,900 of property valued by the witnesses from \$2,800 to \$3,500 was not a case of such gross inadequacy as would warrant the court in refusing a decree, even assuming the larger sum to be the fair value; and in *Abbott v. Swooner*, 4 De G. & Sm. 448, the difference between £3,500, which the court deemed to be the value of the property, and £5,000 the price agreed to be paid for it, was not so great as to require the court to refuse specific performance.

1. In *Callaghan v. Callaghan*, 8 Cl. & Fin. 374, a proprietor of an estate in Ireland conveyed it to his brother at the price of £6,000. Thereafter his brother granted him a lease for life on terms which were almost gratuitous in their nature. The evidence showed that the lessee had obtained the lease for the purpose of enabling him to prove a qualification for M. P. The court *held* that that fact taken in connection with the gross inadequacy of the consideration and the other facts of the case, sufficiently showed that the agreement was one which the parties had not intended should be carried into effect.

2. 1 Bouv. Law Dict. (15th ed.) 783.

mon law;¹ but it is defined and punished as a felony in most of the states.²

II. Essentials of the Crime—1. Relationship.—In order to constitute the crime of incest, the parties must be related to each other in some degree within which marriage is prohibited; and this usually includes the first three degrees of consanguinity, consisting of the relationships of parent and child, brother and sister, and uncle and niece or aunt and nephew. In the case of parent and child, the relationship need not be of blood, for it is equally criminal for a man to have carnal intercourse with his stepdaughter during the life of her mother;³ and the same is true of a stepmother and stepson.⁴ But such intercourse is not incest after the death of the stepchild's parent;⁵ nor before, unless it be shown that one of the parties was lawfully the husband or wife of the parent of the other.⁶

1. *State v. Keesler*, 78 N. C. 469; s. c., 2 Am. Cr. Rep. 331; 4 Bl. Com. 64. See *State v. Slaughter*, 70 Mo. 484.

Incest No Offence at Common Law.—In *State v. Keesler*, *supra*, it is said that incest was not indictable at common law, and as we have no statute in this state declaring it to be a criminal offence, this indictment cannot be maintained. It is related that in the time of the Commonwealth in England, when the ruling found it for their interest to put on the semblance of extraordinary strictness and purity of morals, incest and wilful adultery were made capital crimes; but at the Restoration, when men from the abhorrence of the hypocrisy of the late times fell into a contrary extreme of licentiousness, it was not thought proper to renew the law of such unfashionable rigor; and these offences have been ever since left to the feeble coercion of the spiritual court, according to the common law. 4 Bl. Com. 64; 2 Tomlin. L. D. 160; Bish. Stat. Cr., §§ 725, 728; Bish. Mar. & Div., §§ 313, 315.

2. See *State v. Keesler*, 78 N. C. 469; s. c., 2 Am. Cr. Rep. 331.

In Louisiana.—As to the crime of incest under the laws of Louisiana, see *State v. Smith*, 30 La. An., part 2., 846.

In Missouri.—The prohibition in Missouri Rev. St., §§ 268, 1538, of cohabitation of persons within certain degrees of consanguinity, has been construed to render incest indictable. *State v. Slaughter*, 70 Mo. 484.

In North Carolina.—As to the North Carolina law relating to incest, see *State v. Keesler*, 78 N. C. 469.

3. *Norton v. State*, 106 Ind. 163;

McGrew v. State, 13 Tex. App. 340.

4. *Baumer v. State*, 49 Ind. 544.

5. *Johnson v. State*, 20 Tex. App. 609; s. c., 54 Am. Rep. 535.

Step-parent—Effect of Death of Natural Parent.—In the case of *Johnson v. State*, *supra*, the court say: "During the existence of the marriage relation between defendant and Kinnie's mother, carnal intercourse between defendant and Kinnie would unquestionably have been incestuous. Kinnie was then his wife's daughter. But after the death of the mother and wife, the relation of stepfather and stepdaughter which existed between defendant and Kinnie ceased. She was no longer his wife's daughter, within the meaning of the statute defining the crime of incest. A divorce between the defendant and his wife would likewise have put an end to his relation to Kinnie. (Noble v. State, 22 Ohio St. 541; s. c., 1 Green Cr. Rep. 662; *Compton v. State*, 13 Tex. App. 271; s. c., 44 Am. Rep. 703. Relationship by affinity ceases with the dissolution of the marriage creating it. 1 Bish. Mar. & Div., § 314; 1 Bish. Cr. Proc. § 901.) If our view of the law be correct, and we are satisfied that it is, the defendant is not guilty of the crime of incest, and the court erred in so instructing the jury as to allow them to find him guilty, the evidence showing that, if he had carnal intercourse with Kinnie, it was not until after her relationship to him of stepdaughter had ceased to exist. Under the facts of the case, he may be guilty of fornication and of adultery, and perhaps of rape, but not of incest."

6. *McGrew v. State*, 13 Tex. App. 340.

Under statutes defining incest, the relationship of brother and sister includes a brother or sister of the half-blood;¹ and it has been held that a brother-in-law and sister-in-law are within the prohibition of a statute forbidding marriage between persons nearer of kin by consanguinity or affinity than cousins.² The fact that one of the parties to the crime was born out of wedlock is immaterial, if he sustains toward the other a relationship within some prohibited degree of consanguinity; therefore, carnal intercourse with an illegitimate brother or sister, or son or daughter, is incest, and creates guilt of the same degree as if the other participant had been born in lawful wedlock.³

1. *Territory v. Corbett*, 3 Mont. Ter. 50; *State v. Wyman*, 59 Vt. 527.

Brother and Sister of the Half-blood.—In *State v. Wyman*, *supra*, "it was objected that the indictment was not sustained by proof that the respondent committed the offence with a daughter of his half-brother, it being claimed that the word 'brother' in the statute was not broad enough to cover a brother of the half-blood. In support of this claim it is urged that at common law a brother of the half-blood is not a brother, and cannot inherit as such. It is true that by the common law a brother of the half-blood could not inherit, but this was a rule for regulation of the descent of property, and had no broader scope. It did not undertake to effect the relations of brethren of the half-blood any further than to prescribe, for certain reasons having their origin in the ancient system of feudal tenures, that, in the descent of the inheritance, a brother of the half-blood should be left out. The common law rule, therefore, would have no force in a case of this kind, but the generally understood significance, and the word 'brother' as used in the common affairs of life, and as defined by the lexicographers of recognized authority, should be adopted in the construction of the statute. In the present case, however, all question is removed by L. R., § 2231, which provides that 'the degrees of kindred shall be computed according to the rules of the civil law;' and by these the half-blood are committed in all respects equally with the whole blood. 2 Kent Com. 422."

2. *Stewart v. State*, 39 Ohio St. 152; s. c., 4 Am. Cr. Rep. 271.

Brother-in-Law and Sister-in-Law.—In *Stewart v. State*, *supra*, Stewart was indicted. The indictment charging "the said Stanton E. Stewart and the said Etta Drake being then and there nearer of kin by affinity than cousins,

to wit, the said Etta Drake being then and there the sister by affinity, said relation being commonly known as sister-in-law, of the said Stanton E. Stewart," and the only question presented is, whether the indictment contains a sufficient statement of the relationship between the defendant and Etta Drake. It is claimed that the indictment is in this respect bad: 1st, because it does not state how the relationship was created, and that it still subsists; and 2nd, because no relatives by affinity are nearer than cousins by consanguinity, there being no mode of comparison between relatives by affinity and relatives by consanguinity. "The first objection to the indictment is disposed of by the decision in the case of *Noble v. State*, 22 Ohio St. 541." "The second objection cannot be sustained. The statute prescribes the punishment of persons having sexual intercourse who are 'nearer of kin by consanguinity or affinity than cousins, having knowledge of their relationship,' and we are aware of the opinion that under this statute the degrees of relationship by affinity are to be determined in the same manner as degrees of relationship by consanguinity, and that a brother-in-law and a sister-in-law are, within the meaning of this statute, nearer of kin than cousins."

3. *State v. Schanhurst*, 34 Iowa 547; *People v. Lake*, 110 N. Y. 61; *State v. Laurence*, 95 N. C. 659. See *Baker v. State*, 30 Ala. 521.

Illegitimate Child.—In *People v. Lake*, *supra*, the court in brief said: "The principal ground of defence asserted is that his daughter with whom he committed adultery was illegitimate, and so it was not incest. He seduced that daughter's mother; abandoned her and the child for some years; then returning, took the daughter for his book-keeper, as he said; seduced her in turn, and now pleads her illegitimate birth.

It is essential, to constitute the crime of incest, that not only the prohibited relationship exist, but that the sexual act be committed in the full knowledge of such relationship; and when a person has sexual intercourse with another, who is related to him within some prohibited degree, in ignorance of such relationship, such person is not guilty of the crime of incest.¹ But this does not excuse the party committing the act in the knowledge of the relationship.²

The offence, although committed with a daughter born out of wedlock, is not by that fact mitigated or condoned. She stood related to him by consanguinity within the forbidden degrees. That she had no inheritable blood for the purposes of descent and distribution does not alter the actual and natural relation. Kent says, while speaking of the general legislation relative to bastards, 'the relaxation in the laws of so many of the States of the severity of the common law rests upon the principle that the relation of parent and child, which exists in this unhappy case in all its native and binding force, ought to produce the ordinary legal consequences of that consanguinity' (Kent Com., vol. 2, p. *213). It was early held to be unlawful for a bastard to marry within the Levitical degrees (Hains v. Jeffel, 1 Ld. Raym. 68), a doctrine which of necessity recognized relationship and consanguinity. But our statutes leave no room for any reasonable doubt. The Penal Code (section 302) enacts that persons being within the degrees of consanguinity, within which marriages are declared by law to be incestuous and void, who shall intermarry with each other, or who shall commit adultery or fornication with each other, shall, upon conviction, be punished, etc. This enactment is taken from the Revised Statutes (pt. 4, ch. 1, tit. 5, art. 2, § 12), and its reference is to the provision as to marriage (pt. 2, ch. 8, tit. 1, art. 1, § 3). That declares marriage between parents and children incestuous and void, and specially includes illegitimate as well as legitimate children. Since, therefore, the consanguinity between father and daughter, although the latter be illegitimate, is by law declared to make their marriage incestuous and void, the provision of the Penal Code applies to the same relation and describes the crime of incest. Beyond its utter want of merit the defence has no foundation in the law."

1. Baumer v. State, 49 Ind. 544; s. c., 19 Am. Dec. 691; 1 Am. Cr. Rep.

354; State v. Ellis, 74 Mo. 385; s. c., 41 Am. Rep. 321. See Rea v. Harrington, 58 Vt. 18.

Knowledge of Relationship.—But see State v. Wyman, 59 Vt. 529, where it was urged that the indictment is fatally defective, in that it does not charge the respondent with knowledge of the relationship existing between himself and the *particeps criminis* at the time of the commission of the crime charged. The indictment is based upon R. L. § 4246, which provides that "persons between whom marriages are prohibited by § 2306, or § 2307, who intermarry, or who commit fornication with each other, shall be punished as in case of adultery." The indictment sufficiently charges that the respondent was related to the *particeps* within the degree of consanguinity specified in sections 2306 and 2307, and that he committed fornication with her. Fornication is only made a crime when committed by persons within certain degrees of consanguinity. It is therefore a statutory crime merely, and its definition, and the proceedings to punish persons charged with it, are dependent upon the words of the statute itself. The statute is entirely silent as to any scienter. It does not say that a person who knowingly or wilfully commits fornication with one related to him or her, within the degrees of consanguinity which prohibit marriage, shall be punished, etc. To come within the statute, therefore, it was not necessary to allege knowledge of the relationship.

2. State v. Ellis, 74 Mo. 385; s. c., 41 Am. Rep. 321. In this case, the court say: "We do not hold it necessary that both parties must be guilty of the crime of incest before the guilty one can be convicted. For instance, if in this case, the defendant was aware of the relationship between him and (his daughter), and she was ignorant of it, he would be guilty and punishable under the statute, if the illicit connection was by mutual consent, although she

2. *The Carnal Knowledge*.—While incest always implies sexual intercourse, which is essential to its commission,¹ yet direct proof thereof is not required, where parties related to each other within the prohibited degree contract a marriage, such a marriage being incestuous and constituting the crime,² and proof need be given only of a ceremonial marriage.³ It is sometimes also made an offence to attempt such a marriage; but there must be some overt act positively evidencing such an intent of both parties.⁴

The crime of incest being wholly statutory, the question as to what constitutes the requisite carnal knowledge must be answered somewhat differently, according to the various provisions in the separate States; but in the absence of a marriage between the parties, a single act of carnal intercourse, such as would sustain a conviction for rape if done forcibly and against the will of the female,⁵ is all that is usually required, although it has been held

could not have been guilty of incest because ignorant of the relationship existing between her and the defendant."

1. **Attempt to Commit Incest by Solicitation**.—In *Cox v. People*, 82 Ill. 191; s. c., 2 Am. Cr. Rep. 223, it is held that in Illinois a bare solicitation to commit incest is not indictable. Such a solicitation is not an attempt within the meaning of the statute. The court say: "It is not claimed, nor is there any express provision made by the Criminal Code for the punishment for an attempt to commit incest, so that the defendant's case is brought within this section, if he is liable at all. The evidence shows simply an unsuccessful solicitation to commit the offence, and the question therefore is, does a bare solicitation constitute an attempt within the meaning of the section?"

Wharton, in discussing whether solicitations to commit are independently indictable, in the second volume of his work on Criminal Law (7th ed.), § 2691, says: "They certainly are, . . . whether their object is to provoke a breach of the public peace, as is the case which challenges to fight and seditious addresses. They are also indictable where their object is interference with public justice, as where resistance to the execution of a judicial writ is counseled, or perjury is advised, or the escape of a prisoner is encouraged, or the corruption of a public officer is sought. . . . But if the offence be not consummated, and if it be not of such a character that its solicitation tends to a breach of the peace, or the corruption of the body

politic, the question whether the solicitation is by itself the subject of penal prosecution must be answered in the negative." See also *Smith v. Com.*, 54 Pa. St. 209; *Com. v. Willard*, 39 Mass. (22 Pick.) 476. "We are of the opinion that this is the better view of the law, although there are respectable authorities holding a different rule; and, reading the section quoted in the light of it, the words: 'Whoever attempts to commit any offence prohibited by law, and does any act towards it,' must be construed, in cases like the present, to mean a physical act as contradistinguished from a verbal declaration; that is, it must be a step taken towards the commission of the offence, and not a mere effort, by persuasion, to produce the condition of mind essential to the commission of the offence."

2. *People v. Murray*, 14 Cal. 159; *State v. Schaunhurst*, 34 Iowa 547.

3. *State v. Schaunhurst*, 34 Iowa 547.

4. **Declarations of an intent to contract an incestuous marriage**, followed by elopement for that avowed purpose, and sending for a magistrate to perform the ceremony, do not amount to an attempt to contract the marriage. The attempt can only be manifested by acts which would end in the consummation of the offence, but for the intervention of circumstances independent of the will of the party. In the above case there could be no attempt until the parties stood before a magistrate about to begin the ceremony. *People v. Murray*, 14 Cal. 159.

5. **Consent of Female—Texas Doctrine**.—It is said in *Mercer v. State*, 17 Tex.

that emission is an essential ingredient of the necessary intercourse.¹ But sometimes the commission of the offence by certain persons, or in a certain manner, is made a separate crime with a separate punishment; as, for instance, carnal knowledge by

App. 452; s. c., 5 Am. Cr. Rep. 292, that the question of consent of the female does not necessarily enter into the composition of the offence of incest, and a prosecution for that offence may be maintained upon proof that establishes either her consent or non-consent to the carnal intercourse. The court say: "This being a conviction for the crime of incest it is contended that if the evidence shows that the defendant is guilty in the same transaction of the higher and distinct crime of rape, it is an illegal conviction, and must be set aside. It is ingeniously and ably argued by counsel for defendant that our statute defining the offence of incest, in using the words, 'carnally known to each other,' presupposes the consent of both parties, and makes it necessary that they should mutually carnally know each other; that the offence will not be complete where the man only acts voluntarily in the illicit connection; but to make the offence complete both man and the woman must have the carnal knowledge with each other mentally as well as bodily; that a rape of the woman by the man excludes the crime of incest, and that, *eo converso*, where incest is, rape cannot be. (See *People v. Harrison*, 1 Park. Cr. Cas. (N. Y.) 344; *Noble v. State*, 22 Ohio 43; *Northwestern Reporter*, April 3, 1880, p. 442.) But, in our opinion, the great weight of reason and of authority is against the doctrine announced in the authorities cited. Mr. Bishop says: 'As every offence to be punishable must be voluntary, so in particular must be adultery. But alike in adultery, and, it is believed, in fornication and in incest, where the crime consists in one's unlawful carnal knowledge of another, it is immaterial whether the other participated under circumstances to incur guilt or not, just as sodomy may be committed either with a responsible human being, or an irresponsible one, or a beast. Therefore, the same act of penetrating a woman who, for example, is too drunk to give consent, may be prosecuted either as a rape or as adultery, at the election of the prosecuting power. There are cases which deny this, and hold that adultery, fornication and incest can be committed

only with consenting persons, and what is rape cannot be one of the others. But they are believed to proceed partly, and perhaps entirely, on special terms of statutes; certainly, in principle, they can have no other just foundation.' Bish. on Stat. Crimes, § 660." "But in the case of *People v. Rouse*, 2 Mich. N. P. 209, it was held upon a trial for incest, where the proof tended to show that the intercourse was forcible and against the will of the female—the complaining witness—with whom the intercourse was had, that the accused might be convicted for incest even if the jury should find that the force used was such as, under the circumstances, to amount to rape. In *Raiford v. State*, 68 Ga. 672, it was held that, in the perpetration of the crime of incest, there may be a certain force or power exerted, resulting from the age, relationship or circumstances of the parties, which nevertheless may not amount to the violence necessary to constitute rape. In *Alonzo v. State*, 15 Tex. App. 378, the question now before us was discussed and the authorities reviewed at some length, the conclusion arrived at and announced being adverse to the view contended for by defendant's counsel in this case. If our view of the law as enunciated in the last cited case be correct, and we believe it is, then that case is decisive of the question we have been discussing, and accordingly we hold that notwithstanding the evidence in this case may show that defendant committed rape on his daughter, he may be prosecuted and convicted for incest; and that to make him guilty of incest, it is not necessary that his daughter should have consented to his carnal knowledge of her. She might be entirely innocent of any crime, and yet he might be guilty of rape or incest, or both, by having carnal knowledge of her. We can see nothing in our statute defining the crimes of rape and of incest which militates against this view."

1. See *Noble v. State*, 22 Ohio St 541.

Emissio Seminis.—Emission is an essential ingredient in the crime of incest, although the statute used the words

a father of his daughter, her assent or compliance being obtained by the use of his parental authority.¹

Upon the question whether a person indicted for incest can be convicted, when the proof shows facts constituting the crime of rape, the decisions are conflicting. It has been held that the crime can only be incest when the sexual act is committed with mutual consent;² but the weight of authority seems to be to the effect that where incestuous fornication is shown to have been committed by defendant, in full knowledge of the relationship between himself and the other participant, the fact that he may have, or did, use force in accomplishing his object is entirely immaterial, and he may be convicted of the crime of incest notwithstanding.³

III. Indictment.—An indictment for incest need not charge both parties,⁴ nor is it necessary that both parties to the incestu-

"sexual intercourse," instead of "carnal knowledge" employed in the law against rape. *Noble v. State*, 22 Ohio St. 541.

1. A provision of the Nebraska criminal code is as follows: "If a father shall rudely and licentiously cohabit with his own daughter, the father shall on conviction be punished by confinement in the penitentiary for a term not exceeding twenty years." In *State v. Lawrence*, 19 Neb. 307; s. c., 7 Cr. L. Mag. 684, it was held that under this statute it is not necessary, in order to a conviction, that the testimony should show that the father and daughter cohabited together as husband and wife, nor that it should appear that he held her out and treated her to others as his wife, nor that he was not living and cohabiting with his wife. If it is shown that the father and daughter lived together in the same family and house, and that he for any considerable length of time, and as a custom, rudely and licentiously had sexual intercourse with her in her room in the house, for that purpose asserting his authority as her parent, it will be sufficient to sustain a conviction.

2. *People v. Harriden*, 1 Park Cr. Cas. (N. Y.) 344. See *Raiford v. State*, 68 Ga. 672.

Defendant was indicted for incestuous fornication with his niece. He was found guilty and contended that the evidence showed rape. Held, that in the perpetration of the crime of incest there may be a certain force or power exerted, resulting from the age, relationship or circumstances of the parties,

which nevertheless may not amount to the violence necessary to constitute rape. *Raiford v. State*, 68 Ga. 672.

3. See *Norton v. State*, 106 Ind. 163; *People v. Rouse*, 2 Mich. N. P. 209; *Mercer v. State*, 17 Tex. App. 452.

Incest may be committed either with or without the consent of the woman, and the fact that the Texas statute defining the crime uses the words "carnally know each other" does not alter the rule. *Mercer v. State*, 17 Tex. App. 452.

4. The crime of incest may be committed by one party to the act without the consenting mind of the other party thereto. *People v. Barnes* (Idaho), 9 Pac. Rep. 532.

In the case of *State v. Thomas*, 53 Iowa 214, under a statute providing that "if any persons within the prohibited degree . . . carnally know each other they shall be deemed guilty of incest," it was held, the crime of incest under the statute contemplates the assent of both parties to the connection. But the court add: "Possibly, if the connection should be procured by fraud, the party perpetrating the fraud might be deemed guilty of incest. The innocent party, of course, could not be."

Same — Massachusetts Doctrine. — In the case of *Com. v. Bakeman*, 131 Mass. 577, it was said that on an indictment against a man and a married woman for adultery, the man alone may be convicted, where the woman was too drunk to consent to the intercourse.

In *State v. Ellis*, 74 Mo. 385, the

ous intercourse be indicted; but one of them may be tried and convicted alone.¹ The indictment must charge clearly that defendant committed an act of fornication which was incestuous, but the form of expression is not material, if the words are sufficiently clear and specific.² Under ordinary statutes defining incest, each act of sexual intercourse between parties within a degree of relationship prohibited, completes the crime of incest; and therefore an indictment which charges the criminal act to have been committed continuously through a specified period of time is to be regarded as charging several distinct offences, and is bad for duplicity.³ The relationship which exists between the

court say: "We do not hold it necessary that both parties must be guilty of the crime of incest before the guilty one can be convicted. For instance, if, in this case, the defendant was aware of the relationship between him and Mary Bell, and she was ignorant of it, he would be guilty and punishable under the statute, if the illicit intercourse was by mutual consent, although she could not have been guilty of incest because ignorant of the relationship existing between her and the defendant. Whether the defendant had sexual intercourse with his daughter, with her consent, was a question which should have been submitted to the jury, with a direction to convict, if satisfied that she consented, and to acquit the defendant if he forced her to submit."

1. *Yeoman v. State*, 21 Neb. 171. See *Hintz v. State*, 58 Wis. 496.

Stepmother and Stepson—Indiana Doctrine.—In *Baumer v. State*, 49 Ind. 544; s. c., 1 Am. Cr. Rep. 354, it is held that, in Indiana, incest is a joint offence, and if one of the parties has been tried and acquitted, this fact, if pleaded, is a bar to the prosecution of the other party for the same. The court say:

"We are referred by counsel for appellant to, and cite in support of this construction of the statute, the following authorities: Bish. Stat. Crimes, §§ 702, 721 and 731; *State v. Byron*, 20 Mo. 210; *Noble v. State*, 22 Ohio St. 541; *Delaney v. People*, 10 Mich. 241. In the last named case, the information was on a statute, the language of which so far as it affected the case in judgment, was as follows: 'If any man and woman, not being married to each other, shall lewdly and lasciviously associate and cohabit together . . . every such person shall be punished,' etc. It was held that the offence was

joint, and that both of the parties must be guilty, or neither. The indictment in the case which we are considering alleges only that the defendant 'did unlawfully have sexual intercourse with his stepmother, Augusta Baumer, then and there knowing the said Augusta Baumer to be his stepmother.' Such an allegation of the crime might have been good, according to our view of the statute, had the indictment been against a stepfather, or a parent, where the guilty participation of the other party to the act is not a necessary ingredient of the crime. But as between stepmother and stepson, where the crime is joint, and where both must be guilty, or neither, we think it is fatally defective. It follows from what has already been said, that the court erred in sustaining the demurrer to the answer of the defendant, setting up the acquittal of Augusta Baumer, the stepmother, and the other party to the alleged joint crime. In addition to the above cited authorities, we may, on this point, refer to the following: *State v. Tom*, 2 Dev. (N. C.) L. 569; *Rex v. Inhabitants*, 13 East 411; *Turpin v. State*, 4 Blackf. (Ind.) 72."

2. See *State v. Carville* (Me.), 11 Atl. Rep. 601; *State v. Dana*, 59 Vt. 614.

In an indictment for incest, an allegation that defendant "did commit fornication with," etc., sufficiently alleges carnal and incestuous intercourse. *State v. Dana*, 59 Vt. 614.

Same—Misspelling.—Indictment for incest is not bad because the word "incestuous" is spelled "incestous." *State v. Carville* (Me.), 11 Alt. Rep. 601.

3. *Barnhouse v. State*, 31 Ohio St. 39. See *State v. Lawrence*, 19 Neb. 307; 7 Cr. L. Mag. 684.

parties must be clearly shown,¹ and it must also be alleged that defendant had knowledge thereof at the time of the alleged commission of the offence;² and where the indictment is against one alone, the name and identity of the participants must be alleged and proved.³

Where a relationship, not formerly included within the prohibited degrees of consanguinity, has been added thereto by statutory provision, and sexual intercourse or marriage by persons between whom it exists pronounced incest, an indictment against

An indictment for incest contained two counts: the first charging the crime to have been committed on the first day of April, 1884; the second on the first day of April, 1882, and on divers other days and times between that date and the first day of April, 1884. On motion of the defence the district court required the district attorney to elect upon which count he proceed to trial. *Held*, no error, being two distinct offences. *State v. Lawrence*, 19 Neb. 307; 7 Cr. L. Mag. 684.

1. See *Baker v. State*, 30 Ala. 521; *Bergen v. People*, 17 Ill. 426; *Hicks v. People*, 10 Mich. 395; *State v. Laurence*, 95 N. C. 659; *Noble v. State*, 22 Ohio St. 541; *Hintz v. State*, 58 Wis. 493.

Averring Relationship.—An information for incest, charging the crime to have been committed with the daughter of defendant, sufficiently avers relationship without using the words of the statute. *Hicks v. People*, 10 Mich. 395.

An indictment, charging that the prisoner "being then and there the father of one Elizabeth B., and within the degree of consanguinity within which marriages are declared by law to be incestuous and void, and then and there knowing the said Elizabeth to be his daughter, did then and there live with the said Elizabeth in a state of adultery," is sufficient under the code. *Baker v. State*, 30 Ala. 521.

Illegitimate Daughter.—Where the indictment charged the defendant with sexual carnal intercourse with his daughter, and the proof was that the person alleged to be the daughter was an illegitimate child of defendant, there was no variance. *State v. Laurence*, 95 N. C. 659.

Stepdaughter.—An information charging that, at a certain time and place, A did have incestuous connection with B, daughter of said A and his wife C, contrary to the statute, etc., was *held* to be sufficient, after verdict, to warrant the

punishment for incest prescribed by Wis. Rev. St., § 4582. C must be assumed to be A's wife at said time. *Hintz v. State*, 58 Wis. 493.

An indictment for incest alleging the relation of stepfather and stepmother necessarily avers the existence of the mother's marriage relation to the stepfather at the time in question. *Noble v. State*, 22 Ohio St. 541.

2. *Baumer v. State*, 49 Ind. 544; s. c., 1 Am. Cr. Rep. 354; *Williams v. State*, 2 Ind. 439. See *State v. Bullinger*, 54 Mo. 142. Compare *State v. Dana*, 59 Vt. 614; *State v. Wyman*, 59 Vt. 537.

An indictment for incest averred as follows: "A, late of said county, on the first day of Dec., 1849, at the county of Adams aforesaid, unlawfully did have sexual intercourse with his daughter B. the said B then and there knowing that she, the said B, was his, the said A's, daughter." *Held*, that the indictment was bad, in not averring that A had intercourse with his daughter "knowing her to be such," the word "unlawfully" not being equivalent to that allegation. *Williams v. State*, 2 Ind. 439.

Indictment for Incest with Daughter.—An indictment of a person for incest with his daughter need not allege that he knew her to be such, unless the prohibiting statute refers to the scienter. The words "unlawfully, incestuously, knowingly, feloniously and wilfully" are sufficient. *State v. Bullinger*, 54 Mo. 142.

Averring Knowledge of Relationship.—It is *held* in *Baumer v. State*, 49 Ind. 544; s. c., 1 Am. Cr. Rep. 354, that under the statute of Indiana against incest between stepson and stepmother, each must know the relation, and an indictment against the stepson which does not allege that the stepmother knew of the relation is bad on a motion to quash.

3. See *State v. Peterson*, 70 Me. 216; *People v. Lake*, 110 N. Y. 61.

Setting Out Name—Variance.—In a trial of an indictment for incest with Etta Peterson, where proof was offered

such persons must allege that they are not lawfully man and wife by marriage contracted before the addition of the natural relationship, which they bear to each other, to the prohibited degrees of consanguinity.¹

IV. Evidence.—The general rules governing the competency and sufficiency of evidence in criminal cases are applicable to prosecutions for incest. Evidence of prior acts of indecency, or of previous familiarities between the participants, is admissible,

that the daughter's name was Mary Etta Peterson, an instruction that if the defendant committed the crime with his daughter, and she was commonly known by the name of Etta, it was sufficient to convict him, was correct. *State v. Peterson*, 70 Me. 216.

An indictment for incest described the female as "Georgiana Towne, commonly known as 'Georgiana Lake.'" It appeared that her real name was Georgiana Jeannette Lake, and that she was generally spoken of as "Nettie Lake." *Held*, no variance, there being no question as to the identity of the female. *People v. Lake*, 110 N. Y. 61.

1. *State v. Fritts*, 48 Ark. 66. In this case the court say: "The indictment . . . charged that the defendants, 'in said county of Carroll, etc., on the twentieth day of December, 1884, unlawfully, wickedly, feloniously, and incestuously did cohabit, fornicate, and each other then and there criminally and carnally know; he, the said James Fritts, then and there being a man, and she, the said Mattie Phillips, being a woman, and they, the said James Fritts and Mattie Phillips, then and there being first cousins, against the peace,' etc. The indictment . . . was quashed on general demurrer.

"Section 1578 of Mansfield's Digest reads as follows: 'Persons marrying who are within the degrees of consanguinity within which marriages are declared by law to be incestuous, or void absolutely, or who shall commit adultery or fornication with each other, shall be deemed guilty of incest.' And the next section makes the offence a felony. Section 4592, being the amendatory act of March 5, 1875, enacts that all 'marriages between parents and children, including grandparents and grandchildren of every degree; between brothers and sisters of the half as well as the whole blood; between uncles and nieces, and between aunts and nephews, and between first cousins, are declared to be incestuous and abso-

lutely void. This section shall extend to illegitimate children and relations.' The intention of the legislature was to prohibit the intermarriage of persons nearly related by blood, partly, no doubt, on account of the supposed evil consequences to body and mind resulting to the offspring of such marriages; and this intention is accomplished by declaring that if persons who are within the prohibited degrees of consanguinity marry or commit fornication or adultery with each other, they are guilty of incest. These indictments attempt to charge incest by alleging that the defendants committed fornication; and yet there is no averment that they stood not to each other in the relation of husband and wife. The fact of a legal marriage is nowhere negatived. All that is alleged may be true, and still no crime may have been committed. It will not do to assume that no legal marriage could have been celebrated between the parties; for if they were married in this State before the passage of the act, or were married since that date in any State or foreign country of which they were citizens or subjects, and in which marriages between cousins-german are not forbidden, then their union was not unlawful, and it is not invalidated by the law. If an incestuous marriage has, in fact, been contracted, the indictment should charge that James Fritts incestuously did intermarry with and take to be his wife, Mattie Phillips, the cousin of the said James Fritts, they being descended from the same grandfather, etc. *Hutchins v. Com.*, 2 Va. Cas. 331; 2 Whart. Prec. (4th ed.), form 1000. If, on the other hand, these cousins had been guilty of an improper intimacy, without any pretence of being married, incestuous adultery should have been charged, if one or both were married, or incestuous fornication if both were single persons, and the indictment should have shown with certainty that Mattie Phillips was not the wife of

for the purpose of strengthening the proof of the particular act charged.¹ But where only one participant is indicted, and the female is the prosecuting witness, it is incompetent for the prosecution to prove prior acts of indecency or sexual intercourse by

James Fritts. Giving the two defendants different names does not carry a necessary implication that they are not man and wife."

1. *State v. Markins*, 95 Ind. 464; s. c., 48 Am. Rep. 733; *People v. Jenness*, 5 Mich. 305.

Evidence of Other Like Acts.—In *State v. Markins*, 95 Ind. 464; s. c., 48 Am. Rep. 733, the court say: "It is a rule of elementary logic, as well as of rudimentary law, that evidence, which tends to establish facts rendering it antecedently probable that a given event will occur, is of material relevancy and strong probative force. It is more probable that incestuous intercourse will take place between persons who have conducted themselves with indecent familiarity than between those whose behavior has been modest and decorous. It cannot be doubted that it is competent to show the previous intimacy between the persons charged with the crime of incest, their behavior towards each other, and their acts of impropriety and indecency. If it be proper to show acts of indecent and lascivious character, then surely it must be proper to show the act to which all such indecent and lascivious acts lead, and in which they will often culminate. It cannot be *held*, upon any principle of law or logic, that the State may show acts of improper intimacy up to the very act of sexual intercourse, and then must stop, although the sexual intercourse is but the usual result of the previous lascivious conduct. If the course of conduct tends to show that the incestuous intercourse charged in the indictment did take place, then surely the culminating act of sexual commerce must be evidence of a convincing character. It would be a singular rule that would admit evidence of lascivious conduct and yet exclude evidence of the act, which of all the series supplies the strongest evidence that the crime charged was one likely to be committed. If the rule were that the State might show previous lascivious conduct, but must not show an act of sexual intercourse, we should have the singular anomaly of a legal rule rejecting evidence simply because of its

strength and importance. The usual rule of common sense, as of law, is, that the more material the evidence, and the stronger its probative force, the greater the reason for holding it to be competent. The intercourse between the sexes which constitutes the prime element in the offences of adultery, fornication, incest and seduction, can only take place by the concurrence of two persons of opposite sexes, and the previous lascivious conduct of the parties is evidence of their disposition to indulge their lustful passions. The probability that a woman will yield to the embraces of a man to whom she has before submitted, or from whom she has for a long time allowed improper familiarities, is much stronger than if it appear that no intimacy had existed between the parties, and the woman's conduct had always been modest and discreet. The disposition of the parties involved in the crime becomes an element of importance, and the disposition of the woman is shown by her conduct towards the man with whom she joins in violating the law. It is but natural to infer that a woman whose conduct has been immodest and licentious will be more likely to sin than one whose conduct has been modest and discreet. A truth recognized by the ordinary sense and experience of mankind was well expressed when it was said, 'You will more readily infer assent in the practised Messalina, in loose attire, than in the reserved and virtuous Lucretia.' The general rule undoubtedly is, that one crime cannot be proved in order to establish another independent crime, but this rule does not apply to cases where the chief element of the offence consists in illicit intercourse between the sexes. The decisions all agree that the cases growing out of illicit commerce between the sexes are not within the general rule. In the case of *People v. Jenness*, 5 Mich. 305, it was *held* that evidence of other acts of sexual intercourse was competent in prosecutions for incest. The case was fully argued, and the opinion is an able one. We quote from it the following: 'Previous familiarities, not amounting to actual inter-

her with another than defendant;¹ prior statements by her, however, as to her relations with defendant, are admissible.²

Where the commission of the sexual act is denied, the testimony of medical experts, as to the female's condition soon after the alleged time of the offence, is competent.³ To prove the existence of the relationship between the parties necessary to constitute the crime, admissions or statements by the defendant with reference thereto are admissible.⁴

The question whether the evidence is sufficient to support a conviction is, as a general rule, to be determined solely by the jury; but, as in other felony cases, this rule has its exceptions, made with reference to certain kinds of evidence; and courts uniformly refuse to sustain convictions for incest which are entirely unsupported except by uncorroborated confessions or admissions made by the defendant.⁵ It is thought that in the absence of a

course, but tending in that direction, must have a strong bearing in all cases of this kind, and we can discover no just principle on which they could have been excluded, without setting at defiance the common sense of mankind. Such evidence was given in this case by the father and mother of the girl, without objection from the defendant; and if such familiarities may be shown because they tend to prove actual intercourse, or to corroborate other evidence of such intercourse, upon what principle can previous actual intercourse be rejected, when offered for the same purpose? It is the principal and most important act of familiarity, to which the others only tended."

1. *Kidwell v. State*, 63 Ind. 384. See *State v. Miller*, 65 Iowa 60.

Declaration of Prosecutrix.—On a trial of incest, declarations of the prosecuting witness that she had become pregnant by sexual intercourse with another than the defendant are irrelevant and inadmissible. So, also, inadmissible any other evidence impeaching her reputation for chastity. *Kidwell v. State*, 63 Ind. 384.

2. **Where the woman was examined by defendant in his behalf**, and testified that she never had sexual intercourse with him, and an affidavit was presented by which proceedings in bastardy had been instituted, which she stated she had signed, *held*, proper on re-examination, to ask her if the signing was voluntary. *Yeoman v. State*, 21 Neb. 171.

3. **Testimony of Medical Experts as to Condition of Female.**—At the trial of an indictment for incest, alleged to have been committed with a girl thirteen

years old, medical experts testified as to the condition of the private parts of the child at the time of an examination made by them about six weeks after the time of the alleged offence. *Held*, that nothing being shown to the contrary, the condition of the child at the time of the examination must be assumed to have been the same as immediately after the offence was committed, and the evidence was competent. *Com. v. Lynes*, 142 Mass. 577; s. c., 56 Am. Rep. 709; 9 Cr. L. Mag. 68.

4. *Bergen v. People*, 17 Ill. 456; s. c., 65 Am. Dec. 672; *People v. Jenness*, 5 Mich. 305.

5. *Bergen v. People*, 17 Ill. 426; s. c., 65 Am. Dec. 672. See *Yeoman v. State*, 21 Neb. 171.

Proof of the Corpus Delicti.—Where in a prosecution for incest it was proven that the person with whom the incestuous intercourse was alleged to have been had was of the age of sixteen years; that she resided at home with her parents; that the accused also resided with the family; that they were often together alone; that she had no suitor and kept company with no other person; that the relation of uncle and niece existed between them; that she became pregnant, and when her pregnancy was discovered the accused confessed the paternity of the child which was afterwards born, admitted the intercourse and settled the claims of the mother in satisfaction of the proceedings in bastardy, and tried to induce a physician to produce an abortion,—it was *held* that the *corpus delicti* had been sufficiently proven to require the submission of the case to a trial

controlling statute a conviction may be had on the uncorroborated testimony of the other participant in the crime; but such testimony is to be treated as that of an accomplice, and considered with due caution.¹

jury. *Yeoman v. State*, 21 Neb. 171.

Same—Confession of Accused Out of Court.—In *Bergen v. People*, 17 Ill. 426; s. c., 65 Am. Dec. 672, the court say: "This was an indictment for incest . . . The court refused to

instruct the jury on the part of the defendant that he could not be convicted upon his mere confessions made out of court, uncorroborated by facts or circumstances. The elementary books generally state the law to be that confessions alone are sufficient to convict; yet it is believed no court would permit a conviction for felony upon mere confessions made out of court, without some proof that a crime had in fact been committed, or of circumstances corroborating and fortifying the confession. The criminal law requires proof sufficient to satisfy the reason and judgment, beyond a reasonable doubt, of the guilt of the accused; and anything short of this will not justify a conviction. MR. JUSTICE BLACKSTONE, in speaking of confessions not made upon due caution and deliberation, and to unauthorized persons, says: 'They are the weakest and most suspicious of all testimony, ever liable to be obtained by artifice, false hopes, promises of favor, or menaces; seldom remembered accurately, or repeated with due precision; and incapable in their nature of being disproved by negative evidence.' And the same author approves the rules laid down by Sir Mathew Hale, never to convict of larceny till the goods are proved to have been stolen; nor to convict of murder or manslaughter unless the body be found dead. 4 Bl. Com. 357, 358, 359. Experience has shown that confessions have sometimes turned out unfounded; that the weak, to avoid apparent impending peril, and under the force of surroundings exciting apprehensions and imaginary dangers, have been induced to state untruths, which have produced their conviction of supposed crimes. The humanity of the law will not tolerate a general rule which in its operation endangers the security of innocence, and is unsafe to life or liberty, in the administration of the law. Confessions proved are necessarily weak or strong evidence,

according to the circumstances attending the making and the proving of them; and we think the only safe general rule is to require some other evidence corroborative of their truth. Proof that the crime has been committed by someone is necessarily corroborative of a confession by the defendant that he committed the crime; for it establishes a fact essential to the guilt of the accused, and which would be included in the crime confessed. A great variety of facts usually attend, or are incidentally connected with, the commission of every crime. Proof of any number of these facts and circumstances, consistent with the truth of the confession, or which the confession has led to the discovery of, and which would not probably have existed had the crime not been committed, necessarily corroborate it, and increase the probability of its truth. In this case, from the nature of the crime, proof of the *corpus delicti*, independently of the confession, except by the guilty participant, and in fact without proving also the defendant guilty of the crime charged would be impossible. There is necessarily no victim, nothing visible or tangible, the subject or consequence of the wrong, capable of ascertainment and of proof. To require it would be to require, independently of the confession, proof of defendant's guilt. The corroborative evidence, therefore, must consist of facts or circumstances, appearing in evidence, independent of the confession and consistent therewith, tending to confirm and strengthen the confession, without proof *aliunde*, mere confessions that the crime charged has been committed by some one, or of some fact or circumstance confirmatory of the confession, a party accused of crime cannot be found guilty, unless such confession be judicial or in open court. The instruction should therefore have been given."

1. *State v. Dana*, 59 Vt. 614. Compare *Dodson v. State* (Tex. App.), 6 S. W. Rep. 548; *Mercer v. State*, 17 Tex. App. 452.

Testimony of Accomplice—What Constitutes Accomplice.—In *Mercer v. State*, 17 Tex. App. 452, it was held that if a woman consents to the crime—

of incest she is an accomplice and a conviction cannot be had upon her unsupported testimony; and that she must be deemed to have consented where she testifies that the crime was committed between her father and herself weekly for a period of eight years.

But in *State v. Dana*, 59 Vt. 614, the court say: "The court very fully instructed the jury as to what facts would constitute the complainant . . . a voluntary accomplice in the crime charged, and that, if they found such facts upon the evidence, then she was an accomplice, and properly advised the jury that although they had a right to convict the respondent upon the uncorroborated testimony of an accomplice implicated in the crime charged, if it satisfied them of his guilt beyond a reasonable doubt, yet they ought not to convict him upon the testimony of an accomplice alone, unless they found, in the story of the accomplice itself, such inherent evidence of truthfulness that they were forced to believe it; and that they ought to proceed with the greatest caution in rendering a verdict of guilty upon the uncorroborated statement of an accomplice; that such a witness is not entitled to the same amount of credit as a witness who is not clouded by any such character; and that ordinarily, when the testimony of an accomplice becomes material to establish the guilt of a respondent, there should be corroboration of it in some material respect—in some respect that goes to the essence of the crime itself—before it would be safe to render a verdict of guilty. The charge in other respects fully advised the jury as to the caution they should exercise in giving credit to an accomplice in a crime; and that, ordinarily, jurors should cast about for corroborative proof before they convict upon the testimony of an accomplice. There is no rule of common law, nor of the statute law of this State, that a person shall not be convicted on the testimony of an accomplice unless corroborated by other evidence. In some States such a rule may exist, either from a code or statute law. It is always a question for the jury who is to pass upon the credibility of the accomplice, as they must upon that of every other witness. His statements should be received with great caution, and the court, as the court did in this case, should always so advise. Yet if the testimony of the accomplice obtains full credit

with the jury and they are fully convinced of the truth, they should give the same effect to his testimony as should be allowed to an unimpeached witness who is in no way implicated in the offence. Such testimony, if believed by the jury, will warrant a conviction. In all cases where the prosecution depends upon the uncorroborated testimony of an accomplice, the court, as before stated, should advise great caution on the part of the jury in giving credit to it; but the jury are not to be advised or instructed as matter of law that the prisoner in such case must be acquitted. It is not the duty of the court to advise the jury as to their conclusions upon the evidence which has been given on trial for them to consider and weigh in finding whether the respondent is guilty or not guilty of the offence charged. The accomplice is a competent witness, and his testimony must receive such credit and weight as the jury find it entitled to. If the jury find his testimony to be true the consequence is inevitable; it needs no confirmation from another witness. When his testimony is believed by the jury it is unquestionably sufficient to establish the facts as to which he testifies without any confirmation. It is not for the court to determine the credibility of the accomplice; and the court cannot, as matter of law, advise the jury that they must acquit the respondent by reason of lack of credibility of the respondent, when his testimony is not corroborated by other evidence."

Testimony of Accomplice.—It was entirely upon the testimony of the defendant's daughter, with whom the incestuous intercourse is alleged to have occurred, that this conviction was obtained. It is contended by defendant's counsel that she was an accomplice in the offence, and that her testimony being uncorroborated in the manner required by law, the conviction is not sustained by sufficient evidence. If the witness knowingly, voluntarily and with the same intent which actuated the defendant, united with him in the commission of the crime charged against him, she was an accomplice, and her uncorroborated testimony cannot support the conviction. *Whart. Cr. Ev.*, § 440; *Freeman v. State*, 11 Tex. App. 92. But if, in the commission of the incestuous act, she was the victim of force, threats, fraud or undue influence, so that she did not act voluntarily, and did not join in the commis-

INCH.—See note 1.

INCIDENTAL.—See note 2.

sion of the act with the same intent which actuated the defendant, then she would not be an accomplice, and a conviction would stand, even on her uncorroborated testimony. *Watson v. State*, 9 Tex. App. 237; Whart. Cr. Ev. § 440.

Same—Michigan Doctrine.—In the absence of some statute permitting this, it is not clear how one who is jointly guilty of an offence can complain of it. If the crime alleged to have been committed was committed forcibly, and without the assent of the witness, it was rape, not incest; if by the consent of the witness, she was guilty of incest as much as the respondent. *People v. Jenness*, 5 Mich. 305; *People v. DeGroat*, 39 Mich. 124.

Evidence Impeaching Witness.—In *Kidwell v. State*, 63 Ind. 384; s. c., 3 Am. Cr. Rep. 236, to impeach the complaining witness' testimony as to a statement to a physician about her pregnancy, the physician was asked to state whether the complainant told him that a young man from the country was the father of the child. *Held*, that the question was immaterial and irrelevant, as her pregnancy and the paternity of the child did not affect the guilt or innocence of the defendant.

The court say: "The question was both irrelevant and immaterial to the issue. The fact that the girl was pregnant, and that the father of her child was a young man from the country, neither tended to prove nor disprove the guilt or innocence of the defendant as charged. The question of the parenthood of the child is not involved. The law does not experiment in impeachment as to facts not relevant to the issue in the case. *Shields v. Cunningham*, 1 Blackf. (Ind.) 86; *McIntire v. Young*, 6 Blackf. (Ind.) 496; *Glenn v. State*, *ex rel.*, 46 Ind. 368."

Same—Reputation, Virtue and Chastity.—In *Kidwell v. State*, 63 Ind. 384; s. c., 3 Am. Cr. Rep. 236, the appellate offered to prove by a competent witness that the prosecuting witness had, from the time she was fourteen years old up to the time of the trial, borne a bad reputation for virtue and chastity. An objection was sustained to this evidence. The court say: "This ruling is correct. Her reputation for virtue and chastity was not material to the charge of incest, and the evidence was

not proper to impeach her general character for truth and veracity. *Fogleman v. State*, 32 Ind. 145; *Fletcher v. State*, 49 Ind. 124; *Farley v. State*, 57 Ind. 331; *Richie v. State*, 58 Ind. 355; *Rawley v. State*, *ex rel.*, etc., 56 Ind. 433."

1. The hydraulic inch is a circle whose diameter is an inch. *Schuykill Nav. Co. v. Moore*, 2 Whart. (Pa.) 493.

2. **Incidental School Purposes.**—A school district was authorized by statute to assess a tax not exceeding \$300 annually "to keep the school house in repair, and furnish it with fuel and appendages." At an annual meeting of the board of the district taxes were voted as follows: "For the payment of teachers' wages in the district, \$650; for the payment of indebtedness of said district incurred for building school house, \$900; for incidental purposes, \$50." It was *held* that the tax of \$50 for "incidental purposes" was a valid exercise of the power conferred by the statutory provision above quoted. Said the court: "It might be more precise, in voting a tax for these purposes, to say for 'repairs, fuel and appendages'; but the words for 'incidental purposes' must, we think, be construed to mean the same thing." *State v. Wolfrom*, 25 Wis. 468.

Costs Incidental to the Sale of Land by a Tenant for Life Under a Statutory Power.—By the English Settled Land act of 1882, which authorizes the sale of settled land by a tenant for life, it is enacted that the "capital money arising under the act, subject to payment of claims properly payable thereout, and to application thereof for any special authorized object for which the same was raised, shall when received" be applied to the payment, *inter alia*, "of costs, charges and expenses of or incidental to the exercise of any of the powers" conferred by the act. Said the court, in a case arising under this provision: "It is to be observed that what is allowed is not merely the costs, charges and expenses of, but also those 'incidental' to the exercise of any power or provision of the act. I have to determine what force is to be given to the word 'incidental.' It seems to me that the meaning is that the tenant for life is to have not merely costs, charges and expenses which directly and neces-

sarily arise out of the powers or provisions of the act, but also those which, without being incurred as a direct or necessary consequence of that exercise, are incurred casually and incidentally in the course of that exercise. I will put this case: A tenant for life, being minded to sell an estate under the powers of the act, advertises it for sale; thereupon the remainder man brings an action to restrain him from proceeding with the sale, and obtains an injunction. At the trial the action is dismissed with costs. These costs would be as between party and party. Is the tenant for life entitled to have paid him out of the capital money the difference between those costs and the costs as between solicitor and client? I think he is. These costs may be described as incidental to the exercise of the powers of sale. The remainder man improperly interposed an obstacle in the way of the exercise of that power, and in the removal of the obstacle certain costs were incurred, and I see no reason in fairness why the tenant for life should not have those costs." *Llewellyn v. Williams*, 58 L. T., N. S. (Ch. Div.) 152.

Injury by an Event Incident to Navigation.—The United States Government chartered a boat for the purpose of carrying its soldiers, etc. By the terms of the charter party the government agreed to make compensation to the owner of the boat in case of her injury or destruction "by any event not incident to the navigation of the river or rivers on which she may be employed." It was *held* that under this agreement the government was liable to the owner for a loss occasioned by the carelessness of the officers of the government in loading the boat. Said **ATTY. GEN. HOAR**: "I think the words 'injury by an event incident to navigation' mean substantially the same as the words 'perils of navigation,' or 'dangers of the seas,' or 'dangers of navigation.'" *Steamer Wathan*, 13 Opin. Atty. Gen. 119.

Labor Incident to a Manufacturing Process.—Sec. 73 of the act "to amend the laws relating to labour in factories," 7 & 8 Vict., ch. 15, provides that "any person who shall work in any factory . . . either in any manufacturing process, or in any labor incident to any manufacturing process . . . shall be deemed . . . to be employed therein within the meaning of the act." A, a manufacturer of cotton sewing thread, was the owner of a

factory at M, and another at L. At the factory at M cotton yarns were doubled into sewing thread, in hanks ready for the wholesale market. For the retail dealers and small consumers, these hanks were sent to the factory at L, where the thread was wound on to bobbins. It was *held* that the winding at L was "labor incident to a manufacturing process," within the meaning of the act, because "it brought cotton thread into a state in which it was more salable." *Haydon v. Taylor*, 4 Best & S. 519.

A Matter or Thing Besides What Is Incident to a Sale and Conveyance.—The Stat. 55 Geo. 3, ch. 184, enacts that "where any deed or instrument, operating as a conveyance on the sale of any property, shall also contain any other matter or thing besides what shall be incident to the sale and conveyance of the property sold, or relate to the title thereto; every such deed or instrument shall be charged, in addition to the duty to which it shall be liable as a conveyance on the sale of property, and to any progressive duty to which it may also be liable, with such further stamp duty as any separate deed, containing the other matter, would have been chargeable with, exclusive of the progressive duty." It was *held* that a deed purporting to surrender a lease for lives, in consideration of 120*l.*, and of a new lease to be granted to the surrenderor for his life, did not require an agreement stamp in addition to the *ad valorem* stamp; the stipulation for a new lease not being a "matter or thing besides what is incident to the sale and conveyance." *Doe dem. Phillips v. Phillips*, 11 Ad. & El. 796.

A Tax Not an Expense Incident to the Issue of Bonds.—In pursuance of a contract made in 1854, a city loaned a railroad company \$4,500,000, having raised the money by issuing its bonds to that amount. In consideration of the loan, the railroad company executed a mortgage of its property to the city, conditioned, *inter alia*, that the company should place in the city treasury, at a specified number of days before each instalment of interest on the city's bonds should fall due, "interest at the rate of six per cent. per annum on the whole amount of the bonds issued," which was the amount that the city had to pay as interest to its bondholders, and that the company should pay "all and any expense incidental to the issue of any of the bonds as aforesaid." In

INCLOSE.—See note 1.

INCLUDE.—See note 2.

1862 Congress passed an excise law, levying an income tax of three per cent. on all sums due for interest by railroad companies, which sum it required the companies to withhold from their creditors, and pay to the government, making, by a subsequent act—one of June, 1864—such payment a discharge, in terms, from their creditors for the amount, "except where the companies might have contracted otherwise." But no such tax was laid on the bonds of cities, nor did the act require them to withhold anything from their creditors. It was *held* that the contract of the railroad company to pay "all and any expense incidental to the issue of any of the bonds," did not oblige it to pay this tax out of its own money, and so to pay the full interest to the city discharged of the tax. Said the court: "To carry out the arrangement between the parties required a considerable expenditure of money for printing, clerk hire, stationery, advertising, and similar matters. These expenses were incidental to the issue of the bonds, and it was right and proper that the railroad company—the party to be benefited by the transaction—should pay them. And it agreed to do so; but this agreement cannot be extended to cover the tax in question, for in no sense is it an expense incidental to the issue of the bonds. At the date of the mortgage (1854) there was no tax of the kind, nor any reasonable expectation of one. If there had been, it is easy to see that appropriate words applicable to the subject would have been used. But the words which were used did not relate to the subject of taxation at all, and it is very certain that the possibility of taxation was not in the contemplation of either of the parties to the mortgage." *Baltimore v. Baltimore R. R. Co.*, 10 Wall. (U. S.) 543.

1. **Inclosed Building.**—A subscription to the building of a church to be paid when the building is inclosed, is due and may be collected when the main building is inclosed, though some towers connected with the building have not been inclosed. *Snell v. Trustees*, 58 Ill. 290.

Inclosed Ground.—In construing a direction by a testator that certain lots should be inclosed with an iron fence,

the court said: "To inclose a lot is to shut it in on all sides. A field with a fence on three sides only could not, in any proper sense, be spoken of as inclosed, unless the fourth side was bounded by some natural object, or occupied by some artificial erection, which rendered a fence impracticable or unnecessary." *Hall's App.*, 112 Pa. St. 42. See also *Grundy v. State*, 53 Ind. 528; *Taylor v. Welbey*, 36 Wis. 42.

The Stat. 5 Geo. 3, ch. 14, § 3, provides for the punishment of any person convicted of fishing in any water in any "inclosed ground which shall be private property," with certain specified exceptions. In an action under this act it appeared that the plaintiff owned a tract of land and so much of the soil of a river bordering on one side thereof as lay between the bank and the *flum aquæ*. All sides of the tract, except that which abutted on the river, were separated from the adjacent lands by a fence. But there was no fence on the river side, nor down the *flum aquæ*. The defendant stood upon the tract, and caught fish from the river. It was *held* that there was no fishing in water in "inclosed ground," within the meaning of the act. Said GIBBS, C. J.: "This is property which, from the nature of the thing, is not and cannot be inclosed." *Lisle v. Brown*, 5 Taunt. 440; s. c., 1 Chitty's Gen. Pr. 179; 1 Marsh. 127.

2. The interpretation clause of English statutes sometimes provides that a certain word shall "include" a variety of things. The courts hold that "this phrase is thus used by way of extension, and not as giving a definition by which other things are to be excluded. *R. v. Kershaw*, 6 E. & B. 1007; s. c., 26 L. J., M. C. 23. Thus where the Merchant Shipping act, 1854 (17 & 18 Vict. ch. 104), provided that 'ship' should include every description of vessel used in navigation not propelled by oars, it was *held* that a vessel propelled by oars was not excluded. *Ex parte Ferguson*, L. R., 6 Q. B. 280, 291. It was declared by the Petroleum act, 1868 (31 & 32 Vict. c. 56), that 'petroleum' should include all such rock oil, etc., as gave off an inflammable vapor at a temperature of less than 100 degrees Fahrenheit. But petroleum itself was

INCOME—INCORPOREAL HEREDITAMENTS.

INCOME.—See LEGACIES; REMAINDERS; TRUSTS AND TRUSTEES; WILLS.

INCOMPATIBLE.—See note 1.

INCOMPETENCY.—See note 2.

INCORPOREAL HEREDITAMENTS.—(See ANNUITY; CEMETERIES; CORPORATIONS; EASEMENTS; FERRIES; FISH AND FISHERIES; FRANCHISES; LANDLORD AND TENANT; LEASE; REMAINDERS, etc.)

1. Definition, 352.
2. Purely Incorporeal, 354.
 - a. Definition, 354.
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3. Mixed Incorporeal, 360.

1. **Definition.**—An incorporeal hereditament is a right issuing out of a thing corporate (whether real or personal), or concerning, annexed to, or exercisable within the same.³

held to be within the act, even if it did not give off an inflammable vapor below the specified temperature. *Jones v. Cook*, L. R., 6 Q. B. 505. To all such cases the words used by BLACKBURN, J., in reference to the Metropolis Management act, 1855 (18 & 19 Vict. ch. 120), have a forcible application. 'It does not follow that because the expression "new street" is to include certain other things, we are to say it does not include its own natural meaning.' *Pound v. Plumstead Board of Works*, L. R., 7 Q. B. 194." *Wilberf. Stat. Law* 299. See also *Worsley v. South Devon Ry. Co.*, 16 Q. B. 539; *Nutter v. Accrington Local Board*, L. R., 4 Q. B. Div. 375.

1. **Absolutely Incompatible.**—In a prosecution for murder the court refused to give the following instruction: "In order to justify the inference of legal guilt from circumstantial evidence, the existence of the exculpatory facts must be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt." On appeal, it was *held* that the words "absolutely incompatible" contained in the instruction implied that the proof of the defendant's guilt must be established beyond the possibility of a doubt, and for that reason the court did not err in refusing the instruction. *State v. Rover*, 13 Nev. 17.

2. **Incompetency as Applied to Guardianship.**—The New York Rev. Stat. authorize the renewal of a testamentary guardian by the surrogate having jurisdiction in the premises on the ground of his "incompetency," or of his wasting the real or personal estate of his ward, or of any misconduct in relation to his duties as guardian. Said the court, in construing this provision: "The word 'incompetency,' as applied to guardianship, is one, in my judgment, of broad signification and comprehensiveness, like the word unsuitableness, as applied to a trustee. In my opinion it has relation, not merely to the mental condition and moral status of a testamentary guardian, but imports that, in the interests of the child, in respect of nurture, care, education and safety, the court may take into consideration the relative, social and pecuniary position of the guardian and the infant." *Damarell v. Walker*, 2 Red. Sur. Ct. (N. Y.) 198.

3. *Anderson's Law Dict.* 509, *citing* 2. Bl. Com. 20: "It is not the corporate thing itself, which may consist in lands, houses, jewels, or the like; but something collateral thereto, as a rent issuing out of those lands or houses, or an office relating to those jewels. In short, as logicians speak, corporeal hereditaments are the substance which may always be seen, always handled: incorporeal hereditaments are but a sort

Incorporeal hereditaments comprise certain rights and privileges connected with land, but belonging to different persons from the proprietors of the land. They are not of the substance, cognizable by the senses, but exist merely in idea.¹

Corporeal hereditaments are fixed in their definition by the legal maxim that at common law they lie in livery and not in grant. The phrase therefore includes only lands regarded as a physical object, and legal estates of inheritance in possession. . . . All other hereditaments . . . are included under the term incorporeal hereditaments.² An incorporeal hereditament is anything

of accidents, which inhere in and are supported by that substance, and may belong or not belong to it, without any visible alteration therein. Their existence is merely in idea and abstracted contemplation; though their effects and profits may be frequently objects of our bodily senses, and indeed, if we could fix a clear notion of an incorporeal hereditament, we must be careful not to confound together the profits produced and the thing or hereditament which produces them. 2 Bl. Com. 20.

1. Walker's Am. Law (9th ed.) 312. "In *England* they make a very important portion of real property. No less than eleven different kinds are enumerated by Blackstone; namely, advowsons, tithes, offices, dignities, franchises, corodies, pensions, annuities, commons, ways and rents. But this list is much reduced in this country. For in regard to the first two, namely, advowsons and tithes, it is sufficient to say that they grow exclusively out of the English church establishment, which, happily, has no existence in this country; and we are thus relieved of a great variety of perplexing questions. In regard to the next six, namely, offices, dignities, franchises, corodies, pensions and annuities, they have, in the first place, no necessary connection with realty; and in this country they are not, and cannot be hereditary. On the contrary, they are strictly personal in their character; and with the exception, perhaps, of annuities, in some cases are neither transferable nor descendible. Not only express provisions of the federal and state constitutions, but the whole spirit and tendency of our institutions are opposed to the English doctrines and practice in regard to these hereditaments, if such they can be called in this country. Again, as to the English right of common, which is the right that one man has to feed his

cattle, dig turf, cut wood or take fish on the lands of another, it originated under the manorial establishments of England, where the lord of the manor was in the habit of setting apart certain portions to be used in common by tenants and copyholders. It there forms quite a diffusive and intricate branch of the law. It has also prevailed in some of the older States of the Union. But, in the sense of the English law, this right of common is not known here." Walker's Am. Law (9th ed.), 312, 313.

2. Challis on Real Prop. 36, 37.

Incorporeal hereditaments are said at common law to lie in grant, because they would pass by the mere delivery of a deed purporting to convey them, and the word grant was the most appropriate (though not the only) word of conveyance for that purpose.

The importance of this distinction between corporeal and incorporeal hereditaments has been diminished by 8 & 9 Vict., ch. 106, § 2, which enacts that after 7th October, 1845, all corporeal tenements shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery. Challis on Real Prop. 37.

In principle there is no difference as to the acquisition of rights between corporeal and incorporeal objects. But with regard to possession alone, as affecting title, a difference is introduced by reason of the statute of limitations. A grant of land conferring an entire title is not presumed from mere possession short of the statutory period. The statute makes all the provisions deemed necessary for quitting possession of a corporeal nature, thereby removing these cases from the operation of the common law. Conclusive presumption of title to an incorporeal hereditament is afforded by twenty years of adverse, exclusive, undisturbed possession. Anderson's Dict., *citing* *Coronett v. Phudy*, 80 Va. 714.

the subject of property which is inheritable, and not tangible or visible.¹

2. Pure Incorporeal Hereditaments—*a. Definition.*—Incorporeal hereditaments may be pure or mixed. Pure incorporeal hereditaments are such that at no time can become corporeal hereditaments. Mixed incorporeal hereditaments are such that at one time they may be incorporeal hereditaments, and at others corporeal hereditaments.²

b. Advowson.—An advowson is the right of presentation to a church or ecclesiastical benefice.³

He who possesses this right is called the patron or advocate. When there is no patron, or he neglects to exercise his right within six months, it is called a lapse, and a title is given to the ordinary to collate to a church. When a presentation is made by one who has no right, it is called a usurpation.⁴

c. Corodies.—A corody is an allowance of meat, drink, money, clothing and such like necessities for sustenance. An allowance from an abbey or a house of religion to one of the king's ser-

1. 1 Bouv. Dict. 696.

Kent says: "Incorporeal tenements and hereditaments comprise certain inheritable rights, which are not, strictly speaking, of a corporeal nature, or land, although they are, by their own nature, or by use, annexed to corporeal inheritances and all rights issuing out of them or concern them." 3 Kent Com. 402.

American authors have treated the subject in a different manner. Thus Kent treats corporeal hereditaments under the following heads: (1) Commons; (2) Ways, easements and aquatic rights; (3) Offices; (4) Franchises; (5) Annuities; (6) Rents. 3 Kent Com. 402.

Walker, in his work on elementary law, as (1) Public Easements, under which are included: 1. Public commons; 2. Public roads; 3. Public rivers.

(2) Private Easements, under which he treats: 1. Land; 2. Water; 3. Air; 4. Light.

(3) Fixtures. Walker Am. Law (9th ed.) 312.

Washburn treats them as: (1) Franchises; (2) Rents; (3) Easements. 2 Washburn Real Prop. (4th ed.) 272.

2. The following illustration, taken from Washburn on Real Prop. 271, illustrates these two kinds of incorporeal hereditaments: "A man may have an estate in possession in lands during his life. B may have a right to these on the death of A, or may have it upon the condition that he survives A, or that A die without children. But he cannot

touch or handle this interest; and if he sells it, he can only pass it by deed, since he has no present seisin which he can deliver to the purchaser. Here A has a corporeal and B an incorporeal property in the same land, though B's interest in such a case, so far as it is a reversion or a vested remainder, is considered as of a mixed nature, at one time incorporeal, but becoming corporeal by being united with the possession at the death of A. Hereditaments may be purely incorporeal, as for example, what are called rights of common, or rights of way appurtenant to other lands. Thus, A may own Black-acre, and have a right to go upon B's adjacent land to cut trees to burn on his own, or to put across B's land to reach his own. Now this is a simple right which he cannot sell and deliver over to a stranger separate, from the land to which it is appendant—nothing, in other words, corporeal or tangible. And yet it may be an inheritable right which will survive to his heirs, and in which he may have an estate in fee simple, or it may be for his life only; in which case he would have a life estate in it, in the same manner as he might have in corporeal property. But in no event can an incorporeal hereditament like this become a corporeal one." Citing Wm. Real Prop. 265.

3. Anderson's Law Dict., 2 Bk. Com. 20.

4. Bouv. Dict. Advowsons belong purely to the ecclesiastic law in force in England, which never had any force

vants who dwells therein of meat and other sustenance. They are now obsolete.¹

d. Commons—(See COMMON).—A common is defined to be a profit which a man hath in the lands of another, as to feed his beasts thereon, to catch fish, to cut wood, etc.

The right existed between the owner of the manor and his feudal tenants, for the encouragement of agriculture.

The tenant's right was to pasture his cattle, provide necessary food and fuel for his family and repair his implements of husbandry from the lord's land.²

These rights were generally known as common of pasture,³ common of estover,⁴ common of piscary,⁵ common of

in the United States, and the meaning and use of the term to us has only a historical value.

1. Bouv. Law Dict.

2. Anderson's Law Dict., citing 2 Bl. Com. 32; 3 Kent Com. 403.

The rights of common are little known in this country, and probably do not exist in any of the northern or western parts of the United States which have been settled since the revolution. 3 Kent Com. 405.

3. **Common of pasture** is the right of feeding one's beast on another's lands. It is either *appendant*, *appurtenant*, because of *vicinage*, or in *gross*. Bouv. Dict.

Commons of pasture were *appendant* when regularly annexed to arable lands for the support of commonable beasts (beasts of the plough or which manure the ground); *appurtenant* when annexed to lands in other lordships for the support of all kinds of animals, and arose neither from necessity nor from any connection of the times; *in gross*, or *at large*, when annexed to a man's person by grant to him and his heirs; because of *vicinage* when the inhabitants of adjoining townships intercommoned. Anderson's Law Dict.

It is believed that there has been no adjudicated case involving the common of pasture in this country for half a century.

The cases of *Western University v. Robinson et al.*, 12 S. & R. (Pa.) 29 (1824), and *Carr v. Wallace*, 7 Watts (Pa.) 394 (1832), were both in reference to one hundred acres of land in the town of Allegheny, Pa. (now constituting a park in the central part of the city), in which the State in 1787 created the right of common of pasture in the purchasers of inlots in the plan of lots laid out and sold by the State for the

purpose of raising money with which to pay the public debts. In 1819 the legislature, without the consent of the owners of these lots, granted fifty acres of these commons to the University, but the supreme court held that the State had the right of soil, subject to the right of common, which latter right the owners could release or modify at pleasure, with the concurrence of the legislature. Some three years later, at the request of a large number and majority of the lot owners, the legislature granted ten acres of the same common to trustees representing the Presbyterian church in the United States, for the use of a theological seminary.

After the lapse of several years, during which more than \$25,000 had been expended in improvements, one Carr, who had acquiesced in this disposition of the common ground, by suit in court questioned the validity of the grant to the trustees. The supreme court held that by failing to complain at the proper time he had approved what had been done. Anderson's Law Dict.

4. **Common of estover** is the liberty of taking necessary wood for the use of furniture of a house or farm from another man's estate. This right is inseparably attached to the house or farm, and is not apportionable. It is to be distinguished from the right to estovers which a tenant for life has in the estate he occupies. Bouv. Dict. See *ESTOVERS*, 7 Am. & Eng. Ency. of Law, 34.

Common of estovers may be equally *appendant* or *appurtenant*. 3 Kent Com. 405.

5. **Common of piscary** is the liberty or right of fishing in the water covering the soil of another person, or running through another man's land. A common of fishery is not an exclusive

turbary,¹ common in soil,² common of shack.³

These rights are appendant,⁴ appurtenant,⁵ because of vicinage,⁶ or in gross.⁷

e. Dignities.—Dignities are titles of honor. The genius of our

right, but one enjoyed in common with certain other persons. It resembles other rights of common. 3 Kent Com. 410; 2 Bl. Com. 34–39.

A *free fishery* is spoken of as being a franchise in the hands of a subject existing by grant or by prescription, distinct from the ownership of the soil. It is an exclusive right, and applies to all navigable rivers, without any right in the soil.

There is also a *several fishery*, which is a private exclusive right of fishery in a navigable river, or arm of the sea, accompanied with the ownership of the soil.

"The conclusion on the subject is," says CHANCELLOR KENT, "that a right of fishery in navigable or tide waters, below high water mark, is a common right; and if one or more individuals set up an exclusive right to a free or several fishery, it must be clearly shown by prescription or positive grant. In rivers not navigable as tide waters, the owners of the soil over which they flow have, at common law (and which common law has been generally recognized in these United States), the exclusive right of fishing each on his own side, unless some other person can show a grant or a prescription for a common of piscary, in derogation of the right naturally attached to the ownership of the soil, and such right is held subject to the public use of the water as a highway, and to the free passage of fish, and in subordination to the regulations to be prescribed by the legislature for the general good." 3 Kent Com. 419.

1. Common in turbary is the liberty of digging turf in another man's land. Common of turbary can only be appendant or appurtenant to a house, not to lands, because turves are to be spent in the house. Bouv. Law Dict.

It is believed that this right never existed in the United States.

2. Common in the soil is the right or liberty of digging minerals in the lands of another. Anderson's Law Dict.

3. Common of shack is the right of persons occupying lands lying together in the same common field, to turn out their cattle after the harvest to feed

promiscuously in that field. Bouv. Law Dict.

4. This term is generally used with reference to common of pasture. A common of pasture appendant is defined as a right annexed to the possession of land by which the owner thereof is entitled to feed his beasts in the waste of the manor. It can only be claimed by prescription. It may by usage be limited to any certain number of cattle, but where there is no such usage it is restrained to cattle levant and couchant upon the land to which it is appendant. Bouv. Law Dict.

5. Common appurtenant, says Bouvier, differs from common appendant in the following particulars, viz: It may be claimed by grant or prescription, whereas common appendant can only arise from prescription; it does not arise from any connection of tenure, nor is it confined to arable land, but may be claimed as annexed to any kind of land; it may not only be for beasts usually commonable, such as horses, oxen and sheep, etc. It may be for goats, swine, etc. It may be severed from the land to which it is appurtenant. It may be commenced by grant, and, on uninterrupted usage for twenty years, is evidence of a grant. Bouv. Law Dict.

6. Common because of the vicinage or neighborhood is when the inhabitants of two townships which lie contiguous to each other have usually intercommoned with one another; the beasts of one straying mutually into the other's fields without any molestation from either. This, indeed, is only a permissive right, intended to excuse what in strictness is a trespass in both, and to prevent a multiplicity of suits. 2 Bl. Com. 33.

7. Common in gross or at large is such as is neither appendant nor appurtenant to land, but is annexed to a man's person; being granted to him and his heirs by deed; or it may be claimed by prescriptive right, as by a parson of a church, or the like corporation sole. This is a separate inheritance, entirely distinct from any landed property, and may be vested in

government forbids their admission into the republic. They are considered as incorporeal hereditaments.¹

Dignities bear a near relation to offices. They were originally annexed to the possession of certain estates in land, and created by grant of those estates. Although now little more than personal distinctions, they are still classed under the head of realty.²

f. Franchises—(See CORPORATION; CEMETERIES; FERRIES; FRANCHISE).—A franchise is defined to be a royal privilege or branch of the king's prerogative subsisting in the hands of a subject.³

It is a special privilege conferred by the government on individuals, and which does not belong to the citizens of the country generally by common right. In this country no franchise can be held which is not derived from the law of a State.⁴

Corporations, or bodies politic, are the most usual franchises known in our law, and are with some impropriety classed by writers among hereditaments, since they have no inheritable quality and, inasmuch as a corporation, in cases where there is no express limitation to its continuance by the charter, is supposed never to die.⁵

g. Offices.—An office is a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging.⁶

In *England*, offices may be granted to a man in fee, or for life, as well as for years, and at will. In the *United States* no public office can properly be termed an hereditament, or a thing capable of being inherited.⁷

Private ministerial offices can only be classed as hereditaments, and none of these, it has been said, are known among us.⁸

one who has not a foot of ground in the manor. 2 Bl. Com. 34.

1. Bouv. Law Dict.

The constitution of the United States declares, art. 1, § 10: "No State shall . . . grant any title of nobility."

The law of dignities, though unknown to us, is of great importance in the English laws, and it frequently brings into view deep investigations in regal and parliamentary antiquities. See Lond. Law Mag. for July 1829, 3 Kent Com. 403, n.

2. Anderson's Law. Dict. 357; citing 2 Bl. Com. 37, Ld. Raym. 13; 7 Rep. 122.

3. 2 Bl. Com. 37.

This is Blackstone's definition applying to a large number of privileges granted under a monarchical government, that could not exist under a republic. This author says: "The kinds of them are various, and almost infinite." He mentions a *county palatine*, our ordinary corporation, *privi-*

lege to hold a court leet to have a manor or lordship, to have waifs, estrays, treasure trove, royal fish, forfeitures and deodands; to have a court of one's own; to have the cognizance of pleas; to have a bailiwick; to have a fair, and many others connected with the "king's forest." 2 Bl. Com. 37-39.

These rights, under the English common law, were classed as incorporeal hereditaments, because they were usually attached to some real estate and descendible to the heir.

They are now granted by the parliament, and not by the crown, in England. 1 Cooley Bl. 274, n.

4. Wash. R. P. 271 (4th ed.), citing *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 595. Angell & Ames on Corp., § 4.

5. Kent Com. 460 (12th ed.).

6. 2 Bl. Com. 32; Anderson's Law Dict.; Bouv. Dict.

7. 3 Kent Com. 454.

8. 3 Kent Com. 454.

There are no offices in this country

h. Rents.—Rent is defined to be a certain profit issuing yearly out of lands and tenements corporeal. According to the definition, rent may be classed with incorporeal hereditaments. But we commonly understand by rent nothing more than a periodical compensation in money or other property, for the use of land; and in this sense it can in no respect be considered as an incorporeal hereditament.¹

The important common law classes of rents are rent-charge,²

that extend beyond the life of the occupant or during his good behavior. This is generally fixed by constitutional provisions. It could not, therefore, be a hereditament.

It is impossible to conceive how, under our form of government, a person can own or have a title to a governmental office. Offices are created for the administration of public affairs. When a person enters into an office he thereby becomes empowered to exercise its powers and perform its duties, not for his but for the public benefit. It would be a misnomer and a perversion of terms to say that an incumbent owned an office or had any title to it. *Donahue v. County of Will*, 100 Ill. 94.

The incumbent of an office has not, under our system of government, any property in it. His right to exercise it is not based upon contract or grant. It is conferred as a trust to be exercised for the benefit of the public. Such salary as may be attached to it is designed to enable the incumbent the better to perform its duties by the more exclusive devotion of his time thereto. A public office and its creation is a matter of public, not of private law. The decisions of some States proceed upon the ground that an incumbent has a property in his office and that he cannot be deprived of his right without the judgment of a court; a view supported by the doctrines of the common law, which regarded an office as an hereditament, but which has no foundation in a representative government. *Anderson's Law Dict.*, 727, citing *State ex rel.*; *Atty. Gen. v. Hawkins*, 44 Ohio St. 109 (1886).

1. *Walker Am. Law* (9 Eq.) 393.

The author further adds: "I shall accordingly reserve the consideration of rent to its proper place, in connection with estates for years."

Rents, as originally understood, had their origin in the feudal system. It was the custom of the lord to grant to

his dependents certain portions of his estate upon the condition that they would perform certain service for him. The right of such service belonged to him as lord of the manor, and became attached to the title of such manor, and property was classed as a hereditament.

But the feudal tenure never existed in the United States, and while rent is classed by leading text-book writers as incorporeal hereditaments, yet by the definitions they themselves give of the term, and the ordinary acceptance of it, it is difficult to see why it should with us be so classed. See *Washburn on Real Prop.* 272 (4th ed.).

Rent at the present day is generally a sum of money paid for the occupation of land. It is important to notice that this conception of rent is attained at a comparatively late period of history. The earliest rent seems to have been a form of personal service, generally labor on the land, and was at the same time fixed by custom. The exaction of a competition or rack rent beyond that limited by custom was, if one may judge from the old Brehon law of Ireland, due to the presence upon the land of strangers in blood, probably at first outcasts from some other group.

The strict feudal theory of rent admittedly labor on the lord's land as a lower form, and at the same time developed the military service due to the crown or lord as a higher form. *Ency. Brit.*, title Rent (9th ed.).

2. *Rent charge* is where the owner of the rent has no future interest or reversion expectant in the land, as where a man by deed makes over to another his whole estate in fee simple, with a certain rent payable thereout, and adds to the deed a covenant or clause of distress that if the rent be in arrear it shall be lawful to distrain the same. Thus the land is charged with a distress of the same. *Anderson's Law Dict.* 879, citing 2 Bl. Com. 42; *Wallace v. Harmondstad*, 44 Pa. St. 492.

rent service¹ and rent seck.²

i. Pensions.—Pensions at common law were treated as incorporeal hereditaments when used in the same sense as *corodies*, and were connected with the ecclesiastical law of England and never in force in the United States.³

j. Tithes.—Tithe means the tenth part. As an incorporeal hereditament it was connected with the ecclesiastical law of England, never in force in this country.⁴

1. **Rent service** is the oldest and most dignified kind of existing rent. It is the only one to which the power of distress attaches at common law, giving the landlord a preferential right over other creditors exercisable without judicial authority. . . . It is so called because by it a tenure by means of service is created between the landlord and tenant. The service is now represented by fealty nothing more than nominal. Rent service is said to be incident to the reversion, that is, a grant of the reversion carries the rent with it. Ency. Brit. (9th ed.), title Rent.

It is said that the right of distress was inseparable incident to this kind of rent. 3 Kent Com. 461.

Although a rent reserved to the grantor and his heirs upon a conveyance of land in fee is *held* to be a rent service in *Pennsylvania*, it has been held in an interesting case that ownership of land in that State is allodial. A party who had conveyed land in fee, reserving a ground rent, afterwards obtained the deeds and fraudulently altered them, whereupon the purchaser refused to pay the rent any longer, it having been *held* that the remedies for the rent of the deed were gone. *Arrison v. Harmstad*, 2 Pa. St. 191; *Wallace v. Harmstad*, 15 Pa. St. 462; the grantor distrained, and took the ground that the rent was an estate which vested in him before the alteration, and was not divested by that, and that it was a rent service to which distress was incident as of common right apart from the deed. But the court *held* that although the rent was a rent service, there might be a rent service without a tenure, that the right of distress, unless derived from the deed, was incident to the tenure only, and that there were no tenures in *Pennsylvania* since the Revolution, in spite of the statute of *quia emptores* not being in force. 3 Kent Com. (12th ed.) 462, n.

2. **Rent seck**, *seccus*, or barren rent, was rent reserved by deed, without any

clause of distress, and in a case in which the owner of the rent had no future interest or reversion in the land.

3 Kent Com. 461 (12th ed.).

Since the power of distress has been given to it by statute, it is the same as a rent charge.

The following authorities have a bearing on rent and its distinctions.

McGee v. Gibson, 1 B. Mon. (Ky.) 105; *Cuthbert v. Kuhn*, 3 Whart. (Pa.) 357; s. c., 31 Am. Dec. 513; *Van Rensselaer v. Hays*, 19 N. Y. 68; *Hurst v. Lithgow*, 2 Yeates (Pa.) 24; s. c., 1 Am. Dec. 326; *Youngblood v. Lowry*, 2 McCord (S. Car.) 39; s. c., 13 Am. Dec. 698; *Diller v. Roberts*, 13 S. & R. (Pa.) 60; s. c., 15 Am. Dec. 578; *Haskins v. Paul*, 4 Halst. (N. J.) 110; s. c., 17 Am. Dec. 455; *Hadden v. Knickerbocker*, 70 Ill. 677; s. c., 22 Am. Rep. 80.

There were quite a number of rents of lesser distinction.

Thus there is the *rent of assize*, which is the certain established rent of the freeholders and ancient copyholders of a manor, which cannot be departed from or varied. Those of the freeholders are frequently called *chief rents*; both sorts are indifferently denominated *quit rents*. When these payments were made in silver or white money they were called *white rents*.

Rack-rent is only a rent of the full value of the tenement. A *fee farm rent* is a rent charge issuing out of an estate in fee of at least one fourth of the value of the land at the time of its reservation. 2 Bl. Com. 42.

Ground rent is a rent reserved to himself and his heirs by the grantor and lessor out of the land itself. It is reserved out of the conveyance. See **GROUND RENTS**.

Rent-roll is a list of rents payable to a particular person or public body. 2 Bouv. Law Dict. 438.

3. See *supra*, title **CORODIES**.

4. Tithes were abolished by statute in England in 1836, and the tax is now

INCORPOREAL HEREDITAMENTS—INCREASE.

k. Annuities—(See ANNUITIES).—An annuity is a yearly sum stipulated to be paid to another in fee, or for life, or years, and chargeable only on the person of the grantor. If it be agreed to be paid to an annuitant and his heirs, it is a personal fee, and transmissible by descent like an estate in fee, and forfeitable for treasure as an hereditament, and for that reason it belongs to the class of incorporeal hereditaments.¹

l. Easements—(See EASEMENTS).—The very nature and character of an easement places it within the category of incorporeal hereditaments.

It is not tangible, is inheritable, and issues out of, annexed to, or concerns corporeal things. It is created by grant, never was by livery.²

3. Mixed Incorporeal Hereditaments—(See REMAINDERS; REVERSIONS, etc.).—A mixed incorporeal hereditament is an hereditament that is incorporeal in its nature, but is capable of becoming corporeal upon the happening of a certain event.³ They are generally vested or contingent remainders and executory devises and reversions.

INCREASE.—See note 4.

raised by a rent charge. Ency. Brit. 1. 3 Kent Com. 460 (12 ed.).

The cases in which an annuity can be called an incorporeal hereditament in this country are limited. It must be chargeable upon the *person* of the grantor, for if the annuity is made chargeable upon the *land*, it becomes a rent charge, and it is extremely doubtful if there is any practical application of an annuity as an incorporeal hereditament.

2. Bouv. Law Dict.; Anderson's Law Dict.

3. 2 Washburn on R. Prop. 271; Wms. on R. Prop. 197.

Authorities.—Anderson's Law Dict.; Bouv. Law Dict.; Black. Com. (Cooley & Sharswood's ed.); Kent's Com. (12th ed.); Walker's Am. Law (9th ed.); Washburn on R. Prop. (4th ed.); Wms. on R. Prop. (4th ed.); Challis on R. Prop.; Ency. Brit. (9th ed.); Watts Actions and Defences.

4. Increase of a Female Slave.—The word "increase" as applied to a female slave includes only her children, and not her descendants to any indefinite future period. *Carroll v. Hancock*, 3 Jones (N. Car.) L. 473.

A bequest of a female slave and her increase ought to be construed to apply only to future offspring, if the expression be not enlarged by the contest of the will or other admissible evidence.

So decided by two judges out of three. *Puller v. Puller*, 3 Rand. (Va.) 83.

Increase of Land.—In an etymological sense it cannot be doubted that the word "increase," as applied to land, or to the soil, means that which grows out of it, or that which is produced by the cultivation of it. The word is frequently employed in this sense in the English Bible. An instance will be found in the twenty-fifth chapter of the book of Leviticus. It is thus said, "Behold, we shall not sow or gather in our increase." So in the twenty-seventh Psalm, the expression occurs, "Then shall the earth yield her increase." *De Blane v. Lynch*, 23 Texas 25.

By the California Pol. Code, it is provided that "an office becomes vacant on the happening of either of the following events before the expiration of the term. 1. The death of the incumbent. . . 9. His refusal or neglect to file his official oath or bond within the time prescribed." It was *held* that, in order to effectuate the intention of the legislature, this provision must be construed "as regarding the person duly elected to an office is the incumbent of that office from the time of the commencement of the term for which he was elected until the expiration thereof, whether he qualifies or not." *People v. Taylor*, 57 Cal. 620.

INCUMBENT.—See note 1.

INCUMBRANCES.—(See IMPLIED COVENANTS · INSURANCE ; LIENS ; MORTGAGES).

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I. Definition.—An incumbrance is a burden upon land depreciative of its value, such as a lien, easement or servitude, which, though adverse to the interest of the land owner, does not conflict with his conveyance of the land in fee.² In legal fiction an in-

1. Incumbent of an Office.—A statute of Ohio of February 14th, 1840, enacted that no citizen should hold at the same time, *inter alia*, the offices of associate judge and county treasurer. It was, however, provided that the statute should not apply to "present incumbents of two or more official stations, until their term of office should expire." A was elected treasurer of P county, October 8th, 1839, for two years, from June 1st, 1840. He qualified himself to discharge the duties of the office by giving bond, taking oaths, etc., on June 2nd. On February 6th, 1840, he was elected an associate judge of P county. He was qualified to discharge the duties thereof on April 4th. It was held that he was not an incumbent of the two offices at the time the statute became law, within the meaning of the proviso. Said the court: "I cannot concur with counsel, that a man appointed or elected to an office, thereby becomes an 'incumbent' of that office. An incumbent of an office is one who is legally authorized to discharge the

duties of that office. For instance, a man who is elected county treasurer is required to give bonds and take an oath of office. Now, those things must be done before he can discharge the duties of the office; and if not done in due time, the office itself is vacant. There is no incumbent." *State v. McCollister*, 11 Ohio 46.

2. *2 Greenleaf on Ev.*, § 242; *Chapman v. Kimball*, 7 Neb. 399; *Carter v. Denman*, 23 N. J. 260, 273.

A right to an easement of any kind in the land is an incumbrance. So is a mortgage. So also is a claim of dower, which may partially defeat the plaintiff's title by taking a freehold in one-third of it out of it. And for the same reason a paramount right, which may wholly defeat the plaintiff's title, is an incumbrance. It is a weight on land which must lessen the value of it. *Prescott v. Trueman*, 4 Mass. 630.

Every right to land, or interest in it, to the diminution of its value, but consistent, with the passage of the fee, must be deemed an incumbrance. 1

cumbrance may be defined as a debt or obligation for which the land charged is primarily responsible irrespective of its owner.¹

II. Covenant Against Incumbrances—1. *Nature of.*—This is a stipulation that the land conveyed by the title deed is free from all mortgages, easements and the like—free from all rights or interests lodged in third persons. It is a covenant *in presenti*. If there is an incumbrance then existing and not excepted, such covenant is “broken as soon as made.”

This covenant is never *in futuro* when standing alone, and never “runs with the land;” but there is often joinder of it with the covenant for quiet enjoyment, which is not so confined. And it is frequently coupled with general warranty, which runs with the land and is assignable. The covenant against incumbrances is not itself assignable; and, in other respects, it differs from general warranty. If incumbrances exist when the averment is that they do not, the covenant is broken as soon as it is made, and becomes a chose in action upon which the covenantee may bring suit. He cannot assign his right of action, though his legal representative may sue.²

Action on the covenant may be brought by a grantee who has expended money to clear his purchased land of incumbrances. The usual action is for breach of the covenant. If the land has been assigned and the breach occurs afterwards, so that damages are sustained by the assignee, he may claim redress of the original grantor. There must be a legal removal of an incumbrance before the cost of clearing the property of it can be allowed. It is not always a bar to recovery that the grantee had knowledge of an incumbrance when he bought with covenant against incumbrances.³

Inst. 4 *b*; Mitchell *v.* Warner, 5 Conn. 478, 527.

1. Waples on Proceedings in Rem, p. 556, § 455.

2. **Warranty and Covenant Against Incumbrances.**—A covenant that the grantor “will warrant and forever defend the premises against all lawful claims, freed and discharged of all incumbrances,” operates as a covenant against incumbrances and also as a general warranty. Carter *v.* Denman, 23 N. J. 260. This covenant ordinarily does not run with the land, while warranty does. Mitchell *v.* Warner, 5 Conn. 497. The former is personal, the latter is a covenant real; the former is not assignable, the latter vests in assignees. *Id.*

A covenant which is broken on the delivery of the deed becomes a chose in action in the hands of the grantee, which is unassignable. No action can be maintained on it except by the covenantee or his legal representative.

Marston *v.* Hobbs, 2 Mass. 433; Bickford *v.* Page, 2 Mass. 455; Greenby *v.* Wilcocks, 2 Johns. (N. Y.) 1; Hamilton *v.* Wilson, 4 Johns. (N. Y.) 72; Kane *v.* Sanger, 14 Johns. (N. Y.) 89, 93. A covenant by a grantor that the premises are not encumbered, when they are, is broken when made and the right to sue for the breach is a chose in action and not assignable. Garrison *v.* Sanford, 12 N. J. 261, 299.

3. **Action.**—A grantee may recover damages for money paid in clearing off incumbrances, though it was paid after he had brought an action for a breach of the covenant against incumbrances. Johnson *v.* Collins, 116 Mass. 392. The measure is the cost of removal. St. Louis *v.* Bissell, 46 Mo. 157.

A remote grantee of lands may maintain an action in his own name against the original grantor on a covenant in the deed of the latter “that the said lands are free from all incumbrances,” where the substantial breach occurs af-

2. *Damages*.—Only nominal damages for an incumbrance can be recovered of the grantor by the grantee, who has not removed it. If he has removed it at his own expense, he may recover his outlay, in damages, by an action on the covenant. It is for him to prove the amount expended for the purpose. He is entitled to reimbursement only so far as his charge is just and reasonable. It would evidently be unreasonable, were it to exceed the price at which he bought the land.¹

3. *Taxes*.—Unpaid taxes are incumbrances more frequently existing, perhaps, than any other. There is a breach of covenant if they exist when the deed, with the clause against incumbrances, is given. But it is held in the case of sales for taxes, that the grantee cannot withhold any part of the price for the purpose of using it to clear off the incumbrances. If the title is otherwise good, the vendor may recover the price, though he may have stipulated to clear the title of incumbrances.²

Generally speaking, unpaid taxes are incumbrances constituting a breach of covenant. They are such always when they are a lien upon the land; but it is otherwise where the statute relieves land of the lien in case the vendor has other property sufficient to satisfy all the tax. If the tax is not a property debt but a per-

ter the assignment and the whole actual damages are sustained by the assignee. *Richard v. Bent*, 59 Ill. 38.

Both parties knew of the existence of incumbrances when one conveyed land to the other with covenant against incumbrances. In the absence of fraud and mistake the fact of such knowledge is no reason why the purchaser may not recover on the covenant. *Gragg v. Wagner*, 71 N. Car. 316. If neither knew: *Edington v. Nix*, 49 Mo. 134.

Nothing can be recovered for clearing off an incumbrance, unless it can be shown to have been legally extinguished. *Stambaugh v. Smith*, 23 Ohio St. 584.

1. *Damages*.—The grantee of a deed with covenant against incumbrances is entitled, in an action upon the covenants, to recover the amount necessarily expended by him in removing an incumbrance which existed at the date of the deed. If he has not removed it, he may still recover nominal damages. *Eaton v. Lyman*, 30 Wis. 41.

In cases where the defect of title or the incumbrance has [been] or could be obtained or removed by purchase, it is considered that the plaintiff is entitled to recover the amount which he has fairly and reasonably paid for that purpose. *Rawle on Covenants*, p. 293, and the many authorities there cited. He acts that the burden of

proof is on the plaintiff to show the value of the incumbrance removed by him, since the amount really paid is not evidence of the value. *Citing Lawliss v. Collier*, 19 Mo. 480.

In the absence of proof of value, only nominal damages can be recovered. *Harlow v. Thomas*, 15 Pick. (Mass.) 69; *Anderson v. Knox*, 20 Ala. 156; *Dickson v. Desire*, 23 Mo. 151, 167; *Pate v. Mitchell*, 23 Ark. 590, cited by *Rawle*, p. 294.

A deed of general warranty embraces the covenants that the vendor is seized in fee, and that there are no incumbrances under South Carolina act of 1795. *Lessley v. Bowie* (S. Car.), 3 S. E. Rep. 199.

2. *Taxes*.—Where the vendor claims under a tax title, he is entitled to recover against the vendee in a suit for the purchase price, notwithstanding the fact that he has agreed with the vendee in writing to clear the title to the premises, unless the vendee can show that the title is imperfect. And where the vendor enters into a written agreement with his purchaser to clear the title to the premises, parol evidence that the vendor, having only a tax title intended to bind himself to procure a deed from the holder of the patent title, is admissible in explanation of the written agreement, as it would add a

sonal one, under any exceptional provision of law, it would not be an incumbrance, but the land would pass free from burden to the vendee.¹

A tax burden should be felt by the vendee before complaining of it. He should show that he has had it to pay, or that his possession has been disturbed, before declining to pay the purchase price on the ground that the covenant against incumbrances has been broken.² If the land has not been taxed but merely entered on the assessment roll, the vendee cannot complain that it was an incumbrance when he bought it, though the act should result in a levy afterwards which would encumber the land.³

4. *Municipal Assessments*.—Though a tax is not a lien upon land until it has been legally laid, and the mere assessment for the purpose of laying it is not the creation of an incumbrance, yet the assessment for benefits conferred by municipal improvements is generally held to attach the burden at once to the land assessed. Even where the assessment, existing at the time of a sale, was subsequently vacated, the incumbrance so far remained that, upon a reassessment, paid by the vendee, the vendor was bound to repay under his covenant.⁴

distinct obligation to it. *Kramer v. Richie* (Iowa), 31 N. W. Rep. 90.

A betterment tax, legally assessed upon an estate, constitutes a breach of covenant of warranty against incumbrances. *Foley v. Haverhill*, 144 Mass. 352.

That a portion of the land conveyed has been illegally sold for taxes is no breach of the covenant against incumbrances. *Cummings v. Holt*, 56 Vt. 384.

A covenant that the land was free and clear from all incumbrances was held to be broken if there were unpaid taxes on the land at the date of the conveyance. *Fuller v. Jillett*, 9 Biss. (U. S.) 296.

Unpaid taxes, constituting a lien on land, are within the covenant against incumbrances. *Plowman v. Williams*, 6 Lea (Tenn.) 268.

1. In Connecticut, taxes are not a lien on the land taxed, if the owner has other property sufficient to pay them. One sued upon a covenant against incumbrances, alleged to have been broken by the existence of a tax lien on the land, was allowed to show that he held other property sufficient to meet the taxes. *Briggs v. Morse*, 42 Conn. 258.

2. A vendor sued upon a promissory note given for purchase money. The vendee pleaded that he had bought under full covenants but the land was encumbered with a lien for taxes. The court held the plea bad on demurrer, for failing to show that the grantee had

paid the taxes to remove the incumbrance, or that he had been disturbed in possession of the land in consequence of the incumbrance. *Cheney v. City Nat. Bank*, 77 Ill. 562.

3. *Assessment Not Incumbrance in New York*.—The entry of land in an assessment roll does not constitute an incumbrance thereon; and the assessment, or the subsequent levy of the tax thereon, is not a breach of covenant against incumbrances contained in a deed of the land, executed after the completion of the assessment roll, but before the levy of the tax. *Barlow v. St. Nicholas Nat. Bank*, 63 N. Y. 399.

In an action for the breach of a covenant against incumbrances, on the ground that a tax was unpaid, the plaintiff can recover only nominal damages, if the grantee requested that the tax should not be mentioned in the deed, promised to pay it himself and to indemnify the grantor against it. *Newcomb v. Wallace*, 112 Mass. 25.

A grantor is not bound to pay a tax on the land he has conveyed when it was assessed but not confirmed before the sale. This is held where the deed contained a covenant that the land was "free, clear, discharged and unencumbered of and from all charges, taxes, assessments and incumbrances, of what kind and nature soever." *Lathers v. Keough*, 109 N. Y. 583.

4. *Municipal Assessment*.—There was

Even before the making of the assessment, its incumbrance has been held to have attached, if public work, beneficial to the property subsequently assessed for it, has been done prior to the sale of the property. The property obligation has been incurred, and become a breach of the covenant, for which the vendor is responsible.¹ But where the mere ordering of an assessment creates no lien, land may be freely sold unburdened.²

Where the ordering of an assessment does create a lien, the rule is otherwise.³ And the incumbrance has been held to attach on assessment for an improvement, though the vendor who covenanted against it had received only constructive notice.⁴ Even a street improvement estimate is sometimes made by statute to create a lien; but where this is so, land sold under covenant against incumbrances before the estimate, though after the beginning of the work, passes free from lien.⁵

An oral promise by the subsequent grantee to pay an assessment will not relieve the grantor from the covenant against incumbrances written in the title.⁷ But otherwise, if the grantee has so obligated himself in an instrument of even date and standing, both construed as one.⁷

a covenant against incumbrances in a deed conveying land. A municipal assessment for benefits was vacated, but a reassessment subsequently made against the land, which the grantee had to pay. The court *held* that he could recover the amount of the assessment under the covenant. *Cadmus v. Fagan*, 47 N. J. 549.

1. Liability to assessments for the opening of a street *held* to be a breach of the covenant against incumbrances in a deed executed after the opening of a street though before the making of the assessment. *Fagan v. Cadmus*, 46 N. J. 441.

2. City lots were conveyed with covenant against all "charges, assessments, taxes, liens, incumbrances, of what nature or kind soever." Prior to the conveyance the city had ordered the construction of a sidewalk in front of the lots, and had adopted an ordinance levying an assessment on them for it, but no lien attached prior to the sale. The grantee had to pay the assessment; the grantor was *held* not liable upon his warranty. *Tull v. Royston*, 30 Kan. 617.

3. The rule that an assessment for betterments becomes a lien from the date of the order, is applicable to assessments for drains and sewers. It was *held* that such an assessment constitutes a breach of the covenant against incumbrances, in a deed delivered after

the order but before the assessment was made. *Carr v. Dooley*, 119 Mass. 294.

4. An assessment of benefit from a street widening was *held* to be a breach of the covenant against incumbrances in a deed of the assessed premises afterwards executed, although the grantor, at the time of the conveyance, had only constructive notice of the widening. *Blackie v. Hudson*, 117 Mass. 181.

5. Where a street improvement estimate was a lien which attached to land liable to assessment, it was *held* that a covenant of incumbrances made prior to the estimate is not broken by the lien, though work on the improvement began before the conveyance was made. *Langsdale v. Nicklaus*, 38 Ind. 289.

6. A covenant against incumbrances in a deed cannot be cut down so as to exclude a betterment assessment by proof of a prior oral agreement that, in consideration of the promise of the grantor to execute the deed in question and another deed to the grantor's brother, the grantee would pay the assessment mentioned. *Flynn v. Bourneuf*, 143 Mass. 277.

7. If land is conveyed with a general covenant against incumbrances, and the vendee on the same day execute to the vendor a deed of trust to secure part of the purchase price, in which he expressly agrees to pay all

Even an illegal assessment was held to operate as an incumbrance, when the grantee had been put to expense in removing it from land bought under it, and when he had become liable to a reassessment.¹

The covenant may apply to only a part of land sold.²

5. *Mortgages*.—The general form of the covenant against incumbrances may be modified by exceptions. If, for instance, a mortgage be excepted from the covenant, the grantee has no action upon the covenant so far as that is concerned. The existence of that particular mortgage is no breach. That is all the grantor gains by the exception.³

A purchaser who had assumed the payment of a mortgage on property conveyed to his wife by his vendor, with covenant against incumbrances, suffered the mortgage to be foreclosed

the taxes then existing against the land, both transactions are to be construed together as one. The vendee is bound to pay the taxes, and he cannot recover from the vendor under the general covenant against incumbrances. *Greer v. Redman*, 92 Mo. 375.

1. When the grantor had covenanted against incumbrances, he was held liable for a sewer assessment. It was said that though the assessment was illegal if the grantee was liable to reassessment he could recover "the reasonable expenses paid by him" to remove the incumbrance. The grantee has his action for breach of covenant. *Coburn v. Litchfield*, 132 Mass. 449.

2. *Land Partly Encumbered*.—When a fourth of an undivided estate had been conveyed with covenant against incumbrances, and three-fourths without it; and when the grantee was compelled to pay an assessment for betterments on all the property which had become an incumbrance before the conveyances, he may recover of the grantor only one-fourth of the assessment paid. The grantor had sold the three-fourths in his capacity as guardian. *Smith v. Carney*, 127 Mass. 179.

3. *Mortgage Excepted*.—Covenant was that the land was "free and clear from all incumbrances except a mortgage thereon for \$1,400," etc. The exception was notice to the grantee. "It prevents him from maintaining an action upon the covenant against incumbrances, basing such action upon the mortgage so excepted from the covenant, and it seems to us," said the court, "that is all the benefit the grantors can claim on account of such exception in the covenant. The following

cases sustain the rule as above stated: *Estabrook v. Smith*, 6 Gray (Mass.) 572, 577; *Calkins v. Copley*, 29 Minn. 471; *Sumner v. Williams*, 8 Mass. 162, 202, 214; *Donahoe v. Emery*, 9 Met. (Mass.) 63; *Howell v. Richards*, 11 East 633; *Smith v. Compton*, 3 Barn. & Adol. 189; *Norman v. Foster*, 1 Mod. 101; *Peters v. Grubb*, 21 Pa. St. 455, 460; *Duvall v. Craig*, 2 Wheat. (U. S.) 45, 58; *Dickinson v. Hoome*, 1 Gratt. (Va.) 302; s. c., 8 Gratt. (Va.) 358; *Barton v. Fitzgerald*, 15 East 546; *Cornell v. Jackson*, 3 Cush. (Mass.) 506; *Rawle on Cov.* (4th ed.), 498 *et seq.*; *Stannard v. Forbes*, 6 Adol. & E. 572; *Kean v. Strong*, 9 Ir. L. 74, 81, 82." *Bennett v. Keehn*, 67 Wis. 154, 161-2.

"The case of *Morrison v. Morrison*, 38 Iowa 73 . . . is not in conflict with the authorities above cited. . . In that case the exception of the mortgage followed all the covenants, and it was therefore held that the exception was a limitation upon the precedent covenants. The covenants were that the grantor was seized of the premises; that they were free and clear of all incumbrances; that he had a good right to sell; and that he would warrant and defend the premises against the lawful claims of all persons whomsoever, except a mortgage of \$800, etc. This exception, following all the covenants, may well be held to restrain and limit all the preceding covenants. The rule is, however, that when the limitation is in a precedent covenant, it does not limit or restrict the subsequent covenants unless it clearly appears from the whole deed that such was the intention of the parties." *Bennett v. Keehn*, 67 Wis. 154, 267.

against the land. The wife, under the circumstances, could recover nothing of the vendor under his covenant.¹

If there is a mortgage, and the vendor has advanced the sum necessary for its removal to the vendee, the latter should so apply it, notwithstanding the covenant in the deed against incumbrances. Should he fail to do so, and yet sell the land to a second purchaser, it would be manifestly unjust to the first vendor.²

6. *Possession—Breach of Covenant.*—The vendee acquires constructive possession by purchasing at a mortgage foreclosure, though the former owner was not in actual possession. The latter is evicted in such a sense as to enable him to sue his vendor for breach of the covenant against incumbrances.³ From the moment of sale to him, the covenant was broken.⁴

Persons, becoming *cestuis que trusts* by the transfer of notes to them for purchase money of mortgaged land, cannot claim possession of the land itself on the ground that the covenant against incumbrances, in the deed of sale, was broken as to themselves.⁵

To encumber property after the date of the covenant is no breach.⁶

The mention of an existing mortgage, with the mortgagee and the sum stated, and the volume and folio of the record of it named in the deed, is only to describe and identify the mortgage. It is a single incumbrance to the extent of all sums due thereon for principal and interest. *Shanahan v. Perry*, 130 Mass. 460.

1. Upon sale of lands the purchaser assumed the payment of the mortgage and the conveyance, by purchaser's request only, and without any consideration from the wife, was made to the wife. The deed contained a covenant against incumbrances, and the wife brought an action in her name for breach of the covenant. *Held*, that it was a good defence to show that the eviction took place under the mortgage, which the husband, the real purchaser, engaged to pay, and was in consequence of his failure to pay it. *Reid v. Sycks*, 27 Ohio St. 285.

2. A purchaser whose vendor has covenanted against incumbrances, and paid him money expressly to take up an outstanding mortgage, is bound to apply it in favor of his own subsequent purchasers, who take with similar covenants. He is liable to refund the money paid by one of them to redeem it. *Twitchell v. Drury*, 25 Mich. 393.

3. *Possession—Breach of Covenant.*—Where land is not in the actual possession of any person, a sale and convey-

ance thereof, under a mortgage foreclosure, vests in the grantee the constructive possession and divests the former owner of all right of possession, and such an eviction is a breach of the covenant against incumbrances contained in the deed. *Nichols v. Alexander*, 28 Wis. 118.

4. The covenant is broken immediately where there is an outstanding mortgage on the demised premises. *Brooks v. Moody*, 25 Ark. 452. See *Almy v. Hunt*, 48 Ill. 45; *Marbury v. Thornton*, 82 Va. 702.

5. Defendants conveyed land to Davis with special warranty, taking his promissory notes secured by trust deed on the land. The notes were indorsed to the plaintiffs, who thus became *cestuis que trusts* under the trust deed. It afterwards appeared that the land was encumbered when it was sold. The plaintiffs were *held* not entitled to possession of the land; there had been no breach of covenant, as to them. *Washington City Saving Bank v. Thornton*, 83 Va. 157.

6. Giving an incumbrance on property, after covenanting it to be free from incumbrances is not a breach of the covenant, nor a breach of warranty. *Foster v. Woodward*, 141 Mass. 160.

Discharge in insolvency cannot be pleaded in defence of an action for breach of covenant, because of a lien

7. *Easements*.—Though a public easement over vacant and unenclosed flats has been held not an incumbrance, the right to overflow land is such, generally; so that a covenant against incumbrances would include such right. Vested in another, the right to overflow would be a diminution of the value of the property purchased.¹

If the land is subject to any easement or servitude at the time it is sold with covenant against incumbrances, there is an immediate breach of the covenant. This may be illustrated by the right of way,² the right to use a spring,³ the right to construct or use a railway,⁴ to cut a ditch or canal for draining,⁵ to make and maintain an artificial water course,⁶ to cut timber,⁷ to dam a stream,⁸ and any right in another that lessens the value of land conveyed.⁹

The fact that both the vendor and vendee knew that a railroad was in operation on the land sold is no bar to a suit for a breach because of the existing easement.¹⁰ If there is no covenant and the vendee is deceived, he may sue for deceit.¹¹

8. *Highways*.—A public road is not an incumbrance within the usual meaning of the words of the covenant. Land is bought and sold, with highways crossing it, without any thought of its being burdened thereby. And, as a matter of experience,

resting on the land. *Waggle v. Worthy* (Cal.), 15 Pac. Rep. 831.

1. *Easement*.—The easement of the public over flats not built upon or inclosed is not an incumbrance within the usual covenant. *Montgomery v. Reed*, 69 Me. 510.

An easement, consisting of a right to flow land, constitutes a breach of the covenant against incumbrances, and is a proper defence to the notes given for the purchase money. *Patterson v. Sweet*, 3 Ill. App. 550.

A payment or settlement of gross damages caused by the flowage from a mill dam creates an incumbrance constituting a breach of the covenants against incumbrances, and of warranty in a subsequent deed. *Isele v. Arlington Bank*, 135 Mass. 142.

Where flats covered by the sea are granted by the commonwealth to one who agrees to fill them up by a stated time, the grant being by warranty deed with covenant against incumbrance, the public right of user for navigation is not extinguished until they are filled. *Boston etc. Steamboat Co. v. Munson*, 117 Mass. 34.

2. *Wilson v. Cochran*, 10 Wright (Pa.) 233; *Russ v. Steele*, 40 Vt. 310. Compare *McMullin v. Wooley*, 2 Lans. (N. Y.) 394.

3. *Blake v. Everett*, 1 Allen (Mass.) 250; *Weatherbee v. Bennett*, 2 Allen (Mass.) 428.

4. *Barlow v. McKinley*, 24 Iowa 70; *Beach v. Miller*, 51 Ill. 206; *Purcell v. Hannibal etc. R. Co.*, 50 Mo. 504.

5. *Smith v. Sprague*, 40 Vt. 43.

6. *Prescott v. White*, 21 Pick. (Mass.) 341. Compare *Prescott v. Williams*, 5 Met. (Mass.) 429, 433.

7. *Cathcart v. Bowman*, 5 Pa. St. 319; *Spurr v. Andrew*, 6 Allen (Mass.) 420.

8. *Morgan v. Smith*, 11 Ill. 199; *Ginn v. Hancock*, 31 Me. 42.

9. *Rawle on Cov.*, pp. 100, 101, citing the authorities copied in the above seven notes, except one.

10. A railroad company's right of way is an easement whose existence is a breach of the covenant against incumbrances in a deed made after the grant of the way over the land conveyed, to a grantee who is not the railroad company. The covenantee has his action for the breach, though both parties to the deed knew that the railroad was upon the land and in use, and that the covenant would not be performed. *Beach v. Miller*, 51 Ill. 206.

11. *Deceit*.—When a vendee desires to protect himself against an easement he should take a covenant against incum-

roads are an advantage rather than a detriment to lands. Cases occur, however, in which the right to open a highway would be a serious incumbrance.¹ "It is a legal obstruction to the purchaser to exercise that domain over land to which the lawful owner is entitled. An incumbrance of this nature may be a great damage to the purchaser, or the damage may be very inconsiderable, or merely nominal. The amount of damages is a proper subject of consideration for the jury who may assess them, but it cannot affect the question whether a public town road is, in legal contemplation, an incumbrance of the land over which it is laid."² On the contrary it has been said that: "Although a public highway, no doubt, is, in many instances, an injury instead of a benefit to the holder or owner of the land upon which it is located, and therefore tends to lessen its value in the estimation of a purchaser, yet it is fair to presume that every purchaser, before he closes his contract for his purchase of land, has seen it and made himself acquainted with its locality and the state and condition of it; and, consequently, if there be a public road or highway open and in use upon it, he must be taken to have seen it, and to have fixed in his own mind the price that he was willing to give for the land, with a reference to the road. . . . The existence of the highway could not be regarded as an incumbrance that came within the meaning of the parties when they used the term, 'incumbrances,' in their contract; and hence an action of covenant could not be sustained on account of it for a breach of the covenant against incumbrances."³

9. *Party Wall*.—The right in another to build a wall partly on one's land is generally held an incumbrance.⁴

brances. If its existence is concealed from him and he has taken no covenant against it, he may sue for deceit. *McMullin v. Wooley*, 2 Lans. (N. Y.) 394.

1. *Highway*.—In the conveyance of a tract of land, a public highway running through the tract is not an incumbrance within the meaning of the usual covenant title. *Jordan v. Eve*, 31 Gratt. (Va.) 1.

Lands were described in the deed as extending to the center of a street which was to be made, and with reference to a plat on which the proposed street was traced. *Held*, that the grant was subject to the street, and that the subsequent use of the street as a highway did not constitute a breach of the covenant against incumbrance. *Cincinnati v. Brachman*, 35 Ohio St. 289.

A public road on land purchased by one who knows of its existence at the time of the purchase does not constitute a breach of a covenant against in-

cumbrances. *Desvergers v. Willis*, 56 Ga. 515.

A highway or railroad is an incumbrance obstructing the free use of the land it runs over. A vendor of such land covenanting that it is clear from incumbrances may be made to remove the road or pay damages in a suit for the performance of his covenant. *Purcell v. Hannibal etc. R. Co.*, 50 Mo. 504.

2. *PARSONS, C. J.*, in *Kellogg v. Ingersoll*, 2 Mass. 97, 101.

3. *KENNEDY, J.*, in *Patterson v. Athurs*, 9 Watts (Pa.) 152.

4. *Party Wall*.—A wall having been built on a boundary line by the owner of one of the adjoining properties, the other agreed to pay one-half the cost in case the wall should be used by himself, his heirs or his assigns. He sold before using, and gave a covenant against incumbrances. But it was *held* that the right of the proprietor of the adjoining land to maintain the wall partly upon the land that was sold

10. *Improvements Required or Forbidden.*—The duty to do or not to do may be an incumbrance. Binding oneself to keep a certain style of fencing around a lot or farm, to erect buildings only in a certain way, and like restrictions, are incumbrances which the purchaser of land may wish to be relieved of; and the covenant against incumbrances, in its general form, covers all such land burdens. Where there is a known city ordinance inhibiting the erection of combustible buildings within certain limits, this restriction would not be deemed an incumbrance.¹

11. *Lease.*—If land is leased, it is burdened. The lease may be valuable, and one who purchases land subject to it may incur no injury, and therefore be entitled to no damages for a breach of covenant against incumbrances. Still, the existence of a right in another to the use of the land for a period, though the consideration may be equivalent to the right, is an instant breach of covenant.²

was an incumbrance and constituted a breach of the covenant. *Mackey v. Harmon*, 34 Minn. 168.

Right to the use of a common stairway is an incumbrance upon real estate in which this right exists in favor of an adjoining proprietor. It was *held* that the grantor was liable on his covenant upon selling estate thus encumbered. *McGowen v. Myers*, 60 Iowa 256.

A party wall was *held* to be not an incumbrance. *Musgrave v. Sherwood*, 54 How. Pr. (N. Y.) 338.

The existence of a party wall wholly upon one of two contiguous lots, yet subject to right of enjoyment by the owner of the other, constitutes an incumbrance and is a breach of the covenant against incumbrances. *Mohr v. Parmelee*, 43 N. Y. Super. Ct. 320.

"It was *held* in *New York*, in a case between lessor and lessee, that the covenant was broken by the adjoining owner having the right to use the party wall (*Giles v. Dugro*, 1 Duer (N. Y.) 331); but in a late case in *Iowa*, which was between vendor and publisher, the decision was the other way (*Bertram v. Curtis*, 31 Iowa 46). Possibly local provisions as to party walls may reconcile these cases; otherwise the decision in *Iowa* would seem to be the better law." Rawle on Cov. 101.

One who bought land in 1864, began suit for the removal of a party wall, and the defendant agreed to pay a thousand dollars, which was entered as a decree. In 1881 the land was sold again without notice of the easement given to the purchaser. He could recover for the breach of covenant. Ap-

peal of *Edmunds* (Pa.), 8 Atl. Rep. 31.

1. **Building restrictions** are "incumbrances." The term includes all restrictions, obstructions and impediments tending to impair the free use and transfer of land. *Anon.* 2 Abb. (N. Y.) N. C. 56. But a condition that a city lot shall not be used as a cemetery was *held* not an incumbrance on the title, as between the grantor and grantee. *Floyd v. Clark*, 7 Abb. (N. Y.) N. C. 136.

An agreement in a deed-poll seasonably recorded, that the grantee (a married woman), her heirs and assigns, would forever make and maintain a good fence all around the granted premises, was *held* to create an incumbrance within the meaning of a covenant against incumbrances in a deed subsequently made by a person claiming under her. *Burbank v. Pillsbury*, 48 N. H. 475.

2. **Lease.**—An outstanding lease is within the meaning covenant against incumbrances. *Fritz v. Pusey*, 31 Minn. 368.

An illegal refusal of a lessee to surrender possession is not within the covenants of a deed from the lessor. *Noyes v. Rockwood*, 56 Vt. 647.

It has been said in several cases that the covenant will be broken by the existence of a prior lessee (*Bachelder v. Sturgis*, 3 Cush. (Mass.) 201; *Van Wagner v. Van Nostrand*, 19 Iowa 422; *Grice v. Scarborough*, 2 Spear (S. Car.) 649. In *Edwards v. Gale*, 52 Me. 360, the lease was expressly excepted from the covenant). And this may be unquestionably true. It must

12. *Dower*.—The right of dower in land is always an incumbrance. Though consummated after the deed has been given, and even by a subsequent change in the law, it has been held to be such.¹ When demand for it has become consummate, the grantee of land bought under covenant against incumbrances may recover damages for the breach, though it was inchoate when the conveyance was made;² but only nominal damages may be recovered before the dower has been actually assigned.³ When other than nominal damages are recoverable, and the plaintiff has purchased the right of dower not released when he bought the property, and has proved the value of the land without the building improvements, the defendant, sued for the breach, may prove the value of the buildings erected since the date of the deed.⁴ But proof of an oral agreement, contradictory of the deed itself, is inadmissible.⁵

13. *Knowledge and Parol Agreements*.—As before remarked, the written covenant against incumbrances cannot be avoided by evidence that both parties knew, at the time of execution, of the existence of the incumbrance complained of as a breach.⁶ Nor can the covenantor's obligation be increased upon parol testimony. An agreement not in the deed cannot be received as

be true in every sense in which the existence of the lease, the possession under which is not apparent, did not, according to competent evidence, form part of the subject of the contract and pass to the purchaser as an incident of the reversion." Rawle on Cov. (5th ed.) 99, and note cited, with authorities.

1. *Dower*.—An outstanding dower interest is a breach of the covenant against incumbrances, even though it become consummate only after the deed, and by a change of law as to the mode of assignment. *Walker v. Denver*, 79 Mo. 664.

2. A covenantee against incumbrances, after demand of dower that has become consummate—the inchoate right whereof existed at the date of the deed—may extinguish the dower and recover a reasonable price paid therefor as damages for the breach. *Ward v. Ashbrook*, 78 Mo. 515.

3. The right of a divorced wife to have dower assigned in the real estate of her late husband is an incumbrance. In an action for breach of covenant, only nominal damages are recoverable after demand, but before assignment of the dower. *Runnels v. Webber*, 59 Me. 488.

4. *Dower—Evidence*.—In a suit for the value of the right of dower, brought

on the covenant against incumbrances—the dower not having been released in the deed under which the defendant derived his title; and being since purchased by the plaintiff—evidence was introduced by the plaintiff of the amount paid thereof and of the value of the land without the buildings. The court held that the defendant could offer evidence of the increase of value caused by the buildings since the date of the deed under which he derived his title. *Sturtevant v. Phelps*, 16 Gray (Mass.) 50. Compare *Kellogg v. Malin*, 62 Mo. 429.

5. Proof of an oral agreement between the parties to a deed, about removing incumbrances, is not competent, for it would tend to contradict the deed itself. *Small v. Jenkins*, 16 Gray (Mass.) 155.

6. *Knowledge—Evidence*.—Knowledge of the incumbrance by the covenantee at the time the covenant is made, will not relieve the covenantor from liability. *Williamson v. Hall*, 62 Mo. 405; *Beach v. Miller*, 51 Ill. 206.

Evidence of the object of the plaintiff in purchasing, or of the increased value of the land purchased, was held inadmissible in a suit for damages on the covenant against incumbrances on account of the existence of a right of way. *Kellogg v. Malin*, 62 Mo. 429. Compare

collateral to it, when it is directly related to the covenant written in the instrument. It cannot be said that the deed is silent on the subject and therefore the rule governing collateral parol agreements is applicable.¹

III. Incumbrances on Insured Property.—I. *Terms of Policy.*—The effect of incumbrances upon the validity of fire insurance depends upon the terms of the policy. If the contract is that the risk shall be void if the insured is not the owner of the property, it is not affected by the existence of a mortgage; but if the risk is upon the condition that the property shall not be incumbered, the effect would be otherwise.² Under the former agreement, the insured may be the owner of the property insured in such sense as to make the policy hold good, though his title be subsequently questioned, and though he had not received it when he claimed ownership; had bought the property and was awaiting its conveyance to him. Whether, in such a case, he should have disclosed the state of things, qualifying his averment of ownership, was held a question for the jury.³ Omission of facts, not intended to deceive or defraud, is not necessarily fatal to insurance. Failure to answer a written question whether the property to be insured was encumbered, without intent to mislead, was not held to be a fatal misrepresentation;⁴ and failure to disclose when the insurer neglected to enquire, was treated as an innocent omission.⁵ But ordinarily, such fact should be disclosed even in the absence of enquiry, if the policy is conditioned on the freedom of

Sturtevant v. Phelps, 16 Gray (Mass.) 51.

1. A covenant in a deed against incumbrances cannot be enlarged by parol so as to show that the grantor assumed a liability additional to that expressed in the deed. The rule that a collateral agreement existing in parol may be shown notwithstanding the silence of the principal agreement in writing upon the subject, does not apply in such a case. The parol agreement sought to be proven is not collateral to but directly related to the subject of the covenant. Farley v. Farrell, 51 How. Pr. (N. Y.) 497.

2. *Terms.*—A policy was conditioned that it should be void if the insurer was not sole owner of the property. It was held not void because of a mortgage then resting on the property. Woodward v. Republic Fire Ins. Co., 32 Hun (N. Y.) 365. But a policy was held void because of the existence of a mortgage when it was issued, under the clause: "If the title of the property is transferred, incumbered or changed, this policy shall be void." Ellis v. State Ins. Co., 61 Iowa 577.

3. One claimed to be "sole and un-

conditional owner" of a building on which he obtained insurance. He had bought the title and taken a bond for its conveyance to him, but his vendor's title was defective and a suit to perfect it was pending. It was held in a suit by the insured, on the policy, that his claim of ownership was not false, and that the case should have been submitted to the jury on the question whether his failure to disclose the defect of title was material to the risk. Williams v. Buffalo German Ins. Co., 17 Fed. Rep. 63.

4. Where the insured left blank the answer to a written question, whether there was any mortgage on the property, though one did exist, the court held that there had been no misrepresentation, and the insurance was good, since it was admitted that there was no intention to deceive. Jersey City Ins. Co. v. Carson, 44 N. J. 210; Alkan v. New Hampshire Ins. Co., 53 Wis. 136.

5. And when there was a parol trust charge upon the property insured, into which the insurer did not inquire, the insurance was held good. Pavey v. Am. Ins. Co., 56 Wis. 221.

the property from incumbrances. And the applicant who seeks insurance on property which he does not own, but on which he holds only a lien, must make known his limited interest.¹

False answers to enquiries, by which the insurance company is deceived as to incumbrances on the property, renders a policy conditioned on the absence of incumbrances, null and void.² But it has been held that if the insured retains possession of the property, the insurance will hold good, though he has conditionally sold it, and there is a lien upon it, under a policy requiring him to be sole owner. And this, though the insured failed to disclose the facts.³

2. *What the Applicant Should Disclose.*—Fair dealing is the requisite. One seeking to insure his property should avoid all deception upon facts which influence the making of the contract. He must not conceal incumbrances when they are required to be disclosed.⁴ He must not mislead the company, even when disclosure is not formally required of him.⁵ An under-statement as

1. An applicant for insurance who holds only a mortgage lien on the property is bound to disclose the nature of his interest without being questioned—especially if the property is recorded as his. *Waller v. Northern Assurance Co.*, 2 McCrary (U. S.) 637.

2. "If the application asks a disclosure of all incumbrances and the answer is 'None,' and there is one, the company is not bound by the policy," unless they have issued it with actual knowledge of the true state of affairs. *Southern Mut. Ins. Co. v. Yates*, 28 Gratt. (Va.) 585.

One who bought improved land gave a mortgage back, and his grantor agreed to pay an existing mortgage for a less amount. The purchaser insured the property, disclosing only the larger mortgage. *Held*, that as he could deduct the amount of the lesser mortgage from that due under the larger one, there was no such concealment of an incumbrance as to avoid the policy. *Ring v. Windsor Co. Mutual Ins. Co.*, 54 Vt. 434.

A mortgage of a homestead, void because not signed by the wife, did not invalidate insurance. *Watertown Fire Ins. Co. v. G. & B. Sewing Machine Co.*, 41 Mich. 131.

3. A policy will not be avoided because of a lien on the property, or of a conditional sale while the insured retains possession, though the condition of the policy is that "if the interest of the insured in the property should be other than its entire, unconditional and sole ownership," the insurance shall be void. This is *held*, though the facts of the

lien and the conditional sale be not represented to the insurance company. *Carragan v. Lycoming Fire Ins. Co.*, 53 Vt. 418; s. c., 38 Am. Rep. 687.

A policy forbade sale, transfer or conveyance of the insured property. *Held*, not violated by the mortgage of the property. There was a mortgage existing and not disclosed at the time of the contract of insurance, and one subsequently made; but the court remarked that the insured was asked no questions as to any outstanding mortgage, and made no agreement as to future ones. *Friezen v. Allemania Fire Ins. Co.*, 30 Fed. Rep. 352.

4. *Required Disclosures.*—If the policy requires incumbrances to be disclosed under penalty of nullity, a concealment of the fact that a mortgage exists on the property will render the insurance void. *Beck v. Hibernia Ins. Co. of Ohio*, 44 Md. 95; *Bowman v. Franklin Fire Ins. Co.*, 40 Md. 620; *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381, 403; *Bowditch Mut. Ins. Co. v. Winslow*, 3 Gray (Mass.) 415; s. c., 8 Gray (Mass.) 38; *Gehagan v. Un. Mut. Ins. Co.*, 43 N. H. 176; *Patten v. Merchants etc. Ins. Co.*, 38 N. H. 338; *Hutchins v. Cleveland Mut. Ins. Co.*, 11 Ohio St. 477; *Penn. Ins. Co. v. Gottsman*, 48 Pa. St. 151. Compare *Peck v. New London Mut. Ins. Co.*, 22 Conn. 575; *Hoffman v. Aetna Fire Ins. Co.*, 32 N. Y. 405; *Jacobs v. Eagle Ins. Co.*, 7 Allen (Mass.) 132.

5. If the policy does not contain this requirement, yet the applicant fails to state all the incumbrances, or falsely

to the amount of incumbrances has proved fatal to the insurance.¹ A false statement, innocently made, has been held to avoid the risk.² There may be an insurable interest notwithstanding existing liens, and when that is the case, they need not be divulged when divulgence is not required, for there would be no deception.³ Blanks, left where answers to written questions should have been, are not necessarily fraudulent evasions annulling the policy; nor are indefinite responses always so.⁴ An unrecorded mortgage not avowed may deceive, while a recorded one, satisfied but not cancelled, could not; the former would invalidate a policy conditioned on disclosure of incumbrances.⁵

discloses the amount of them, the insurance has been pronounced void. *Egan v. Mut. Ins. Co.*, 5 Denio (N. Y.) 326; *Cooper v. Farmers' Ins. Co.*, 50 Pa. St. 299; *Cumberland etc. Co. v. Mitchell*, 48 Pa. St. 374; *Shoemaker v. Glens Falls Ins. Co.*, 60 Barb. (N. Y.) 84; *Draper v. Charter Oak Ins. Co.*, 2 Allen (Mass.) 569.

1. Where an applicant stated the incumbrances to be one fourth less than they were, the policy was avoided. *Hayward v. New Eng. Ins. Co.*, 10 Cush. (Mass.) 444; *Friesmuth v. Agawam etc. Ins. Co.*, 10 Cush. (Mass.) 588.

2. If the property has been sold for taxes, yet the applicant asks to have it insured as his own, and states that there are no incumbrances, the false disclosure, though innocently made, is fatal to the policy. *Wilbur v. Bowditch Ins. Co.*, 10 Cush. (Mass.) 444.

If mortgages are disclosed, yet an insurable interest shown, and a policy issued, the insurance is good. *Buffum v. Bowditch Ins. Co.*, 10 Cush. (Mass.) 540.

3. When the company does not require that the incumbrances be disclosed, it is not necessary to the validity of the policy that they be acknowledged. But the applicant must have an insurable interest. *West Rockingham Ins. Co. v. Sheets*, 26 Gratt. (Va.) 854. But if the applicant volunteers any statement respecting incumbrances, it must be true. *Id.*

4. If, to written questions, the applicant leaves blank the answer as to incumbrances, and the company issues the policy to him without further question, the insurance will hold good, it has been held. *Lorrillard Ins. Co. v. McCulloch*, 21 Ohio St. 176; s. c., 8 Am. Rep. 52.

If the question is general: "Are the

premises encumbered?" and the answer is in the affirmative without specification, the company waives further objection if it issues the policy. *Nichols v. Fayette Ins. Co.*, 1 Allen (Mass.) 63.

5. A valid mortgage not recorded and not disclosed in answer to a written question renders the policy void. (*Hutchins v. Cleveland Ins. Co.*, 11 Ohio St. 477.) But a recorded mortgage, which has been satisfied but not cancelled, is no impediment (*Hawkes v. Dodge Co. Ins. Co.*, 11 Wis. 188. Compare *Warner v. Middlesex Mut. Ass. Co.*, 21 Conn. 444.

Fatal falsity may be with reference to the amount of the incumbrance as well as to the existence of it. *Hayward v. New Eng. etc. Co.*, 10 Cush. (Mass.) 444.

As the interest of the applicant for insurance may be limited, if not neutralized, by mortgages or other incumbrances, it becomes important to the insurer that the incumbrances be disclosed. They concern the risk, and are therefore material. *Patton v. Merchants and Farmers' Ins. Co.*, 38 N. H. 338; *Gehagan v. Union Ins. Co.*, 43 N. H. 176; *Friesmuth v. Agawam Mut. Ins. Co.*, 10 Cush. (Mass.) 588; *Richardson v. Maine Ins. Co.*, 46 Me. 394.

A disclosure in general terms, though the questions require particular answers, has been held sufficient after the policy has been issued thereon without objection. *Nichols v. Fayette Ins. Co.*, 1 Allen (Mass.) 63; *Wyman v. People's Ins. Co.*, 1 Allen (Mass.) 301. Failure to disclose when questions to elicit it have been put, has been held to render the insurance void. *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247. A false disclosure, concealing the true number and amount of the incumbrances is fatal to the policy. *Smith v. Empire Ins. Co.*, 25 Barb. (N. Y.)

3. *Notice of Incumbrances Required.*—It is fatal to insurance, if the policy is violated by the insured in failing to notify the insurer of a mortgage of the building, according to the terms stipulated. And the nullity extends to the insurance of goods in the same policy.¹ So, if the consent of the insurance company to the encumbering of property is to be obtained before mortgaging, and the insured disregards the terms and gives a mortgage; and the nullity applies also to an insured building not appurtenant to the land mortgaged.² But the conditions respecting disclosures, and the consent of the company to a mortgage, have been liberally construed in favor of the insured.³

497; *Towne v. Fitchburg Mut. Ins. Co.*, 7 Allen (Mass.) 51; *Battles v. York Co. Ins. Co.*, 41 Me. 208.

Where the applicant stated the incumbrance to be less than it was, the excess vitiated the insurance. *Redmon v. Phoenix Fire Ins. Co.*, 51 Wis. 292; s. c., 37 Am. Rep. 830.

There was a policy on real and personal property. The latter was subsequently mortgaged without the consent of the insurance company, and the whole was then invalidated. *Dacey v. Agricultural Ins. Co.*, 21 Hun (N. Y.) 83. See *Bailey v. Homestead Fire Ins. Co.*, 16 Hun (N. Y.) 503.

A policy payable to a mortgagee, voidable for any incumbrance not expressed or disclosed, was declared void because there was another mortgage not stated in the policy. Evidence that the policy was accepted in lieu of another, on the assurance of the agent that the holder would be equally safe, was ruled inadmissible. *Fitchburg Savings Bank v. Amazon Ins. Co.*, 125 Mass. 431.

Policy invalidated by a subsequent mortgage contrary to conditions. *Gould v. Holland Purchase Ins. Co.*, 16 Hun (N. Y.) 538.

1. *Mortgage Without Notice.*—A building and its contents were insured—the policy inhibiting mortgage without notice to the company, under pain of nullity. The insured mortgaged the building, and the policy was rendered void, both as to that and its contents. The risk on the latter was affected by the mortgage. *McGowan v. People's Mut. Fire Ins. Co.*, 54 Vt. 211; s. c., 41 Am. Rep. 843.

2. *Mortgage Without Consent of the Insurance Company.*—A husband and wife executed a mortgage on his land. There was a creamery on the land, owned by the wife. The mortgagee

was not notified that the building was not appurtenant to the land. *Held*, that the mortgage was an incumbrance on the creamery, within the meaning of a clause, in the policy of insurance on the building, that the policy should be void if the property should be encumbered without the consent of the insurance company. *Mallory v. Farmers' Ins. Co.*, 65 Iowa 450.

3. In a fire policy, a clause was inserted: "If the property be sold or transferred, or upon the passing or entry of a decree of foreclosure, or if any change takes place in title or possession, or if the interest of the assured, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee or otherwise, be not truly stated in the policy, the policy is void. . . . If the interest of the assured be any other than the entire, unconditional and sole ownership of the property, for the use and benefit of the assured, it must be so represented to the company, and so expressed in the written part of this policy, otherwise the policy shall be void." The assured, at the time the policy was issued, was the owner in fee of the property insured, but had mortgaged it, and also leased it for a term of years. The policy contained no statement of these incumbrances. *Held*, that the policy was not thereby avoided. *Dolliver v. St. Joseph Ins. Co.*, 128 Mass. 315; s. c., 35 Am. Rep. 378.

The charter of an insurance company required that property should be free from incumbrance, unless the title and incumbrances be disclosed. A policy was *held* good when the title was so, though apparently defective on the records. There was a legal title in a mortgagee liable to the operation of the statute of limitations—the premises being occupied by a tenant. The policy

4. *Judgments*.—The insured does not violate his policy when his insured property becomes encumbered by judgments rendered against him without his consent, though the policy requires that the property be kept free from incumbrances.¹ So of other liens not consented to. But judgments not disclosed when insuring the property would be fatal, under such terms.²

IV. Priority of Incumbrances—1. *Rank by Registration*.—The order of the registration or recording of liens and mortgages determines their relative rank, under the statutes of the different States, except so far as the nature of the incumbrance determines its place among competing claims. While the right is good between the debtor and creditor, or the immediate parties, from the time of its creation, it is not so with respect to third persons till the public has been notified by the recordation. The presumption of law is that all interested persons know of the existence of a recorded mortgage, lien or privilege, so that the act of specially notifying is not necessary.³ It is not merely between incum-

was *held* good. *Lockwood v. Middlesex Mut. Assurance Co.*, 47 Conn. 553.

1. *Judgments*.—Where encumbering without the consent of the company was inhibited, it was *held* that judgments, or other incumbrances *in invitum* by operation of law, did not invalidate the insurance. *Baley v. Homestead Fire Ins. Co.*, 80 N. Y. 21; s. c., 36 Am. Rep. 570. Same principle: *Steen v. Niagara Ins. Co.*, 61 How. Pr. (N. Y.) 144. *Aliter*, if the insured confessed judgment. *Kensington Bank v. Yerkes*, 86 Pa. St. 227. So, under such inhibition a mechanic's lien was filed against the insured property; it was *held* not such an incumbrance as was contemplated by the condition. *Green v. Homestead Fire Ins. Co.*, 82 N. Y. 517; s. c., 17 Hun (N. Y.) 467.

2. Judgment liens rested on property when it had been represented as free from incumbrances in the application for the policy. This was *held* a good defence to an action on the policy. *Leonard v. American Ins. Co.*, 97 Ind. 299.

Ownership.—On an application for fire insurance a warranty of ownership of the premises is not broken by the incumbrance of a mortgage. *Carson v. Jersey City Fire Ins. Co.*, 43 N. J. 300; s. c., 39 Am. Rep. 584.

A judgment entered against a homestead proprietor does not affect the insurance of the homestead. *Eddy v. Hawkeye Ins. Co.*, 70 Iowa 472.

Successive Incumbrances.—A mortgage during the first policy is no breach of condition of a new policy, against

incumbrances. *Lebanon Mut. Ins. Co. v. Leathers* (Pa.), 8 Atl. Rep. 424.

The insured sold part of his land, paid off a mortgage on it, then obtained a new mortgage on the part retained to raise money to purchase another tract of land. *Held*, that if the new mortgage was not greater than the old, in relation to the land, there was no breach of a condition against future incumbrances. *Russell v. Cedar Rapids Insurance Co.*, 71 Iowa 69.

It was *held* a good defence to a suit on a fire insurance policy, that the plaintiff had mortgaged his one-third interest in the property insured, and that there was a judgment lien on the property, contrary to the conditions of the policy. *Hicks v. Farmers' Ins. Co.*, 71 Iowa 110.

But under similar conditions, and one inhibiting assignment without the assent of the company, a policy *held* good notwithstanding a mortgage and an assignment, when the company had assented to a second assignment (knowing of the first), and the mortgage was then paid. *Eddy v. Hawkeye Ins. Co.*, 70 Iowa 472. Where the mortgage is paid and the policy assigned with the consent of the insurance company, the insurance is good. In such case it was *held* "not error for the court, in the absence of any conflict of evidence as to the facts themselves, to withhold from the jury the issues of law depending thereon." *Kimball v. Monarch Ins. Co.*, 70 Iowa 513.

3. **Recording**.—Priority of mortgages depends upon the order of registration.

branches of a particular class, such as mortgages, that the first recorded is first in rank, but also between those of different classes, for the most part. For instance, a registered mortgage is superior to a judgment lien of later registry.¹

If a mortgage is not recorded, the land on which it rests may be sold, and incumbrances may be put upon it, without regard to the mortgage, for it would be inferior to them.² Circumstances may vary this rule, in the interest of justice.³ For instance, it is held that a junior mortgagee who knows of an existing mortgage, cannot claim superiority on the ground that the older one was defective till amended, and that the amended instrument was filed after his.⁴ So a mortgage invalid in some of its relations,⁵ cancelled by mistake,⁶ incorrectly described,⁷ etc., may yet retain superior rank, especially for certain purposes, and for equity's sake.

There has been conflict of decision as to the relative

The earliest is the highest in rank. Recording is notice to the world. The law holds a purchaser to knowledge of a title recorded before his own. *Buchanan v. International Bank*, 78 Ill. 500.

1. A mortgage ranks a judgment lien if first recorded. *Wertz's Appeal*, 65 Pa. St. 306; *Jackson v. Dubois*, 4 Johns. (N. Y.) 216; *Scott v. McMurrin*, 7 Blackf. (Ind.) 284; *Dunwell v. Bidwell*, 8 Minn. 34. Or, though not recorded, if notified to a creditor before he acquires a lien by judgment. *Williams v. Tattall*, 29 Ill. 553; *Cheesebrough v. Milard*, 1 Johns. Ch. (N. Y.) 409; *Thomas v. Vanlieu*, 28 Cal. 616.

Simultaneously recorded, a mortgage and a judgment rank alike. *Hendrickson's Appeal*, 24 Pa. St. 363. A recorded mortgage, to secure future endorsements, has preference over a judgment of later date against the mortgagor. *Ackerman v. Hunsicker*, 85 N. Y. 43; s. c., 39 Am. Rep. 621.

2. **Recording—Notice.**—The lien of an unrecorded mortgage is inferior to the rights of subsequent vendees and incumbrances. *Hunt v. Bowen*, 75 Ga. 662. But in Kansas such lien is prior to that of an attachment, though the attaching creditor had no notice of the mortgage. *N. W. Forwarding Co. v. Mahaffey*, 36 Kan. 152.

If the assignee of a senior mortgage neglects to record the assignment, and allows one without notice to take a mortgage under an agreement that it shall be treated as a senior mortgage, he will be bound by the agreement. *Parmenter v. Oakley*, 69 Iowa 388.

3. A vendee of land received the deed and gave a purchase money mortgage, after contracting for materials to be used on the land. The materials were delivered before the deed and mortgage were recorded. *Held* that the mortgagee's claim was paramount, and this, although he deferred recording the mortgage until after the record of the deed. *Oliver v. Davy*, 34 Minn. 292.

4. Knowing of an unrecorded mortgage prior to his own, a second mortgagee cannot claim that his takes rank above a new instrument executed and recorded later than his to correct the description in the first mortgage. *Council Bluffs Lodge v. Billups*, 67 Iowa 674.

5. An auditor made a mortgage to secure a loan to himself of school funds when he had no authority to borrow them. It was *held* that the reimbursement of the school fund from the county revenues, an entry, on the margin of the record, of the invalidity of the mortgage and its surrender without satisfaction, would not impair the validity of the mortgage as against a vendee without notice. *State v. Green*, 101 Ind. 532.

6. The cancellation of a mortgage by mistake does not affect its rank relative to other mortgages and liens. *Foster v. Paine*, 63 Iowa 85.

7. A mortgage of property incorrectly described was *held* superior to an attachment lien when the attaching creditor had notice of the mortgage and the mistake. *Duncan v. Miller*, 64 Iowa 223.

rank of an unrecorded mortgage and a subsequent judgment.¹

So far as the mortgagor is concerned, he is bound to the mortgagee without registry of the instrument; and courts of equity will give the latter such protection *quoad* third persons holding recorded liens as the nature of the case will admit.²

They cannot give him precedence over an innocent purchaser or lien holder whose rights are of record. Where there is an execution sale to effectuate a judgment rendered prior to the making of an unrecorded mortgage, a purchaser will take free from the unrecorded incumbrance, even though he had notice of it. And though the date of the judgment be subsequent to that of a mortgage but antecedent to the registry of it, the judgment has been held superior.³

2. *Notice*.—A second mortgagee who had no notice of the first, gained priority by recording his in advance of the other. His assignee, acquiring without actual notice after both mortgages had been recorded, had the superior lien.⁴

1. It has been frequently held that an unrecorded mortgage is preferred to a judgment. *Orth v. Jennings*, 8 Blackf. (Ind.) 420; *Greenleaf v. Edes*, 2 Minn. 264; *Kelly v. Mills*, 41 Miss. 267; *Jackson v. Dubois*, 4 Johns. (N. Y.), 216; *Schmidt v. Hoyt*, 1 Edw. Ch. (N. Y.) 652; *Pixley v. Huggins*, 15 Cal. 127; *Norton v. Williams*, 9 Iowa 528; *Bell v. Evans*, 10 Iowa 353; *Patterson v. Linder*, 14 Iowa 414; *Welton v. Tizzard*, 15 Iowa 495; *Coans v. McGlasson*, 18 Iowa 150; *Churchill v. Morse*, 23 Iowa 229; *Hoy v. Allen*, 27 Iowa 208; *First Nat. Bank v. Hazlett*, 40 Iowa 659; *Morton v. Robarls*, 4 Dana (Ky.) 258; *Righter v. Forrester*, 1 Bush (Ky.) 278.

The reverse rule has been held also: *Hulings v. Guthrie*, 4 Pa. St. 123; *Hibberd v. Bovier*, 1 Grant (Pa.) Cas. 266; *Uhler v. Hutchinson*, 23 Pa. St. 110; *Mayham v. Coombs*, 14 Ohio 428; *White v. Denman*, 16 Ohio 59; *Holliday v. Franklin Bank*, 16 Ohio 533; *Fosdick v. Barr*, 3 Ohio St. 471; *Van Thorniley v. Peters*, 26 Ohio St. 471; *Barker v. Bell*, 37 Ala. 354; *Reichert v. McClure*, 23 Ill. 463; *Moore v. Watson*, 1 Root (Conn.) 388; *Miles v. King*, 5 S. Car. 146.

2. Recording is not necessary to hold the mortgagor. *Wood v. Chapin*, 13 N. Y. 506, and many other cases cited, in *Jones on Mortgages*, § 467: "And even in those States where it is provided by statute that a mortgage shall be recorded within a stipulated time, it is still valid between the parties without registration. The mortgagee,

by an unrecorded mortgage, will be protected by a court of equity so far as this can be done without infringing upon the rights of subsequent purchasers, or third persons who have in the meantime acquired liens of record upon the property."

3. *Notice*.—A purchaser at execution sale, without notice of an existing mortgage unrecorded, acquires title superior to it. *Miles v. King*, 5 S. Car. 146. And with notice he acquires superior title, if the judgment is prior to the unrecorded mortgage. *Smith v. Jordan*, 25 Ga. 687. A judgment recovered after the date of a mortgage, but before it is recorded or left for record, ranks above the mortgage in *Ohio*. *Mayham v. Coombs*, 14 Ohio 428.

It was held in *New Jersey* the statutory provision declaring an unrecorded mortgage void as against a subsequent judgment creditor without notice, has no application to a mortgage given by an ancestor as against a judgment against one of his four heirs. *Westervelt v. Voorhis*, 42 N. J. Eq. 179.

A mortgage was executed before a justice of the peace of a county other than that in which the land was situated, and was recorded without the certificate required by statute that the justice was duly commissioned. The record was not constructive notice. *Sitler v. McComas*, 66 Md. 135.

4. *Notice of Unrecorded Mortgages*.—An owner mortgaged his land; then gave a second mortgage on it to another, who, without notice of the prior

But, where an assignee knew of an older mortgage unrecorded, his lien was held inferior, under the circumstances of the case.¹

Recording is notice, though the index of the records may not facilitate the finding of the entry. Assignment is notified to the public, if recorded.² Circumstances showing knowledge may be proved.³

Vendees, notified actually of an unrecorded mortgage, buy sub-

transaction, recorded his mortgage first. When both had been recorded, the second mortgagee assigned his right. The assignee had no actual notice of the first mortgage, and was held to have the prior rank. *Morse v. Curtis*, 140 Mass. 112; s. c., 54 Am. Rep. 456.

Property was sold and a mortgage taken under a probate order, but it was held that there was no constructive notice of the mortgage, since it was not recorded. *Piester v. Piester*, 22 S. Car. 139.

1. An owner gave a mortgage; then, before it had been recorded, sold the land, taking a mortgage for the purchase money, which he assigned, after maturity. The assignee knew of the unrecorded mortgage. His rights were inferior to those of the holder of the unrecorded mortgage. *Building etc. Assoc. v. Clark*, 43 Ohio St. 427.

2. When the assignment of a mortgage is recorded, though it does not purport to convey the bond, it affords constructive notice to a subsequent assignee. *Yates Co. Bank v. Baldwin*, 43 Hun (N. Y.) 136. He who takes a mortgage from one whose deed recites the existence of a prior mortgage is charged with constructive notice, though the prior mortgage is not indexed on the records. *Ætna Life Ins. Co. v. Bishop*, 69 Iowa 645.

3. A creditor who releases his judgment to enable his debtor to mortgage his property to another, is chargeable with notice of the mortgage. He cannot set up a subsequent judgment as prior to it, though obtained before the mortgage was recorded. *Hutchinson v. Bramhall*, 42 N. J. Eq. 372.

A mortgagee was held precluded from foreclosing a mortgage taken by him with constructive notice of a recorded ante-nuptial contract, attested by one witness only, which stipulated that the land should not be mortgaged. *Aultman v. Pettys*, 59 Mich. 482.

In *Kentucky*, under a statutory provision that a vendor shall not have a

lien as against creditors and purchasers in good faith, unless the deed states how much of the purchase money remains unpaid, it was held that a subsequent mortgagee's claim is paramount to that of a prior mortgagee whose mortgage, though setting forth a certain indebtedness, states that there is a credit to be allowed without giving the amount. *Ky. Gen. Stat. ch. 43, § 24; Morris v. Murray*, 82 Ky. 36.

A prior mortgage of land was intended to be recorded, but it was erroneously described. A junior mortgage was apprised of the mistake. The senior mortgagee was entitled in equity to the prior lien. *Cox v. Esteb*, 81 Mo. 393.

If, when a mortgage is released of record without payment, for some purpose, one who knows the fact takes a mortgage, his lien has been held inferior to the released mortgage. *Farmers' Bank v. Butterfield*, 100 Ind. 229.

Omission of the amount of the note will not subordinate the mortgage to claims of creditors having no actual notice of the mortgage. *Wilson v. Vaughan*, 61 Miss. 472.

A purchaser of a recorded mortgage, without actual notice of a prior one unrecorded, has priority, though his vendor had notice of the older mortgage. *Jackson v. Reid*, 30 Kan. 10.

A purchaser for value cannot be bound by an unrecorded mortgage unless his knowledge of it at the date of sale is clearly shown. *Riley v. Hoyt*, 29 Hun (N. Y.) 114.

A statement that certain property is mortgaged for all it is worth is not notice of any particular mortgage so as to give an unrecorded one precedence over a subsequent judgment. *Condit v. Wilson*, 36 N. J. Eq. 370.

A junior mortgage registered will not rank above senior one unregistered, if there was notice of the senior. *Kirkpatrick v. Ward*, 5 Lea (Tenn.) 434.

ject to it.¹ Or of a defective one.² They are not less informed than they would have been by the constructive notice by record.³ The equities existing between claimants of priority have to be considered as well as the dates of the registry of the competing liens; especially are the equities to be invoked in marshalling unrecorded liens.⁴ In the interest of justice, the decisions present many exceptional circumstances to which the ordinary rule of fixing priority by date of record is not wholly applicable.⁵

One should not have preference when it is against conscience, if the statute leaves room for equitable decision,⁶ but the rule of marshalling in the record order should not be lightly departed from. It is a plain rule, little liable to work injustice, and there are good reasons for making it inflexible to the denial of any application of the doctrine that actual notice is equivalent to recording, so far as the person notified is concerned.⁷

1. *Kirkpatrick v. Ward*, 5 Lea (Tenn.) 434; *Oliver v. Davy*, 34 Minn. 202; *Conover v. Van Mater*, 18 N. J. Eq. 481; *Woodworth v. Guzman*, 1 Cal. 203; *Bell v. Thomas*, 2 Iowa 384; *Nelson v. Dunn*, 15 Ala. 501; *Sparks v. State Bank*, 7 Blackf. (Ind.) 469; *Underwood v. Ogden*, 6 B. Mon. (Ky.) 606; *Lambert v. Nanny*, 2 Munf. (Va.) 196; *Musgrove v. Bonser*, 5 Oregon 313; *Butler v. Viele*, 44 Barb. (N. Y.) 166; *Fort v. Burch*, 5 Den. (N. Y.) 187; *Jackson v. Van Valkenburgh*, 8 Cow. (N. Y.) 260.

2. *Duncan v. Miller*, 64 Iowa 223; *Coe v. Winters*, 15 Iowa 481; *Johnston v. Canby*, 29 Md. 211; *Forepaugh v. Appold*, 17 B. Mon. (Ky.) 625.

3. *Smallwood v. Lewin*, 15 N. J. Eq. 60; *Smith v. Nettles*, 13 La. Ann. 241; *Copeland v. Copeland*, 28 Me. 525; *Council Bluffs Lodge v. Billups*, 67 Iowa 674.

4. *Cox v. Esteb*, 81 Mo. 393; *La Farge Fire Ins. Co. v. Bell*, 22 Barb. (N. Y.) 54.

5. *Hart v. Farmers etc. Bank*, 33 Vt. 252.

6. *Harrington v. Allen*, 48 Miss. 492.

7. *Mayham v. Coombs*, 14 Ohio 428.

Negligence.—An old mortgage was assigned; then, with the assignment not recorded, the mortgagee entered a release of the mortgage, and a new mortgage was given. *Held*, that the lien of the old mortgage was prior to that of the new, as the holder of the latter was guilty of negligence in taking it without knowing that the note secured by the old mortgage had been taken up. *Skeele v. Stocker*, 11 Ill. App. 143.

Second Mortgage Preferred.—A retir-

ing partner took a mortgage to secure himself against the firm liabilities and for balance of purchase money. A second mortgage was given—the mortgagee being assured by both parties to the first mortgage that the purchase money had all been paid. His lien was held paramount to that of the first mortgagor. *Passumpsic Savings Bank v. St. Johnsbury Bank*, 53 Vt. 82.

Taking a second mortgage on the same property to secure the same debt, and discharging the first, with intent to waive it, extinguishes the first mortgage; and one intervening has priority over the substituted new mortgage. *St. Albans Trust Co. v. Farrar*, 53 Vt. 542.

Competing Mortgages.—Where a mortgage and three judgments are recorded on the same day and there is nothing to indicate priority, and the land is sold under act Pa., Feb. 16, 1876, enabling assignees, for the benefit of creditors, to sell incumbent real estate free from liens, except mortgages prior to all other liens but other mortgages, ground rent and purchase money due to the commonwealth, the lien of the mortgage is devoted on confirmation of the sale, and the proceeds will be applied in payment of it, though given to secure an indefinite number of payments dependent on a life in being. *Appeal of Richey* (Pa.), 14 Atl. Rep. 235.

In case a junior mortgage intervenes in a subsequent act of mortgage in favor of a senior mortgagee to secure plantation advances, and postpones thereto his own mortgage, he cannot complain that the proceeds of the crop are applied to its discharge, even though the advances were not necessary plantation

3. *Equitable Mortgage*.—A corporation, instead of giving a mortgage in its own name, gave it in the name of the stockhold-

supplies; there being no clause in the act making such a limitation. *Lehman v. Goodberry* (La.), 4 So. Rep. 316.

Each of several lots was encumbered with a mortgage and there was a general mortgage on them all. The plaintiffs owned one of the lots, the defendant owned eight and the general mortgage. The latter sought to avoid the general lien on his lots by having them sold under foreclosure of the prior mortgages and throwing the general mortgage wholly on the other lots. But it was *held* that each lot should pay its proportion of the general mortgage, and that the plaintiffs might pay the amount due on the mortgage and collect the amount due from each lot owner. *Coffin v. Parker*, 1 N. Y. Sup. 100.

A contractor, to purchase real estate, mortgaged it. The mortgage attached to the freehold and was held prior to one given after he had received a deed for the land. He had improved the premises with the money obtained from the first mortgage. *Bank of Louisville v. Baumiester* (Ky.), 7 S. W. Rep. 170.

A lot was sold, and money advanced to enable the grantee to build thereon, and materials were furnished for which the mechanic's lien might have been filed, but that right was released to the grantor, who took a mortgage on the premises for his interest and executed a deed to the grantee. Then the grantee gave a deed, absolute on its face, to the material man to secure his claim. But he took back a defeasance, which was not recorded. Then, to pass the title, the material man conveyed back to the mortgagor, and the latter to his vendee, who gave a mortgage for the amount of his claim to the material man as part of the consideration. *Held*, that a judgment creditor of the last vendee had no priority of lien over the mortgage to the material man, as the deeds and mortgage were but one transaction. *Bradley v. Byran*, 43 N. J. Eq. 396.

Mortgages of Even Date.—One mortgage does not rank another which is delivered immediately after it, so that the presentation of both may be considered one act. Each of the two mortgages being without notice of the other's claim, and the delivery by the mortgagor being simultaneous, it is immaterial which was first executed;

they rank alike. A mistake in one of such mortgages in the description of the land will not affect its rank with reference to the other. If one of these mortgages is for purchase money, and the other is for money borrowed to make the cash payment on the land mortgaged to both, the fact that the vendor surrendered his lien by accepting the mortgage gives the first mortgage no rank above the second. *Koevenig v. Schmitz*, 71 Iowa 175.

In case of two simultaneous mortgages, if, as between the mortgagees, an equitable priority exists in favor of one, and the other assigns for value, and the assignee has no notice of the priority, he will take his mortgage discharged of the equity. *Riddle v. George*, 58 N. H. 25.

Junior Mortgages.—An ancient debt secured by mortgage, acknowledged by a notarial act, and duly recorded, ranks above a debt subsequently acknowledged and secured by mortgage. It is immaterial whether the ancient act of mortgage was reinscribed within ten years of its first inscription. The second act declared the debt to have been secured by a prior mortgage, and this was deemed equivalent to a reinscription. *Hart v. Caffrey* (La.), 2 So. Rep. 788.

Where a second mortgage on real estate is given, with a covenant against "the lawful claims and demands of all persons except those claiming under the prior mortgage," and the premises are sold under a power of sale contained in the first mortgage, and by subsequent conveyances come to the original mortgagor, he is not estopped by the covenant in the second mortgage from claiming the fee unencumbered, since he now holds under the first mortgage, which was expressly excepted in his covenant of warranty. *Huzzey v. Hefferman*, 143 Mass. 232.

A mortgage for a pre-existing debt, without any additional consideration is junior to a subsequent mortgage for the purchase money of the land. If, however, such pre-existing debt is definitely extended with a new note and mortgage given, "this constitutes a valuable consideration sufficient to support the mortgage as a purchase." *Koon v. Tramel*, 71 Iowa 132.

The complainant, in a bill to foreclose a mortgage, agreed with a defend-

ers, but it held good in equity and ranked a later one properly given.¹ So, where the filing of the stockholders' consent was necessary, but it was not filed in the proper county, a mortgage without it held good over a later one given by the corporation to a mortgagee who knew of the former.²

The mortgagee was held not bound to constructive notice of a resulting trust in favor of the wife, when taking a mortgage from the husband.³

ant, who had purchased the equity of redemption from the mortgagor, that if the latter should buy the land at the sheriff's sale, the former would take a new mortgage for the amount of his decree. The land was bought by the complainant at that sale, and he had the deed given to the defendant, who had never lost possession. Rights superior to the complainant's mortgage and to his judgment lien, were then surrendered to the defendant that the mortgage which he was to give to the complainant should become a superior lien, and in consideration that the defendant (owner of the equity of redemption) should reconvey these rights to their owners at once, subject to the complainant's mortgage. *Held*, that the owners of those rights did not thereby lose in equity their priority to the judgment. *Van Duyne v. Shann*, 41 N. J. Eq. 311.

A mortgage for purchase money, made simultaneously with the deed, is prior to any judgment against the vendee. *Ward v. Carey*, 39 Ohio St. 361. But one given to secure money borrowed to discharge a prior mortgage cannot recover the land as against another mortgage then existing. *Holt v. Baker*, 58 N. H. 276. But when a mortgagor fraudulently concealed material facts and thus induced a first mortgagee to release and take a new mortgage to give a second mortgagee priority, equity restored the parties to their original position, it was *held* the second mortgagee was not a party to the fraud. *Farmers etc. Ins. Co. v. German Ins. Co.*, 79 Ky. 598.

The mortgage to secure purchase money will take precedence of all other incumbrances. *Moring v. Dickerson*, 85 N. Car. 466.

Junior Mortgage.—A second mortgage encumbers the remnant after the first is satisfied. A judgment creditor who, as against himself, defeats the first mortgagee, is before the second mortgagee to the amount of the first mortgage. *Simon v. Openheimer*, 20

Fed. Rep. 553. If the first mortgage has been given to secure a future indebtedness and has been recorded, a second mortgagee cannot maintain a proceeding to have his lien declared paramount. *Simons v. Union Springs Bank*, 93 N. Y. 269. But by agreement between the first and second mortgagee, the latter's lien may be first recorded and acquire the prior rank. *Mutual Loan etc. Association v. Ewell*, 38 N. J. Eq. 18; *Maze v. Burke*, 12 Phila. (Pa.) 335.

A prescribed mortgage, revived by the mortgagor, maintains its rank as to subsequent liens. *Kerndt v. Porterfield*, 56 Iowa 412.

There is no priority in the case of a single mortgage given to secure different parties on claims maturing at different times. *Shaw v. Newsom*, 78 Ind. 335.

A corporation mortgaged all its property to one stockholder for a sum loaned by eleven stockholders and officers. The president acted for the mortgagor in giving the mortgage and for the mortgagee in foreclosing it. The mortgagee had received his one-eleventh of the sum loaned before the foreclosure. The president and secretary, who executed the mortgage, were beneficiaries under it. The mortgage was never recorded as required by statute. (Ga. Code, § 1957.) General judgments against the corporation were *held* superior to such mortgage. *Holst v. Burrus* (Ga.), 4 S. E. Rep. 108.

1. **Equitable Mortgage.**—*Bundy v. Ophir Iron Co.*, 38 Ohio St. 300.

2. Where a corporation executed a mortgage but failed to file the stockholders' consent in the proper county, *held*, that a subsequent mortgagee, with knowledge of the fact, could not attack the prior mortgage as invalid. *Rochester Savings Bank v. Averell*, 26 Hun (N. Y.) 643.

Concurrent liens have no priority one over another. *Collerd v. Huson*, 34 N. J. Eq. 38; *Granger v. Crouch*, 86 N. Y. 494.

3. Though there may be a resulting

Where land had been omitted from a mortgage by mistake, equity allowed the mortgage lien against it to rank above a subsequent judgment lien.¹ And where a judgment was older than a mortgage, the latter was held superior: a devisee having mortgaged his interest or its proceeds, if it should be sold under a power.²

But the priority of judgments and executions on mortgage notes is not affected by the setting aside of the mortgage.³

A consent judgment in one county was held not to rank above a mortgage of property in another, when the judgment had not been enrolled.⁴

Statutory liens are presumed to enter into the contract of parties to a mortgage; and where the statute fixes the order for the marshalling of liens, it must govern.⁵

trust in favor of a wife in certain land, the legal title to which stands in the name of the husband, one lending money in good faith to the husband upon a mortgage of the land is not bound to constructive notice of the wife's equities. *Slocum v. Slocum*, 9 Ill. App. 142.

1. Payments.—If land is omitted from a mortgage by mistake, and judgment is rendered against the mortgagor, the lien of the judgment creditor is subject to the equity of the mortgage. *Martin v. Nixon*, 92 Mo. 26. A mortgage held superior to a judgment obtained by an action instituted subsequently to the making and recording of the mortgage. *Bellamy v. Cathcart*, 72 Iowa 207.

2. A devisee mortgaged his interest, or the proceeds of it, if it should be sold under a power. The mortgagee was held entitled to the proceeds of such sale in preference to a judgment creditor of the devisee, whose judgment was older than the mortgage. *Duryee v. Martin*, 36 N. J. Eq. 444.

3. Judgments.—The priority of judgments and levies taken on notes secured by mortgage will not be affected because the mortgage itself is set aside and the mortgagee held to account. *Lippincott v. Shaw Carriage Co.*, 25 Fed. Rep. 577.

4. Parties consent to a decree concerning land which was not enrolled. Subsequently they mortgage the land, situated in a county other than that in which the decree was agreed to. The decree did not rank the mortgage. *Kerngood v. Davis*, 21 S. Car. 183.

Liens.—Heirs gave notes to an administrator, each for his respective share's value of land, subject to final adjustment—"Liens being declared on the portion of each for his indebted-

ness." The administrator's right to enforce these liens was superior to that of a mortgagee of a distributee, "except as to the extent of the interest actually inherited by the latter." *Jones v. Robinson*, 77 Ala. 499. The prior mortgagee of an executory land contract, though the mortgage was given to secure an antecedent debt, has rights paramount to those of a subsequent mortgagee under a mortgage made after the acquisition of the legal title by the mortgagor. *Edwards v. McKernan*, 55 Mich. 520.

5. Statutory Liens.—Statutes enter into contracts of mortgage as into any other. If they provide that liens of a described class shall rank above others, the mortgagee contracts in accordance with such provision and his mortgage right must yield rank to the superior statutory lien. *Warren v. Sohn*, 112 Ind. 213.

The lien of a mortgage executed by one cotenant prior to the institution of a suit for partition and recovery of rents and profits, is superior to the decree in such suit for rents and profits. *McArthur v. Scott*, 31 Fed. Rep. 521.

A mortgage given by a tenant on his nursery stock is prior to the lessor's lien on the crop, fruit and grain, provided for in the lease. *Duffus v. Bangs*, 43 Hun (N. Y.) 52.

Water Rent Lien.—The lien for water rent, authorized by statute and made superior to all other incumbrances, is of higher rank than that of a mortgage given and recorded before water had been introduced on the land. *Provident Institution v. Jersey City*, 113 U. S. 506.

Assignment of Debt.—A mortgagee who has assigned the debt cannot give priority by making the entry of satis-

4. *Agreements Affecting Priority.*—The parties to two mortgages may fix their relative rank by agreement; and it does not matter between themselves if the one designated as prior be re-

faction to be made by "every mortgagee . . . having received full payment," to a subsequent mortgagee in good faith without actual notice of the assignment. *Reeves v. Hayes*, 95 Ind. 521, overruling *Ayers v. Hayes*, 60 Ind. 452.

Index.—Though recording a mortgage without indexing it holds good (*Barrett v. Prentiss*, 57 Vt. 297), yet it was *held*, where one's liability as replevin bail does not appear—the undertaking not being properly indexed—one who subsequently takes a mortgage is not chargeable with notice of the liability, and the mortgage is paramount to the liability. *Travellers' Ins. Co. v. Pat-ten*, 98 Ind. 209.

Homestead Right as to Mortgage.—If a man mortgages land which afterwards becomes his homestead, and then makes a new promise to pay the debt, thus extending the time when, but for such promise, the bar of the statute of limitations would attach, the mortgagee's rights are extended and are paramount to the homestead claim. *Hambrick v. Jones*, 64 Miss. 240.

A conventional mortgage granted by a debtor on property constituting his duly registered homestead may be enforced when the homestead has ceased by reason of his removal from the State. *Chaffe v. McGehee*, 38 La. Ann. 278.

A first mortgage, without release of homestead, upon the abandonment of homestead takes precedence of a subsequent mortgage waiving homestead. *Asher v. Mitchell*, 9 Ill. App. 335.

A mortgage given by a purchaser on the day he received the deed and took possession of the land, to one not notified of a contract between the purchaser and another person for the delivery of lumber by the latter, had preference over that person's claim of lien. *Ryder v. Cobb*, 68 Iowa 235.

Parties to a mortgage settled accounts. For a balance a new mortgage was given. The lien of the old one did not hold good against a purchaser who bought the property before its subjection to the new mortgage. *Smith v. Bynum*, 92 N. Car. 108.

The description of land incorrect in a first mortgage was corrected in a new instrument, and it had precedence over

another mortgage made before the correction. *Clark v. Bullard*, 66 Iowa 747.

The intent of the contracting parties, as shown by the instruments, may govern the question of priority when two mortgages are given on the same land and constitute parts of one transaction. *Iowa College Trustees v. Fenno*, 67 Iowa 244.

Land possessed and paid for cannot be affected by a mortgage executed by the vendor after the sale. *Sawyers v. Baker*, 66 Ala. 292.

Pending ejectment against a grantor on his conveyance, which he pleaded, was only a mortgage, he made a second conveyance. Judged as a mortgage, the first conveyance was a lien from its date, and the junior deed was subject to it. *Carter v. Monroe*, 65 Ga. 542.

A trust deed was inoperative as against attaching creditors, not being recorded. A subsequent, written transfer of the goods (the subject of the trust deed) was given to a creditor whom the deed had been intended to secure, but there was no immediate delivery. It was *held* that a subsequent delivery would enable him to defeat a later attachment. *Baldwin v. Flash*, 59 Miss. 61.

Where a mortgage was given to secure money furnished to purchase an outstanding tax title, upon property previously owned by the mortgagors, it was superior to mortgages executed by them on the same property prior to the existence of the tax title. *Kaiser v. Lembeck*, 55 Iowa 244.

School Fund Mortgage.—Land sold for taxes is still subject to the school fund mortgage in *Indiana*. *Stockwell v. State*, 101 Ind. 1.

Lease.—A lease recorded, afterwards assigned, is prior to a mortgage made later than the recording of the lease, though foreclosed before its assignment. *Enos v. Cook*, 65 Cal. 165.

Where a party took a lease of property for three years from the assignee of the mortgagor, the mortgage being defective for want of an affidavit to the consideration required by the Md. Code, art. 24, § 29, but of which mortgage the lessee had actual notice when he accepted the lease, *held*, that he took the land subject to the mortgage, and that the purchaser of the mort-

corded after the other.¹ An agreement in a subsequent conveyance, excepting a mortgage not then recorded, will operate as notice to judgment creditors of the grantee, though their judgments be recorded before the registry of the mortgage.²

An agreement that a fourth mortgage should rank the first, was held to place it above the second and third, so as to hold its priority after the first had been discharged.³

Though the agreement be not entitled to record, it will prove effective when made in good faith, and will govern the priority as against a mortgage that would have proved superior had it not been made in bad faith.⁴

Under some circumstances, an agreement to give a mortgage has been held superior to a mechanic's lien.⁵

A verbal agreement under which advances are made for the construction of a building on mortgaged premises creates a lien superior to that for the materials furnished after notice of the mortgage to secure the advances.⁶

An agreement by a mortgagee that a mortgage to be given should rank his own was held not entitled to record, and not to

gaged property acquired a title free from the lease. *Russum v. Wanser*, 53 Md. 92.

1. **Priority Fixed by Agreement.**—An agreement by the parties thereto that one of two mortgages executed at the same time shall be the prior lien will be enforced as between the parties, although the mortgage postponed was first recorded. *Rigler v. Light*, 90 Pa. St. 235.

2. An unrecorded mortgage was excepted, by express words, in a subsequent conveyance of the lands by the mortgagor, and that deed recorded. Afterwards the mortgage was recorded. *Held*, that such exception was constructive notice to judgment creditors of the grantee, whose judgments were recovered before the mortgage was recorded. *Westervelt v. Wyckoff*, 32 N. J. Eq. 188.

3. Execution and delivery by the beneficial owner of a first mortgage to the fourth mortgagee of a sealed agreement that the fourth mortgage should have priority of lien over the first mortgage, as if previously recorded, *held* to render the fourth one a first lien, and its priority over the second and third mortgages not to be affected by the subsequent payment or discharge of the first. *Taylor v. Wing*, 23 Hun (N. Y.) 233. *Reversed*, 84 N. Y. 471.

4. Upon an issue as to the priority of mortgages, it appeared that the

plaintiff bank had taken its mortgage upon the faith of a sealed instrument made by the defendant's assignor and intended to postpone his mortgage to that of the bank, which was subsequent in time. This instrument was recorded, but not in such a way as to be constructive notice to anyone, the description of the mortgage whose priority was waived being incorrect, and the recording being in the book of conveyances instead of that of mortgages, and the agreement moreover not being one entitled to record under the statute. *Held*, that if the defendant took in good faith and for value, he was not bound by his assignor's agreement. But as it appeared that this was not the case, the plaintiff's mortgage was given priority. *N. Y. Savings Bank v. Frank*, 56 How. (N. Y.) Pr. 403.

5. When an agreement to give a mortgage will be entitled to priority over a mechanics' lien, see *Payne v. Wilson*, 18 N. Y. Supr. Ct. 302; *Perkins v. Davis*, 120 Mass. 408.

6. A mortgage executed *bona fide* to secure the payment of advances to be used in the construction of a building on the mortgaged premises, is a prior lien to claims for materials furnished in the construction of such building, with notice of the mortgage to the full amount of the mortgage, if so much was advanced. That the agreement under which the advances were made was verbal and not in writing does not

operate as notice though recorded.¹ Any agreement to affect priority must be made in good faith, and must be confined to the contracting parties. Third persons ignorant of the arrangement cannot be affected by it.² But where an agreement was made in good faith respecting a mortgage to be given for purchase money, the refusal of a wife to join in making it did not subordinate it to her inchoate rights of dower or homestead.³

5. *Priority of Incumbrances Relative to Assignments.*—It may be that an assignee can claim priority for his mortgage though the assignor could not have done so before the assignment,⁴ for there may have been bad faith in the latter not attributable to the former. If an assignment of a mortgage is recorded, the rights of the assignee are notified to all persons, and they are not afterwards affected by any act of the mortgagee.⁵ It will hold against a prior mortgage unrecorded though given for value to a *bona fide* purchaser.⁶

affect the lien. *Platt v. Griffith*, 27 N. J. Eq. 207. Compare *Barnett v. Griffith*, 27 N. J. Eq. 201.

1. An agreement made by W, a mortgagee, with a bank, for a valuable consideration, that W would waive the priority of his mortgage in favor of a mortgage to be given on the same premises to the bank, *held* not entitled to record under 1 N. Y. Rev. St. 756, § 2, and if recorded, not to be constructive notice to anyone. But knowledge of the attorney of W's assignee as to such agreement is equivalent in law to knowledge of the assignee. *N. Y. Savings Bank v. Frank*, 45 N. Y. Sup. Ct. 404.

2. The parties to a mortgage agreed that a new one should be substituted with a clear title. Upon the same day on which this was done, and without the knowledge of the mortgagees, another mortgage was given to the mortgagor's father-in-law, who had advanced considerable money to the mortgagor's wife without asking repayment. The testimony indicated that the mortgage was made to him without his participation and with the fraudulent purpose of giving it priority. *Held*, that it must be postponed to the other mortgage, since, even if he were an honest mortgagee, his mortgage, if made first, was on premises already encumbered, and he had no equities which would make it anything but a second mortgage, and if the original mortgage was exchanged under a false pretence that the title was to be cleared, he was in no position to object to the restoration of the old security in behalf of the original mortgagees. 1877. *Eggeman v. Harrow*, 37 Mich. 436.

3. In an action to recover money which plaintiff had advanced in the purchase of a house for or by defendant, the proof showed that the plaintiff purchased and paid for the land in question and had the deed made to the defendant under an oral agreement that the plaintiff was to hold the deed, and that, concurrently with taking the deed, defendant and his wife were to execute a mortgage to the plaintiff to secure the purchase money. Defendant did execute the mortgage but his wife refused to join. *Held*, that the mortgage was entitled to priority, as a purchase money mortgage, over any inchoate right of dower or homestead of defendant's wife. 1878, *Bunting v. Jones*, 78 N. Car. 242.

4. *Priority Relative to Assignments.*—The assignee, in good faith and for value of a mortgage, by recording his assignment may gain priority over a prior unrecorded mortgage, although it could not be claimed by his assignor. *Decker v. Boice*, 83 N. Y. 215.

5. The record of an assignment of a mortgage is constructive notice to all persons of the rights of the assignee as against any subsequent acts of the mortgagee affecting the mortgage; it protects as well against an unauthorized discharge as against a subsequent assignment by the mortgagee. [Reversing s. c., 15 Hun (N. Y.) 328.] *Viele v. Judson*, 82 N. Y. 32.

6. An assignment by a junior mortgagee, who has notice of a prior unrecorded mortgage to a *bona fide* purchaser for value that has not such notice, is a "conveyance" within 1 N. Y. Rev. St. 762, §§ 37, 38, and the as-

An assignee of a second mortgage, when the first is not recorded, who takes in good faith for valid consideration and without notice, and whose assignment is recorded, has preference, under the statutes of *Michigan*, which render void all unrecorded conveyances as against recorded ones that have been made in good faith.¹

6. *Securities*.—A mortgage or deed of trust to secure sureties given by a debtor and recorded will not prevent his creditor from availing himself of anything in its terms that may be favorable to himself. The sureties cannot impair his rights while he remains unpaid, by having satisfaction entered. A purchaser from the debtor, after such entry of satisfaction, is deemed to have had notice of the creditor's rights under the deed of trust.²

signee, in order to be entitled to a preference, must procure a record of his assignment before that of the first mortgage. *Westbrook v. Gleason*, 79 N. Y. 23.

A first mortgage was given to a building society and certain shares of stock afterwards surrendered by the mortgagor. The mortgage authorized an insurance of \$1000 on the premises at the expense of the mortgagor. A fifth mortgage thereon, given to a married woman, was assigned as collateral security to three different persons, whose assignments were duly recorded. The third assignee was also the assignee from the lessor of a lease of the premises, executed six days after the bill was filed. A receiver of the rents was appointed, *pendente lite*, on foreclosure of the fifth mortgage. *Held*:

1. That neither the mortgagor nor the third assignee of the fifth mortgage could attack its assignments on the ground that it had been assigned by a married woman to secure her husband's debts.

2. That the holder of the first mortgage could only recover the sum due thereon after deducting the withdrawal value of the shares when surrendered.

3. That he could only recover the premiums paid for insurance to the extent of \$1000.

4. That the assignees of the fifth mortgage were entitled to be paid in the order in which their several assignments were recorded.

5. That the rents of the premises accrued since the receiver's appointment go to him for the benefit of the mortgagees. *Conover v. Grover*, 31 N. J. Eq. 539.

1. Where a mortgage is left unre-

corded, and the mortgagor's heirs give a second mortgage, which is put on record, an assignee of the second mortgage, who takes it in good faith for a full consideration actually paid and without any notice, actual or constructive, that any claim exists against the premises, and whose assignment has also been recorded, is protected and given precedence by *Mich. Comp. L.*, § 4231, which provides that every unrecorded conveyance shall be void as against any subsequent purchaser in good faith, whose conveyance is recorded first. *Burns v. Berry*, 42 Mich. 176.

2. *Incumbrance as Security*.—When a mortgage or deed of trust is executed by a debtor with the declared purpose of securing his sureties, but in terms which make it enure to the benefit of his creditor, and it is duly recorded, the sureties cannot, while the debt remains unpaid, impair the rights of the creditor, by entering satisfaction or directing the trustee to enter satisfaction, on the record of the deed; and a purchaser from the debtor, after such entry of satisfaction, is chargeable with notice of the creditor's rights under the deed. *McMullen v. Neal*, 60 Ala. 552.

After bonds had been issued by a railroad company and a mortgage executed to secure them, and while both were outstanding unsatisfied, but before the mortgage had been recorded, a creditor of the company, with knowledge of all the facts, attached and afterwards levied his execution upon the mortgaged property. *Held*, that he stood no better than if, with such knowledge, he had taken a conveyance of the property, and that he did not obtain priority of title. *Mead v. N. Y. etc. R. Co.*, 45 Conn. 199.

A mortgage given as security would be futile if a purchaser at its foreclosure could not avail himself of the lack of notice on the part of the mortgagee, though he himself may have had actual notice of an equity outstanding.¹ A purchaser for valuable consideration, who is also the holder of the mortgage on which the sale is made, which was given to secure him as a surety, is protected against equities of which he had no notice.²

A mortgage given to secure present and future indebtedness was held superior to a prior one subsequently recorded, even with respect to indebtedness arising later than the date of the second recordation.³ But such security for future indebtedness can rank subsequent incumbrances with respect to only the indebtedness created under the first mortgage without actual notice of the later ones.⁴

7. Dower Rights.—A mortgage to secure a widow's dower will not be postponed to another by agreement when the widow is not cognizant of the nature of the agreement and gave no assent, while the interested party knew of her rights.⁵ A wife may avail herself of an agreement fixing her compensation for dower, made by her husband with mortgagees.⁶ Such compensa-

1. A purchaser at a sale under a mortgage having actual notice of an outstanding equity, may nevertheless take advantage of the want of notice on the part of the mortgagee, since otherwise the mortgage would be a worthless security. *Cahalan v. Monroe*, 56 Ala. 303.

One who, either with or without notice of a prior unrecorded mortgage, takes a mortgage or conveyance of land as security for an existing debt, without giving up any security or divesting himself of any right or doing any act to his own prejudice, on the faith of the title, is not a *bona fide* purchaser for value within the meaning of the recording act (1 N. Y. Rev. Stat. 756, § 1); and as against him the prior mortgage is valid. *De Lancey v. Stearns*, 66 N. Y. 157. To the contrary, under Ala. Rev. Code, §§ 1557, 1558, see *Saffold v. Wade*, 51 Ala. 214.

In *New York*, a mortgage for a past indebtedness, if taken without notice of one for an indebtedness to be subsequently incurred has precedence if it be first recorded. *Genesee Nat. Bank v. Whitney*, 103 U. S. 99.

2. When a mortgage is given to indemnify a surety against a liability contemporaneously assumed, the mortgagee is a purchaser for valuable consideration, and entitled to protection against latent equities of which he had no notice. *Bartlett v. Varner*, 56 Ala. 580.

3. Where a note and mortgage were assigned to a bank as security for anything, the assignor owed or might owe. *Held*, that the subsequent recording of a prior mortgage would not affect the bank's priority, even with respect to advances made after the recording. *Clasey v. Sigg*, 51 Iowa 371.

4. A security for future advances is entitled to priority over subsequent incumbrances only to the extent of the sums advanced prior to actual notice of the subsequent incumbrance. *Sayre v. Herves*, 32 N. J. Eq. 652.

A mortgage executed in 1872 to secure the repayment of money used in the purchase of the land. *Held*, that the mortgage would be postponed as against the widow's dower and the year's support of the family of the mortgagor. *Wilson v. Peeples*, 61 Ga. 218.

5. Mortgage Relative to Widow's Dower.—An agreement that a mortgage should have priority to one given to secure the dower of a widow, in land to which she had relinquished dower upon its sale, she neither having knowledge of nor assenting to the agreement, and the party whose mortgage was thus given priority having knowledge of her rights in the premises, will not be binding upon her. *Fine v. King*, 33 N. J. Eq. 108.

6. Where certain mortgagees accepted a deed of trust made by the mortgagor, wherein they were named

tion may be fixed by herself in an ante-nuptial contract, so that subsequent mortgages given by the husband will not affect her rights.¹

8. *Incumbrances to Secure Purchase Money.*—A mortgage to secure purchase money is highly favored, and though recorded later than another on the same day, it has been held superior under given circumstances.² It does not supersede previous liens, though it is superior to prior judgments against the purchaser.³

A deed and a mortgage to secure the consideration, to be delivered to the respective parties, are operative from the date of the delivery, as between the parties.⁴

9. *Fraudulent Incumbrances.*—A fraudulent mortgage is entitled to no priority in the interest of the mortgagor, though there may be circumstances under which an innocent mortgagee

as grantees containing a provision that the grantor's wife, who signed the deed, should have one-twelfth of the proceeds of the sale in lieu of a dower, *held*, that the mortgagees were thereby postponed to the one-twelfth interest of the wife. *Thurman v. Stoddard*, 63 Ala. 336.

1. Where a wife, in an ante-nuptial contract, took an estate in fee in part of her husband's lands in lieu of a dower, and, after marriage, he satisfied a mortgage on his lands which existed at the date of such contract, with money raised by a new mortgage, *held*, that her estate was discharged from the first mortgage and was superior to the second. *Anglade v. St. Avit*, 67 Mo. 434.

A mortgage by a husband to his wife to secure a portion of her separate estate used in the purchase of the mortgaged property will be postponed to senior mortgages to third persons, who took without notice of the wife's lien. *Neal v. Perkerson*, 61 Ga. 345.

Where heirs at law mortgaged lands descended before suit entered by the ancestor's creditors, *held*, that the mortgage would be postponed to debts of such creditors. *Adger v. Pringle*, 11 S. Car. 527.

2. *Purchase Money.*—A mortgage given to a vendor to secure purchase money of land, and recorded on the same day, has priority of one given by the purchaser, before he has concluded the purchase to a person who has furnished him the money to make the cash payment, notwithstanding the latter is recorded first. *Turk v. Funk*, 68 Mo. 18.

3. A mortgage for purchase money

does not have priority over previous liens, although it does over a previous judgment against the purchaser. *Houston v. Houston*, 67 Ind. 276.

4. Where the owner executes a conveyance of lands, and deposits it, and a mortgage back to secure the unpaid purchase money, with an agent, to be delivered to the purchaser when he complies with the contract, such instruments become operative only from the date of delivery; the title remains in the vendor until such delivery, and *eo instanti* returns to him by the mortgage so as to preclude the interposition of any title or right in any other person; and the purchaser's mortgage, if duly recorded within ninety days, as expressed in the Ala. Rev. Code, § 1657, operates as a notice of its contents to one purchasing in the interval between its delivery and record. *McRae v. Newman*, 58 Ala. 529.

A deed and a mortgage to the grantor, to secure part of the purchase money of the conveyance, were executed simultaneously on February 28th, and acknowledged unrecorded on March 3rd, at noon. Another mortgage on the same premises to another person than the grantor, also stating that it was given to secure part of the purchase money, was executed March 1st, and was acknowledged and registered March 3rd, at a quarter before twelve, noon. *Held*, that the first mortgage was entitled to priority, the registering of the second mortgage not being notice to the first mortgagee, the vendor, since at that time the vendee's deed had not been recorded. *Boyd v. Mundorf*, 30 N. J. Eq. 545.

might claim precedence over later mortgages given in good faith. But when there was no consideration such a mortgage was held inferior to subsequent judgment liens against the mortgagor, in a suit against him by the mortgagee.¹ When a mortgage had been fraudulently obtained and recorded by a third party in collusion with the mortgagor, it was held inferior to one subsequently substituted by the original parties in lieu of it.² A defendant who had made a mortgage to a creditor and recorded it prior to the registry of a previous one given to the plaintiff, and who had done so in fraud of the plaintiff's rights, was held liable to damages.³

If a claim secured by mortgage is partially fraudulent, the mortgage may be entitled to priority over junior ones for that part of the claim which is honest.⁴

10. *Knowledge*.—It is not necessary to prove that a mortgagor knew of the contents of a conveyance deed, when a transcript from the record of the instrument itself is in evidence.⁵ Presumption of knowledge on the part of the purchaser of a mortgage is created by the registry of an older mortgage subsequently inscribed, when his vendor had actual knowledge at the time of the sale.⁶ And he who has actual knowledge of an existing

1. Fraud Relative to Incumbrances.—

A mortgage upon real estate, executed fraudulently or without consideration, by the owner, in favor of another, prior in point of time and lien to that of a judgment rendered against such owner, in favor of a third person, may, in an action by the mortgagee, against such owner and such judgment creditor, to foreclose such mortgage, be subjected to the priority of such judgment. *Kelly v. Lenihan*, 56 Ind. 448.

A mortgage, fraudulent as to the mortgagor's creditors, executed to a relative, who afterwards loaned him a sum to enable him to adjust his unsecured debts, and surrendered the mortgage to him, *held* to be a lien prior to a mortgage earlier, executed by him to a bank, but recorded later. *Clarke v. Forbes*, 9 Neb. 476.

2. A mortgage fraudulently obtained and recorded by a third party through collusion with the mortgagor, during the interval of substituting a new mortgage for an old one, *held*, to be postponed to the substituted mortgage. *Waldo v. Richmond*, 40 Mich. 380.

3. The defendant, intending to defraud the plaintiff, who had, at his request, given up the defendant's note and taken instead a mortgage on real estate without covenants, made a subsequent mortgage to another creditor

and had it recorded prior to the plaintiff's mortgage. *Held*, that he was liable in damages, the act being made a misdemeanor by statute (2 Rev. Stat. 691, § 3), as well, it seems, as being wrongful at common law. *Graves v. Briggs*, 6 Abb. (N. Y.) N. Cas. 38.

4. Where, in marshalling liens, the court awards to a portion of a claim secured by mortgage priority over a subsequent mortgage, but finds that the residue of the claim secured by the prior mortgage is fraudulent and void as against the lien of the subsequent mortgage, the partial preference thus given to the elder lien is not necessarily erroneous. Where no positive illegality enters into the consideration of a claim, it may be valid in part and in part invalid. *Black v. Kuhlman*, 30 Ohio St. 196.

5. *Knowledge, with Reference to Priority*.—N. J. Rev., p. 152, § 4, as to proof of conveyances, is sufficiently complied with by record made by a transcription from a copy of the mortgage examined by the clerk on production to him of the original. The mortgagor need not be proved to have known the contents. *Coe v. N. J. Midland R. Co.*, 31 N. J. Eq. 105.

6. The purchaser of a mortgage is *held* bound by such notice as the registry afforded of another mortgage of the same date, but subsequently recorded,

mortgage when he buys and takes deed for land, takes subject to it though it had not been registered.¹ If a mortgage be taken as security for a pre-existing debt without extension of time for payment, it will protect against equitable claims of which the mortgagee had no knowledge.²

It would be different with respect to a note previously assigned if the mortgagee's attorney had actual notice of the assignment.³

A mortgagee, acting in good faith, is not held to notice or knowledge from the bare fact that the real estate mortgaged is occupied by a person who is not the mortgagor. The occupant, though really the owner, cannot charge notice upon the mortgagee after having given title to the mortgagor which the mortgagee had no reason to doubt.⁴ Possession by the mortgagee is notice to others of his right.⁵

of which his vendor had actual knowledge. *Van Aken v. Gleason*, 34 Mich. 477.

1. One who takes a conveyance of land with actual knowledge of a prior mortgage, takes it subject to such mortgage, although unrecorded. *Maxwell v. Brooks*, 54 Ind. 98.

A mortgage executed and acknowledged and recorded by the mortgagor, in pursuance of an agreement for a loan on such security, and afterwards delivered to the mortgagee when the loan is made, will have priority in equity over a mechanic's lien for work and materials furnished in erecting a building on the mortgaged premises, after the recording and before the delivery of the mortgage, the mortgagee having no knowledge of the commencement of the building when he parted with his money. *Jacobus v. Mutual Benefit etc. Ins. Co.*, 27 N. J. Eq. 604.

2. One who takes a mortgage for a pre-existing debt, the time of payment not being extended, nor any other new consideration intervening, is a purchaser for value and is protected against an equitable claim or title of which he had no notice. *Thurman v. Stoddard*, 63 Ala. 336.

3. **Notice to Attorney.**—A prior mortgage is chargeable with notice of the assignment of a note, if his attorney had actual notice of the fact. *Walker v. Schreiber*, 47 Iowa 529.

Actual and Constructive Notice.—The provision of the Iowa Code, § 3125, making the publicity of a sheriff's sale constructive notice thereof only twenty days from expiration of the time of redemption, avails nothing to one having actual notice of the fact. *Walker v. Schreiber*, 47 Iowa 529.

4. **Possession as Notice.**—As against an innocent mortgagee, *held*, that notice of title from the mere possession of lands could not be set up by an occupant who was insolvent when he placed the title in the name of the mortgagor, and knew soon after the time of the giving of the first of the two mortgages that it had been given. and did not notify the mortgagee of his claims, but kept silent and permitted the mortgagor to borrow more money of the mortgagee on a second mortgage of the property. whereas if he had notified the mortgagee of his claim when he was first made aware of the existence of the mortgage, the mortgagee might have collected the mortgage debt of the mortgagor and would not have made the second loan on security of the mortgaged premises. *Groton Savings Bank v. Batty*, 30 N. J. Eq. 126.

5. An immediate and continuous change of possession into the hands of a mortgagee is the best possible notice of his rights as against all others. *Parsell v. Thayer*, 39 Mich. 467.

Where a third incumbrancer acquires a right of priority over the first, but the act or omission from which such right flows does not change his relative position towards the second, yet as it is impossible to put him in advance of the first without advancing him also over the second, his lien must of necessity be advanced to the first position as against both the first and second incumbrances. *Sayre v. Hewes*, 32 N. J. Eq. 652.

As between a first and second incumbrancer by mortgages upon the same premises, which mortgages were given pursuant to one and the same arrangement (no money passing at the time),

Where the law requires that an affidavit be filed with the mortgage to show that the consideration was in good faith, the inscription of a mortgage without it is not notice to a subsequent mortgagee. Actual notice is necessary.¹

A sale without consideration cannot defeat a mortgage which has consideration, though the latter has not been recorded.² Nor will such an unrecorded mortgage be superseded by an execution levy on the land mortgaged, if it be registered before the execution sale.³ Nor will it give way to a junior one recorded before it when neither was recorded within the time legally prescribed.⁴ Nor will its assignment be postponed to a junior on the ground of failure to record it, unless the holder of the latter shows a

the second mortgagee has a right to insist that the first mortgage has no force as against his junior mortgage, except to the extent that the prior mortgagee has performed the agreement under which such mortgage was given. *Morse v. Brockett*, 67 Barb. (N. Y.) 234.

Notice.—A deed from an administrator, duly recorded, contained a recital of the decree under which the land was sold, the terms of which required that ten per cent. of the purchase money should be paid in cash, while the balance might remain upon a credit of twelve months, the purchaser giving his note therefor, secured by a mortgage upon the land, and also recited that these requirements had been complied with. *Held*, that such recitals afforded sufficient notice to any one dealing with such purchaser of the existence of the mortgage to the administrator, although such mortgage was unrecorded. *Aetna Life Ins. Co. v. Ford*, 89 Ill. 252.

A party purchasing premises upon which, as appears by the record, there is an unsatisfied mortgage, takes the conveyance with notice that the mortgage is an existing lien in the hands of someone; and he takes subject to it, unless the mortgagee is the owner thereof. *Oregon etc. Trust Co. v. Shaw*, 5 Sawy. (U. S.) 336.

1. A mortgage recorded without an affidavit as to the *bona fides* of the consideration, which is required, will not operate as constructive notice to a subsequent mortgagee; but actual notice of such defective mortgage establishes its priority. *Reiff v. Eshleman*, 52 Md. 582.

Defective Incumbrance.—Where a party took a lease of property for three years from the assignee of the mort-

gagor, the mortgage being defective for want of an affidavit to the consideration required by Md. Code, art. 24. § 29, but of which mortgage the lessee had actual notice when he accepted the lease. *Held*, that he took the land subject to the mortgage, and that the purchaser of the mortgaged property acquired a title free from the lease. *Russum v. Wanser*, 53 Md. 92.

Statutory Lien.—As to the precedence of a mortgage lien or of a judgment of condemnation over a mere statutory lien, see *Gimbel v. Stolte*, 59 Ind. 446.

Registry.—A paper in the form of a mortgage, but with the right of the mortgagee to sell in thirty days after the debt becomes due, is a mortgage, and under Ga. Code, § 1957, is postponed to a subsequent deed made without notice and prior to its recording, though the deed is not recorded until after the mortgage. *McGuire v. Barker*, 61 Ga. 339.

A valid mortgage in the hands of a *bona fide* assignee is preferred to a subsequent one, although the assignment is not recorded, unless the statute requires such record; but as between *bona fide* assignees of the same mortgage the assignment first recorded will have priority. *Oregon etc. Trust Co. v. Shaw*, 5 Sawy. (U. S.) 336.

2. An unrecorded mortgage takes precedence of a subsequent conveyance by the mortgagor without consideration. *Merriman v. Hyde*, 9 Neb. 113.

3. A mortgage made prior to the levy of an execution upon the land covered by it, but not recorded until after said levy though before the sale on execution, is a prior lien to that of the execution levy. *Holden v. Garrett*, 23 Kan. 98.

4. A senior mortgage not recorded

duly recorded chain of title to himself derived from the common source of title.¹

The mere entry of a mortgage upon record, contrary to the instructions of the mortgagee who has left it with the registrar who is to await further orders, is not such recording as to give a lien over a mortgage subsequent but regularly made and recorded.²

11. *Defects and Omissions.*—An instrument of mortgage so defectively executed as not to be entitled to registry, gains no advantage over a subsequent judgment by being registered; and subsequent cure of the defects will not give it priority.³ The omission of the mortgagee's name is fatal so far that a subsequent purchaser is not charged with notice by the record of the mortgage.⁴ Omission of the mortgage on the index of the registry cannot affect the rights of the mortgagee, who is not to suffer by the neglect of the recording officer in a particular not essential.⁵

in time has the precedence over a junior mortgage recorded before the senior one, but not in time. *Myers v. Picquet*, 61 Ga. 260.

1. To render a prior assignment of a mortgage void as against one claiming under a subsequent one, on the ground that the former was not recorded, such claimant must show a recorded chain of title to himself from the common source of title, and that the instruments recorded in fact were entitled to record. *Potter v. Stransky*, 48 Wis. 235.

2. A debtor gave a mortgage for the debt, the *bona fides* of which was not disputed, and it was at once placed on record. Subsequently it was found that another party had a mortgage from the same mortgagor on the same land, purporting to be given and recorded first. This mortgage had no debt to support it, unless it was one owing to a firm of which the mortgagee was a member, and for which other mortgages for more than its amount were in existence. The register of deeds testified that it was left with him by the mortgagor, with directions not to place it on record until further directions were given, and that he never received any such directions, but his clerk recorded it without orders. *Held*, that the spreading it upon the record book under such circumstances was not a recording which entitled it to priority. *Brigham v. Brown*, 44 Mich. 59.

Certificate of Registry.—Records of mortgages on lands in *Nebraska*, but made in another State, which contain

no certificates of their execution and acknowledgment, or which contain certificates which fail to show that the clerk who made them was well acquainted with the handwriting of the officer who made the acknowledgment, or that he believed the signature of such officer to be genuine, or that the mortgages were executed and acknowledged according to the laws of the State where they were made, are nullities under Neb. Gen. St. 873, 874, and furnish no notice to purchasers. *Irwin v. Welch*, 10 Neb. 479.

3. **Mistakes and Omissions.**—Putting a mortgage defectively executed, and so not entitled to be recorded, upon the record, does not give it priority over a subsequent judgment; and reforming it will not give it effect as to a judgment perfected before the decree of reformation. *Van Thorniley v. Peters*, 26 Ohio St. 471. And see *Cogan v. Cook*, 22 Minn. 137.

4. The record of a mortgage from which the name of the mortgagee is omitted does not charge a subsequent purchaser with notice thereof. *Disque v. Wright*, 49 Iowa 538.

5. A recorder of mortgages cannot deprive a mortgagee of his rights under a recorded mortgage by omitting it from the index, or by indexing it improperly, or by omitting it from his certificate. *Swan v. Vogel*, 31 La. Ann. 38.

Under the New York recording acts, the index is not an essential part of the record for the purpose of notice, and a mortgage duly recorded though not in-

• Serious defects of land description in a mortgage foreclosed and in the deed given by the officer, cannot be corrected as against a subsequent deed and mortgage executed by the same mortgagor.¹ But when a mortgage description did not include all the property which the parties meant that it should cover, the court allowed it to be corrected, because a subsequent mortgagee of the whole, who was authorized to procure the correction of the first one, had offered the first mortgagee an interest in his to the amount of the consideration of the first mortgage. The offer was declined, and the court allowed the correction and gave the first mortgagee priority.² Errors of description may be corrected when the equity of the mortgagee is equal and prior to that of a judgment creditor, in a contest between the two.³

dexed is constructive notice, even against a *bona fide* purchaser or mortgagee who dealt on the faith of finding no incumbrance in the index. *Mutual Life Ins. Co. v. Dake*, 1 Abb. (N. Y.) N. Cas. 381.

1. Where a mistake in a mortgage in describing the land is carried into the foreclosure decree, a sheriff's certificate of sale and his deed to the assignee thereof, the latter is not entitled to a correction as against persons who claim under an intermediate deed and mortgage executed by the same mortgagor. *Angle v. Speer*, 66 Ind. 488.

2. A mortgage was taken which by mistake omitted certain property it was intended to cover. A third person, authorized to procure its correction, secured for himself a mortgage upon the whole and offered the original mortgagee an interest in this mortgage to the amount of the former one, but the offer was declined. *Held*, that the original mortgage remained in force and should be rectified and foreclosed. *Hunt v. Hunt*, 38 Mich. 161.

A mortgagee cannot have his mortgage reformed and corrected as against the purchaser in good faith, for a valuable consideration, of a judgment which was a lien upon the land which was intended to be, but by mistake was not, embraced in the mortgage, the purchaser of the judgment having no notice of the mistake at the time of his purchase, and where the holder of such a mortgage, having brought an action against such a purchaser to reform the mortgage, in order to prove notice on the part of such purchaser, offered to show that he had purchased the judgment at much less than its face, by reason of the existence of the mortgage as a prior lien, it was *held* that it was

not error to exclude such evidence. *Wainwright v. Flanders*, 64 Ind. 306.

A mortgage of lands in New Jersey, drawn in New York, to executors, "their successors and assigns," containing the usual clause conveying all the mortgagor's estate, right, title, interest, etc., in the premises, and recorded in full, is notice to a subsequent mortgagee and judgment creditor of the mistake, and that such mortgage was intended to convey the fee. *Bunker v. Anderson*, 32 N. J. Eq. 35.

3. **Error of Description.**—Where a mortgage or trust deed contains errors of description of land, the equity of the mortgagee or grantee to have them corrected is equal, and prior, in respect to time, to that of a subsequent judgment creditor. *Brewster v. Clamfit*, 33 Ark. 72.

An agreement by a creditor to extend the time for payment of his debt, and also to purchase a certain mortgage executed by the debtor, *held* to constitute a sufficient consideration to support a second mortgage to him, and to entitle both mortgages in his hands to priority over another and prior mortgage given by the debtor for the purchase money of the property, but which by mistake did not contain a correct description of the land, and of which the holder of the two subsequent mortgages had neither actual nor constructive notice. *Port v. Embree*, 54 Iowa 14.

Lien Relative to Execution.—Provisions of statute, requiring a mortgagee who has sued at law on his mortgage to show return of execution unsatisfied, are for the benefit of the debtor; omission to do so does not enable a junior mortgagee to claim priority. *Simmons Hardware Co. v. Brokaw*, 7 Neb. 405.

12. *Competing Liens*.—A lien by mortgage was held higher than one by execution, though later in date, when the latter had lapsed before the making of the mortgage, though it was renewed afterwards.¹ But if unrecorded it is below a judgment lien, though foreclosed before the judgment was rendered.² To have it otherwise it has been held that the judgment creditor must be notified actually of the existence of the unrecorded mortgage before giving the credit to his debtor on which his judgment is founded.³

It has been held that taxes do not supersede registered mortgages in order of lien, unless their priority is expressly created by statute.⁴ The title acquired at a tax sale is subject to the mortgage liens resting upon it, so far that a junior mortgagee cannot, by purchasing, dislodge those liens.⁵ The general rule is, however, that the tax lien is higher in rank than any conventional one.

1. A mortgage executed after an execution lien had been created and allowed to lapse, and before such execution lien was renewed, is a paramount lien to such a renewed execution lien. *Gamble v. Fowler*, 58 Ala. 576.

The title acquired by a mortgagee of the defendant in execution in the interval elapsing between the stay by order of the plaintiff after issue of execution and the issue of an *alias fi. fa.*, will prevail over the title acquired by a purchaser at a sale under the *alias fi. fa.* *Bates v. Bailey*, 57 Ala. 73.

2. A judgment lien is superior to a prior unrecorded mortgage, although it has been foreclosed and execution levied before the rendition of the judgment. *Richards v. Myers*, 63 Ga. 762.

3. An unrecorded mortgage can take nothing as against judgments in point of law, nor is it entitled to any preference in equity. If it is, it must be by bringing home to the owners of the judgments actual notice of the existence of the unrecorded mortgage, not only before their respective liens attached, but before the debts on which they are founded were contracted. *Lahr's Appeal*, 90 Pa. St. 507.

Up to the moment of its adjudication by the sheriff, the property of a debtor which has been seized under execution may be validly sold or mortgaged by him subject to the rights of the seizing creditor. And if the seizing creditor waives his rights in favor of a mortgage executed by the seized debtor, such mortgage will, after being recorded, rank any mortgage subsequently put on the property by the seizing creditor who

bought it in. *Citizens' Bank v. Ferry*, 32 La. Ann. 310.

4. *Taxes as Incumbrances*.—Taxes levied subsequent to the registry of a mortgage do not have priority over it without express legislation giving such priority. *Dows v. Drew*, 27 N. J. Eq. 442.

5. A junior mortgagee cannot, by purchase at tax sale, acquire a title which shall defeat the lien of the senior incumbrancer. 1876. *Garrettson v. Schofield*, 44 Iowa 35.

Mortgaged land was sold for taxes, but the tax sale was set aside on a bill filed by the mortgagor, and the purchaser appealed from the decree.

Meanwhile the mortgagees undertook to sell the land under the power reserved in the deed, and a junior judgment creditor of the mortgagor enjoined the sale and sought to have the tax title declared void and the property sold under decree. The mortgagees filed a bill to foreclose. *Held*: 1. That the mortgagees were entitled to a decree to sell, and to the first lien on land and rents. 2. That the judgment creditor must pay the costs of contesting the tax title and of advertising the sale enjoined, and was entitled to a decree authorizing him to redeem from the mortgagees and then to a sale of the land to pay both debts, or to a sale of the equity of redemption, or to the surplus proceeds of the sale under the decree of the mortgagees. 3. That the court had no power to suspend the execution of these decrees because of the pendency of the suit touching the tax title. *Fulghum v. Cotton*, 3 Tenn. Ch. 296.

13. *Release of Lien*.—When a mortgage is released and a new one substituted, and both the release and the new mortgage recorded with even dates, the lien continues so as to hold against a mortgage recorded before the substitution.¹ When a mortgagee has entered satisfaction upon the record, though induced to do so by the fraud of the mortgagor, the record ceases to be constructive notice.²

An assignment of a mortgage was held of lower rank than a second mortgage made after it. The first mortgagee, after assigning, released the mortgage to the mortgagor. Then the latter gave the second mortgage to another person who knew nothing of the assignment of the first, which had not been recorded.³

14. *Redemption*.—A junior mortgagee is not bound to redeem against a mortgage prior to his own or lose his rights.⁴ He may

Mortgage Given to the Court.—A mortgage made to an officer of the court, designated by the chancellor, brings the fund as much within the custody of the law as if it were made directly to the chancellor, and hence such mortgage is a lien on the premises covered, superior to municipal taxes and assessments. *Jersey City v. Foster*, 32 N. J. Eq. 825.

1. *Release of Incumbrances*.—Where a mortgagee releases the mortgage and takes a new mortgage to secure the same debt, reciting the fact, and the release and new mortgage are recorded on the same day, the lien is superior to that of a mortgage given to another before the date of the last and after the date of the first mortgage. (Following *Campbell v. Carter*, 14 Ill. 286.) *Shaver v. Williams*, 87 Ill. 469.

A prior mortgagee's release, given with notice of a subsequent deed, and to the prejudice of the subsequent incumbrancer or purchaser, operates as a discharge of his lien to the extent of the value of the land released. *Cogswell v. Stout*, 32 N. J. Eq. 240.

Where a mortgagee, intending on the margin of the record to release the mortgage only as to those of the secured notes which are unassigned, by mistake releases all, without the knowledge of the assignee of a part of them, a subsequent purchaser of the premises for value and without notice will be protected against the assignee. *Ayers v. Hays*, 60 Ind. 452.

2. *A record of a mortgage* ceases to be constructive notice of its existence after the mortgagee has duly entered satisfaction thereof, although induced so to do by false representations of the mortgagor. A written notice by the mort-

gagor, afterwards attached to such record of satisfaction, reciting that the mortgage is still in force, is constructive notice to no one; and a subsequent purchaser, without actual notice of the non-payment of the mortgage, takes the property free therefrom, although he claims by virtue of a title based on a sheriff's sale made after the entry of satisfaction. *Etzler v. Evans*, 61 Ind. 56.

Deed of Trust.—A company, after giving a deed of trust to secure the payment of its bonds, issued other bonds in lieu thereof secured by a second deed of trust. The trustee released the first deed, but failed to exchange as to one of the old bonds. The company's property was afterwards sold under proceedings in bankruptcy. *Held*, that the record of the trust deed did not afford to the purchasers notice of the incumbrance as to the bond not exchanged. *Burt v. Batavia Paper Manf. Co.* 86 Ill. 66.

3. *Release and Assignment*.—Where a mortgagee assigned his mortgage and then released it to the mortgagor, who made a second mortgage, *held* that the assignee, who had not recorded the assignment, held a subordinate lien to the second mortgagee who had no notice of the assignment. *Smith v. Keohane*, 6 Ill. App. 585.

A mortgage assigned his mortgage and then released to the mortgagor, who gave a new mortgage to a *bona fide* purchaser for value. *Held*, that the latter's claim was superior to the assignee's, as he had not recorded the assignment. *Howard v. Ross*, 5 Ill. App. 456.

4. *Redemption*.—Where there is an existing mortgage a subsequent mort-

do so when the senior is about to foreclose to collect debt past due; or he may tender payment without design to redeem or to have the older mortgage transferred to himself.¹

15. *Reinscription, etc.*—It is necessary, in *Louisiana*, to reinscribe mortgages to preserve their rank, when the debtor buys the mortgaged property on twelve months' credit, so that the effect of the sale is merely to extend his time of payment and to secure it, the mortgages not being transferred from the property to the proceeds.²

The rule in *Louisiana* that mortgages must be reinscribed every ten years to preserve their liens is subject to the exception of the minor's mortgage on the property of his tutor.³

A mortgage of a railroad may have priority over a judgment with respect to the parts of the road in the county where it is recorded, yet not to other parts in other counties.⁴

The first mortgagee must exercise due diligence in enforcing his rights as to the second; but the latter cannot hold him responsible for losses to property caused by the mortgagor without his own fault.⁵

gagee can be made to redeem against it or be barred of all rights under his mortgage. *Tower v. Divine*, 37 Mich. 443.

1. A junior mortgagee has the right to pay off or redeem from a senior mortgage which is past due, when the owner of the latter is seeking to enforce collection by foreclosure. But his tender, to have the effect of payment of the prior mortgage, must be made in unmistakable terms, so that there can be no doubt of the intent to satisfy and discharge the senior mortgage, not to redeem and have a transfer of it. *Frost v. Yonkers Sav. Bank*, 70 N. Y. 553.

2. *Reinscription.*—Where, at a sale to pay mortgage debts, the seized debtor buys on twelve months' credit, the sale operates a mere prolongation of time with security, and the mortgages are not transferred from the property to the fund. Accordingly, it is necessary to reinscribe the mortgages to preserve their rank as against the fund. *Fillastre v. St. Amand*, 32 La. Ann. 352.

The legal mortgage on a person's property resulting from the registry of his official bond as sheriff is extinguished by prescription, unless reinscribed within ten years from the date of said registry. The necessity of a reinscription every ten years applies to all mortgages except those specifically exempted from that necessity. *Gale's Succession*, 30 La. Ann., part 1, 351.

The mortgage lien becomes operative from the moment, not of mere deposit in the parish registry, but of actual inscription in the "book of mortgages." *State v. Rogillio*, 30 La. Ann., part 2, 833.

3. Every mortgage, except a minor's on the property of the tutor, ceases to have effect, save as to the parties thereto, unless reinscribed in ten years from the date of its original inscription. Neither notice nor the pendency of a suit to enforce the mortgage obviates the necessity of its inscription, or its reinscription. *Watson v. Bondurant*, 30 La. Ann., part 1, 1.

Further, on reinscription, see *Succession of Gayle*, 27 La. Ann. 547; *Sorrels v. Stamper*, 27 La. Ann. 630.

4. *Railroad Mortgage.*—Where a mortgage, by a railroad company, of its road, which passes through several counties, is recorded in one of those counties before judgment recovered against the company by a stranger, but is not recorded in the other counties, it has a priority of lien over the judgment upon the part of the road lying in that particular county, but not upon such portions of it as lie in the other counties. *Ludlow v. Clinton Line R. Co.*, 1 Flip. (U. S.) 25.

5. *Diligence—Equity.*—As between the first mortgagee and the second mortgagee of a part of the same property, the former is required to exercise good faith and reasonable diligence in the assertion and enforcement of his rights;

The second mortgagee has the equitable right to claim reimbursement for his expenditures in relieving the mortgaged estate of incumbrances.¹

An equitable mortgage unrecorded in the form of a written reservation by a vendor of personal property, was held superior to a subsequent recorded mortgage.²

INCUR.—To become liable or subject to;³ to cause, occasion, bring on.⁴

but he will not be charged in equity, at the suit of the latter, with the value of property covered by his mortgage, which was lost, destroyed, or removed beyond his reach, by the act of the mortgagor, without fraud or gross negligence on his part. *Shields v. Kimbrough*, 64 Ala. 504.

1. A second mortgagee has no right to buy the estate of his mortgagor at a sale to satisfy a prior incumbrance, but he has a clear equity to be reimbursed for any expenditure to relieve the estate of any incumbrances, and the property in his hands is charged therewith in preference to the trusts expressed in the mortgage. *Taylor v. Heggie*, 83 N. Car. 244.

2. **Reservation.**—Where a conditional sale of personal property reserves title in the vendor, such reservation must be in writing, and the instrument will be treated as an equitable mortgage, and will take precedence, although unrecorded, of a subsequent mortgage recorded, where the vendor brings suit against the second mortgagee within the time required for recording. *Tal-madge v. Oliver*, 14 S. Car. 522.

Jurisdiction.—The adjustment of conflicting mortgage claims falls within the jurisdiction of the court from which the process issued under which the sale of the mortgaged property was made. *Factors and Traders' Ins. Co. v. De Blanc*, 31 La. Ann. 100; *Wisdom v. Parker*, 31 La. Ann. 52.

Judicial Order for Recording.—In *Maryland*, a mortgage recorded after six months from its date without an order of court, is void as against creditors without notice, whose debts have been contracted since the date of the mortgage. But a record by order of court, as provided by Md. Code, art. 16, § 23, operates as constructive notice from the time it is made. *Pfeaff v. Jones*, 50 Md. 263.

Relief to Junior Mortgagees.—Where heirs of a junior mortgagee of land held by State certificates of purchase, who had not been made parties to the fore-

closure of the first mortgage, surrendered the certificates to the State and received the patent, and there was no redemption from the foreclosure sale, *held*, that they must seek their relief as junior mortgagees or for expenditures in perfecting title. *Henderson v. Grammar*, 53 Cal. 649.

Estoppel.—One buying lands which the vendor had encumbered by mortgage to secure a debt to a third person, and expressly agreeing with the seller and the mortgagee to pay such debt, which is deducted from the cash payment required, subordinates his title to the mortgage, and is estopped from denying its validity, and the mortgage being duly recorded, a purchaser of the lands at a sale on execution against the vendee merely succeeds to his rights and is also bound by the estoppel. *Kennedy v. Brown*, 61 Ala. 296.

Authorities.—Rawle on Covenants (5th ed.); Jones on Mortgages (3rd ed.); Fisher on Mortgages; Hilliard on Mortgages; May on Insurance (2nd ed.); Phillips on Insurance (5th ed.); Goddard on Easements; Washburn on Easements and Servitudes (3rd ed.); Waples on Proceedings in Rem, book 4, Things Indebted.

3. *Scott v. Tyler*, 14 Barb. (N. Y.) 204. Men contract debts, they incur liabilities. In the one case they act affirmatively, in the other the liability is *incurred* or *cast* upon them by operation of law. *Crandall v. Bryan*, 15 How. Pr. (N. Y.) 56; s. c., 5 Abb. Pr. 109.

4. *Ashe v. Youngst.* (Tex.), 3 S. W. Rep. 454.

In an act denying an action for damages incurred, where the plaintiff shall have neglected to keep in repair a division fence, "the word *incurred* means 'brought on' (Web. Dict.), and by this statute the party in default is to have no action for damages brought on himself in some manner." *Deyo v. Stewart*, 4 Den. (N. Y.) 103.

Under an act providing that each party shall be liable for costs incurred

INCURABLE.—Admitting no cure.¹

INDEBTED—INDEBTEDNESS.—(See DEBT).—Placed in debt; being under obligation; held to payment or requital; beholden.²

Indebtedness is pecuniary obligation. It includes liabilities of every sort, present and to accrue.³

by him, which may be collected by execution in case they cannot be collected from the party against whom they are adjudged, the fee for a guardian *ad litem* of the defendant is costs incurred by the plaintiff, though successful. *Ashe v. Youngst.* (Tex.), 3 S. W. Rep. 454.

A judgment obtained after a date named, upon an action for a hog instituted before that date, is not a debt incurred after the date. *Knight v. Whitman*, 6 Bush. (Ky.) 57; s. c., 99 Am. Dec. 652.

Where a purchaser of land gave his notes with another as security for the purchase money, and the assignee of the notes subsequently took in their stead notes of the principal alone, these latter were held to be a debt incurred for the purchase of land. *Williams v. Jones*, 100 Ill. 362.

Where an act placed additional duties in respect to the registry of votes upon a town clerk and authorized the parish officers to repay him "expenses incurred," this expression meant money paid out by him, and did not include remuneration for his services. It did not mean his labor. *Reg. v. Kingston upon Hull*, 2 E. & B. 184.

A guaranty for *all liability incurred* by A to B would in strictness relate to past transactions, but evidence is admissible to show that A was not at the time indebted to B, and that the guaranty therefore applied to future indebtedness. *Agawam Bank v. Strever*, 18 N. Y. 502.

The act of congress of June 6th, 1872, section 12, provided that a distiller who carried on business after the time stated in a notice of suspension should incur the forfeitures provided for persons who carried on business without having given bond, being the forfeitures mentioned in section 44 of the same act. The word "incur" here means "bring into operation," and the forfeiture takes effect without regard to ownership. *United States v. Distillery at Spring Valley*, 11 Blatchf. (C. C.) 255.

1. In construing the law giving an action of rehibition where a slave sold had an infirmity incurable by nature,

a Louisiana court said: "An infirmity is incurable either by its nature or by the progress it has made, or by the ignorance of the physician. When an infirmity results from the injury of one of the organs necessary to life, as the brain, the heart or the lungs, it is, and always will be, incurable by its nature. It is also said, though not very correctly, to be incurable by its nature when the healing art has no remedy to cure it. . . . When an infirmity curable by its nature has been neglected or ill treated in its beginning, it reaches a stage where it ceases to be curable and is said to be incurable by the progress it has made. When the infirmity is such that the physician called to heal it is ignorant of the means of cure, it is said to be incurable by the ignorance of the physician.

"Out of these three classes of incurable infirmities the law gives the rehibitory action in the case of those which are incurable by their nature." *St. Romes v. Pore*, 10 Mart. 205.

2. Webster, quoted in C. S. P. U. & C. R. Co. v. Lundstrom, 16 Neb. 254.

3. *Merriman v. Social Manf. Co.*, 12 R. I. 175. In this case the court, in construing a contract to assume indebtedness, said: "Indebtedness is a word of large meaning. It is used to denote almost every kind of pecuniary obligation originating in contract. . . . The language is, 'all the indebtedness . . . now due or to grow due.' The assumption was obviously meant to be comprehensive. We think it must be held to cover liabilities contracted by endorsement, whether then due or to grow due.

The term includes not only debts voluntarily contracted, but every debt of every character however arising. As used in a statute making the trustees of a corporation individually liable if the indebtedness exceeded the capital, it includes a judgment for costs. *Allen v. Clark* (N. Y.), 11 Cent. Rep. 72.

Where a testator directed that "all moneys or indebtedness which shall appear upon any inventory or ledger or book of account" kept by him, "charged as due" to him from any of the bene-

ficiaries during his lifetime, "and as an outstanding and unsettled account" at the time of his decease, should be deducted from the share of the person concerned, the word was *held* to cover advances so made. The word "indebtedness" is not exclusively a term of legal technicality. It has at times a signification far broader than the law dictionaries assign to it, not even involving of necessity the idea of money obligation. Like any other word, therefore, which is used in a testamentary paper, its signification is open to construction, and it may be necessary to scrutinize the provisions of the testator's will, and even, under some circumstances, the condition of his estate and his relation to the objects of his bounty, in order to ascertain the sense in which he has seen fit to employ it. *Matter of Robert*, 4 Dem. (N. Y.) 185.

In a statute subjecting the purchaser of a railroad to all the indebtedness existing against the company from which it is purchased, "the word indebtedness is used in its large and general sense and not in a technical one. . . . The plaintiff in error took the railroad in question charged with the payment of any just claims which were outstanding against the road and its former owner as such." *C. S. P. U. & C. R. Co. v. Lundstrom*, 16 Neb. 254.

In Charter or By-Law of Corporation—(See STOCK, STOCKHOLDERS).—"The word *indebted*, when employed in a by-law or charter restraining a stockholder from transferring his stock while indebted to the company, applies as well to debts to become due as to those which are actually due, and as well to those owing by the stockholder as surety or endorser as to those in which he is the principal debtor." *St. Louis Perpetual Ins. Co. v. Goodfellow*, 9 Mo. 154; *Grant v. Mechanics Bank*, 15 S. & R. (Pa.) 140; *Rogers v. Huntingdon Bank*, 12 S. & R. (Pa.) 77; *Sewall v. Lancaster Bank*, 17 S. & R. (Pa.) 286. *Contra, In re Stockton Malleable Iron Co.*, 2 Ch. Div. 101. Under such a provision a liability to pay for amount of stock subscribed is an indebtedness, even though not yet called for. *P. & C. R. Co. v. Clarke*, 29 Pa. St. 146. But see *Kahn v. Bank of St. Joseph*, 70 Mo. 263.

Limitations to Municipal Indebtedness.—(See DEBT, vol. 5, p. 155, *et seq.*)—Under the various constitutional and statutory provisions whereby limit is placed upon the extent to which municip-

pal corporations may create debts, "indebtedness" is not to be limited to debts evidenced by bond or those which are due simply. Where the contract made by the municipal corporation pertains to its ordinary expenses, and is, together with other like expenses, within the limit of its current revenues and such taxes as it may legally and in good faith intend to levy therefor, such contract does not constitute the "incurring of indebtedness" within the constitutional prohibition." *Grant v. Davenport*, 36 Iowa 395.

Indebtedness covers any agreement to pay money when no suitable provision has been made for the prompt discharge of the obligation. It covers orders on a city treasury, even for current expenses, when there are no funds applicable for their payment. *Sockett v. New Albany*, 88 Ind. 473; *Valparaiso v. Gardner*, 97 Ind. 1.

"The plain object of such restrictions is to require that all moneys which are to be paid for municipal expenses, after the debt has reached the fixed limit, shall be raised by taxation. In view of the object it is clear (and all the cases agree in this) that prohibitions against increasing the indebtedness or the debt of a municipality are not to be construed as limited to obligations which are debts *eo nomine*, but are to be extended to all contracts for the payment of money, or contracts whereon the payment of money may be enforced; but where the money to be paid upon such contracts is provided for to be raised by taxation under some fixed and definite scheme, such contracts are not, in my judgment, within such prohibition. Where, however, the money to meet such contracts is not provided for to be raised by taxation and appropriated for that purpose, or by some legislative scheme which positively prescribes that it shall be raised by taxation and appropriated for its payment as needed, then such contracts do increase the indebtedness or debt of municipal corporations within the meaning of such prohibitions." *MAGIE, J.*, in *State v. Atlantic City* (N. J.), 9 Atl. Rep. 765; s. c., 11 East Rep. 589. And see *Davenport v. Kleinschmidt* (Mont.), 13 Pac. Rep. 257; s. c., 1 Ry. Corp., L. J. 366. (See vol. 5, p. 144.)

"A party becomes indebted when he enters into an obligation to pay. *Web. Dict.* . . . The purchaser, having become bound to pay, has incurred an indebtedness which he may be com-

INDECENT—INDECOROUS—INDEMNITY.

INDECENCY.—See EXPOSURE OF PERSON; DISORDERLY HOUSE; OBSCENE PUBLICATIONS.

INDECENT.—Unfit for the eye or ear; tending to obscenity.¹

INDECENT EXPOSURE.—See EXPOSURE OF PERSON.

INDECENT LANGUAGE.—See OBSCENE LANGUAGE.

INDECENT PUBLICATIONS.—See OBSCENE PUBLICATIONS.

INDECOROUS.—Impolite.²

INDEFINITE.³

INDEMNITY.—(See AGENCY; INDEMNITY CONTRACTS; INSURANCE; SUBROGATION; TORTS.)

I. Definition.—Security to save harmless; exemption from loss or damage; security from penalty, or the punishment of past offences.⁴ A writing to secure one from all danger and damage that may ensue from any act.⁵ That which is given to a person

pelled to pay. Being thus bound he is in debt, no matter what amount of property he may have received in consideration for his obligation. He has become indebted for his purpose." The issue of bonds is such an indebtedness. *Scott v. City of Davenport*, 34 Ia. 208. "We are not by any means inclined to limit or restrain the meaning of the word 'indebtedness' as there used, so as to confine it to debts evidenced by bond, or to those which are due simply, but rather to give the word its fair and legitimate meaning and general acceptation." It includes all contracts entered into which cannot be met by current revenue. *French v. City of Burlington*, 42 Iowa 614.

Evidence of Indebtedness.—Under a constitutional provision that "no scrip . . . shall be issued except for the redemption of stock, bonds or other evidences of indebtedness previously issued," bank bills not issued directly by the State, but issued by a corporation created by the State, in which it was the sole stockholder, under express authority from the State, and for the sole benefit of the State, are such evidences of indebtedness. *Bond Debt Cases*, 12 S. Car. 200, 287.

A judgment is an evidence of indebtedness in writing. *O'Donnell v. C. & A. Ry. Co.*, 22 Ill. App. 233.

1. *United States v. Wightman*, 17 Pitts. L. J. 242. In construing an act forbidding the use of the mails to circulate publications of an indecent character, it was said: "The term is said to signify more than indelicate and less than immodest—to mean something unfit for the eye or ear. *Worcester*

Dict." *United States v. Loftis*, 12 Fed. Rep. 671.

2. It is error to charge the jury that recovery can be had against a railroad company for indecorous conduct of its employes. "This word as defined by Webster, and as commonly understood, means impolite, or a violation of good manners or proper breeding. It is broad enough to cover the slightest departure from the most polished politeness to conduct which is vulgar or insulting. It does not necessarily, nor in deed generally, involve an insult. The latter assumes superiority, and offends the self respect of the person to whom it is offered, while the former excites pity or contempt for the one guilty of it. A word or act may be both indecorous and insulting, but yet it lacks the essential elements of an insult.

"In the case now under consideration, the jury may have believed it was indecorous in the conductor not to stop the train at the platform, or not to carry her valise for her when she was leaving the train, or to let her get off between stations, although she chose to do so rather than suffer inconvenience by being carried to the next station, or in merely telling her that she could walk back to her station; yet none of these things amounted to 'insult, indignity, oppression or inhumanity.'" *L. & N. R. Co. v. Ballard* (Ky.), 3 S. W. Rep. 530; s. c., 9 Ky. L. Rep. 9.

3. A lessee "for the term of one year and an indefinite time thereafter," at an annual rent, is a tenant from year to year. *Pugsley v. Aiken*, 11 N. Y. 494.

4. Webster's Dictionary.

5. Wharton's Law Dictionary.

to prevent his suffering damage.¹ In *England* there is an act which provides that every deed, will or other instrument, creating a trust either expressly or by implication shall, without prejudice to the clauses actually contained therein, be deemed to contain a clause that the trustees or trustee for the time being of the said deed, will or other instrument, shall be respectively chargeable only for such moneys, stocks, funds and securities as they shall respectively actually receive, notwithstanding their respectively signing any receipt for the sake of conformity, and shall be answerable and accountable only for their own acts, receipts, neglects or defaults, and not for those of each other, nor for any banker, broker or other person with whom any trust-moneys or securities may be deposited, nor for the insufficiency or deficiency of any stocks, funds or securities, nor for any other loss, unless the same shall happen through their own wilful defaults respectively; that it shall be lawful for the trustees or trustee for the time being of the said deed, will or other instrument, to reimburse themselves or himself, or pay and discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers of the said deed, will or other instrument.²

INDEMNITY CONTRACTS.—(See INDEMNITY.)

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I. Definition.—A contract of indemnity is an agreement between two parties whereby the one party, the indemnitor,³ either agrees to indemnify and save harmless the other party, the in-

1. Bouvier's Law Dictionary.
 2. 22 and 23 Vict., ch. 35, § 31.
 3. The use of the word "indemnitor" appears to be of comparatively recent origin. It is not given in Webster's dictionary, nor is it justified by the existence of a corresponding word in the Latin language. It however, very appositely expresses the idea intended to be conveyed, and has been recognized and used sufficiently often to justify its

recognition as a standard legal technicality. Instances of its use will be found in the following cases: *Smith v. McGehee*, 14 Ala. 404; *Lewis v. Johns*, 34 Cal. 633; *Davidson v. Dallas*, 8 Cal. 227, 254; *Leshner v. Getman*, 30 Minn. 321; *Herring v. Hoppock*, 15 N. Y. 413; *Bridgeport Ins. Co. v. Wilson*, 34 N. Y. 275, 280, 281; *Aberdeen v. Blackmar*, 6 Hill (N. Y.) 324; *Heinmuller v. Gray*, 44 How. Pr. (N. Y.) 260; *Weber*

demnitee,¹ from loss or damage,² or binds himself to do some particular act or thing, or to protect the indemnitee against liability to, or the claim of a third party.³

II. Validity.—1. *Consideration.*—Following the general rule that any consideration is sufficient to support a promise, in the case of indemnity contracts any injury to the promisee—*e. g.*, if he incurs expense in reliance upon the obligation of the promisor, —or benefit to the promisor, is a sufficient consideration.⁴ A moral obligation will form a sufficient consideration;⁵ and the

v. Ferris, 37 How. Pr. (N. Y.) 102, 103. The only law dictionary which recognizes it is Anderson's.

1. This term has scarcely been used. The only instance appears to be in the case of *Weller v. Eames*, 15 Minn. 461. It is used here in view of the fact that it is the only term to express technically the idea to be conveyed.

2. This is the contract of indemnity, strictly so called. The covenant against liability is not philologically a contract of indemnity. The reports are full of instances in which the word "indemnity" has been used in its strictly literal meaning, and the distinction must be kept clearly in view. See *Gage v. Lewis*, 68 Ill. 604; *Weller v. Eames*, 15 Minn. 461; *Valentine v. Wheeler*, 122 Mass. 566; *Hoy v. Hansborough*, 1 Freem. Ch. (Miss.) 533; *Carson Opera House Assoc. v. Miller*, 16 Nev. 327; *Jones v. Child*, 8 Nev. 121; *Chace v. Hinman*, 8 Wend. (N. Y.) 452; *Crippin v. Thompson*, 6 Barb. (N. Y.) 532; *McGee v. Roen*, 4 Abb. Pr. (N. Y.) 8; *Crofoot v. Moore*, 4 Vt. 204; *Pond v. Warner*, 2 Vt. 532.

3. *Weller v. Eames*, 15 Minn. 461; *Peck v. Wakely*, 2 McCord (S. C.) 279; 1 Bouv. Law Dict. (15th ed.) 786; Anderson's Dict. of Law, 534; Whart. Law Lex. (5th Eng. ed.) 470; 1 Abbott's Law Dict. 596.

4. *Dorwin v. Smith*, 35 Vt. 69.

Release of Lien.—Where the plaintiff, a constable, attached a horse, the property of an absent debtor, which was in the possession of the defendant, who promised that if plaintiff would release the horse he would pay the debt, it was held that the promise of the defendant was not a *nudum pactum*, the plaintiff having parted with the lien at defendant's request. *Adkinson v. Barfield*, 1 McCord (S. Car.) 575.

Permission to Defend Suit.—If the defendant in a suit at law, at the request of a third person indirectly interested in the result, permits such person

to assume the defence upon a promise to indemnify him and pay all costs recovered against him, such promise is not void for want of consideration. *Goodspeed v. Fuller*, 46 Me. 141.

Indemnity to Officer.—An officer having an execution in his hands, received a letter from the creditor's attorney stating that A was authorized to act in respect to the collection of the execution, and that his engagements for an indemnity might be relied upon. The officer levied by A's direction on goods supposed to belong to the debtor, and paid over the money to A upon his giving a bond of indemnity, and promising to procure a surety. The attorney then wrote that he was informed of his doings and agreed that A should save the officer harmless according to the terms of his engagement. T brought an action against the officer and recovered. It was held that there was sufficient consideration to support the attorney's promise. *Train v. Gold*, 22 Mass. (5 Pick.) 380.

Entry Upon Lands.—In *Allaire v. Ouland*, 2 Johns. Cas. (N. Y.) 52, it was held that if an employer directed his servant to enter upon lands under a claim of right, promising to indemnify him against loss if such entry should prove to be a trespass, the act of the promisee in obeying the direction was a sufficient consideration.

Removal of Property.—The danger incurred in removing property under a claim of right is sufficient consideration to support an indemnity to those engaged in or participating in the removal. *Avery v. Halsey*, 31 Mass. (14 Pick.) 174.

5. A debtor who had been allowed by the sheriff's deputy to escape, promised afterwards to indemnify the sheriff for the amount of the debt and costs paid by him; and it was held that the moral obligation upon which the promise was based was a good consideration. *Doty v. Wilson*, 14 Johns. (N. Y.) 378.

promise of indemnity will be sustained, even though given subsequently to the event out of which the promisee's liability arises.¹

2. *As Affected by Statute of Frauds.*—In most of the States it is held that a promise of indemnity is not a collateral, but an original promise, and that, therefore, such contracts are not within the provision of the statute of frauds that a promise for the debt or default of another must, to be valid, be in writing.² But

1. See *Doty v. Wilson*, 14 Johns. (N. Y.) 378.

Antecedent Promise.—An obligation undertaken on the faith of a promise that the obligant would be indemnified is sufficient consideration for a bond of indemnity subsequently executed. *Grim v. Semple*, 39 Iowa 570.

Promise Subsequent to Liability.—A having paid to B the whole of a demand claimed by B, but part of which was due to C, B afterwards engaged to indemnify A against any claim by C. It was held that the promise of indemnity was supported by a sufficient consideration, although it was made after the payment of the money. *Lord Suffield v. Bruce*, 2 Stark. 153.

Where an agent, acting in the service and for the benefit of his principal, is subjected without any fault of his own to a loss by means of a groundless suit brought against him by a third person, such loss will constitute a sufficient consideration to support a promise by the principal to indemnify the agent. *Stocking v. Sage*, 1 Conn. 519.

2. This is the rule in *California*, *Lerch v. Gallup*, 67 Cal. 595; *Stark v. Raney*, 18 Cal. 622; *Connecticut*, *Reed v. Holcomb*, 31 Conn. 360; *Marcy v. Crawford*, 16 Conn. 549; *Stocking v. Sage*, 1 Conn. 519; *Georgia*, *Bohannon v. Jones*, 30 Ga. 488; *Jones v. Shorter*, 1 Ga. 204; *Illinois*, *Nelson v. First Nat. Bank*, 48 Ill. 36; *Indiana*, *Anderson v. Spence*, 72 Ind. 315; s. c., 37 Am. Rep. 162; *Horn v. Bray*, 51 Ind. 555; *Iowa*, *Mills v. Brown*, 11 Iowa 314; *Kentucky*, *Lucas v. Chamberlain*, 8 B. Mon. (Ky.) 276; *Dunn v. West*, 5 B. Mon. (Ky.) 376; *Massachusetts*, *Perley v. Spring*, 12 Mass. 297; *Perkins v. Littlefield*, 87 Mass. (5 Allen) 370; *Aldrich v. Ames*, 75 Mass. (9 Gray) 76; *Fish v. Thomas*, 71 Mass. (5 Gray) 45; *Alger v. Scoville*, 67 Mass. (1 Gray) 391; *Blake v. Cole*, 39 Mass. (22 Pick.) 97; *Chapin v. Lap- ham*, 37 Mass. (20 Pick.) 467; *Maine*, *Goodspeed v. Fuller*, 46 Me. 141; *Knight v. Sawin*, 6 Me. 361; *Smith v. Hayward*, 5

Me. 504; *Michigan*, *Green v. Brookins*, 23 Mich. 48; s. c., 9 Am. Rep. 74; *Minnesota*, *Goetz v. Foos*, 14 Minn. 265; *New Hampshire*, *Demeritt v. Bickford*, 58 N. H. 523; *Holmes v. Knights*, 10 N. H. 175; *New Jersey*, *Apgar's Adms. v. Hiler*, 24 N. J. (4 Zab.) L. 812; *New York*, *Sanders v. Gillespie*, 59 N. Y. 250; *Konitzky v. Meyer*, 49 N. Y. 571; *Mallory v. Gillett*, 21 N. Y. 412; *Barry v. Ransom*, 12 N. Y. 462; *Lyon v. Clark*, 8 N. Y. 148; *Farley v. Cleveland*, 4 Cow. (N. Y.) 432; *Conkey v. Hopkins*, 17 Johns. (N. Y.) 113; *Harrison v. Sawtel*, 10 Johns. (N. Y.) 242; *Allaire v. Ouland*, 2 Johns. (N. Y.) Cas. 52; *Chapin v. Merrill*, 4 Wend. (N. Y.) 657. But see *Kingsley v. Balcome*, 4 Barb. (N. Y.) 131. *Vermont*, *Hodges v. Hall*, 29 Vt. 209; *Beaman v. Russell*, 20 Vt. 205; *Wisconsin*, *Vogel v. Melms*, 31 Wis. 306; s. c., 11 Am. Rep. 608; *Shook v. Vanmater*, 22 Wis. 532; and in the *Federal Courts*, *Townesley v. Sumrall*, 27 U. S. (2 Pet.) 170; bk. 7, L. ed. 386; *D'Wolf v. Rabaud*, 26 U. S. (10 Pet.) 476; bk. 7, L. ed. 227.

In *Ohio* the latest decision, *Mays v. Joseph*, 34 Ohio St. 22, holds that a verbal promise by a judgment creditor to indemnify an officer holding an execution against loss or damage from the seizure and sale of property claimed by the debtor to be exempt from execution, is not within the statute of frauds. But in the earlier cases of *Kelsey v. Hibbs*, 13 Ohio St. 340, and *Easter v. White*, 12 Ohio St. 219, it was held that a promise to indemnify one who had become surety upon a bond against any loss arising therefrom was within the statute of frauds, and therefore invalid if not in writing. In *Mays v. Joseph*, 34 Ohio St. 22, the decision was rendered upon the ground that the promise was an original and not a collateral engagement; that there was no element of debt, default or miscarriage of any third party in the agreement, and that the act against which the indemnity was promised was for the benefit of the promisor, and

in some States the contrary view has been adopted, and it has been held that contracts of indemnity are invalid except they satisfy the requirements of the statute.¹

3. *Illegality*.—If the parties at the time of entering into a contract of indemnity are aware that the act which the indemni-

therefore was not within the statute of frauds. The court in its opinion made no reference to the earlier cases, and there is nothing, therefore, to show whether it was intended to overrule the law as there laid down.

In England a contract of indemnity is held by the greater number of the decisions to be an original promise, and therefore not within the purview of the statute. *Eastwood v. Kenyon*, 11 Ad. & E. 438; *Green v. Cresswell*, 10 Ad. & E. 453; *Toplis v. Grane*, 5 Bing. N. Cas. 636; *Thomas v. Cook*, 8 B. & C. 728; *Cripps v. Hartnoll*, 4 B. & S. 414; 32 L. J., N. S., Q. B. 381; 10 Jur., N. S. 200; 8 L. T., N. S. 765; *Reader v. Kingham*, 13 C. B., N. S. 344; *Batson v. King*, 4 H. & N. 739; *Wildes v. Dudley*, L. Rep., 19 Eq. 198; *Lakeman v. Mountstephen*, L. R., 7 H. L. Cas. 17; 43 L. J., N. S., Q. B. 188; 30 L. T. 437; 22 W. R. 617, overruling L. R., 5 Q. B. 613. But see, to the contrary, *Winckworth v. Mills*, 2 Esp. 484.

Original and Collateral Promises.—In *D'Wolf v. Rabaud*, 26 U. S. (1 Pet.) 476, STORY, J., said: "The statute of frauds of New York is a transcript on this subject of the statute of 29th of Charles II, ch. 3. It declares 'that no action shall be brought to charge a defendant on a special promise for the debt, default or miscarriage of another, unless the agreement or some memorandum or note thereof be in writing and signed by the party or by anyone by him authorized.' The terms 'collateral' and 'original' promise do not occur in the statute and have been introduced by courts of law to explain its objects and expound its true interpretation. Whether by the true intent of the statute it was to extend to cases where the collateral promise (so called) was a part of the original agreement and founded on the same consideration moving at the same time between the parties, or whether it was confined to cases where there was already a subsisting debt and demand, and the promise was merely founded upon a subsequent and distinct undertaking, might, if the point were entirely new, demand grave deliberation. But

it has been closed within very narrow limits by the course of the authorities and seems scarcely open for general examination, at least in those States where the English authorities have been fully recognized and adopted in practice. If A agree to advance B a sum of money, for which B is to be answerable, but at the same time it is expressed upon the undertaking that C will do some act for the security of A and enter into an agreement with A for that purpose, it would scarcely seem a case of a mere collateral undertaking; but rather, if one might use the phrase, a trilateral contract. The contract of B to repay the money is not coincident with nor the same contract with C to do the act. Each is an original promise, though the one may be deemed necessary or secondary to the other. The original consideration flows from A, not solely upon the promise of B or C, but upon the promise of both, *diverso intuitu*, and each becomes liable to A, not upon a joint but a several undertaking. Each is a direct, original promise, founded on the same consideration. The credit is not given solely to either but to both; not as joint contractors on the same contract, but as separate contractors upon co-existing contracts, forming parts of the same general transaction."

1. *Alabama*, *Martin v. Black*, 20 Ala. 309; *Brown v. Adams*, 1 Stew. (Ala.) 51; *Mississippi*, *May v. Williams*, 61 Miss. 125; s. c., 48 Am. Rep. 80; *Missouri*, *Bissig v. Britton*, 59 Mo. 204; *North Carolina*, *Draughan v. Bunting*, 9 Ired. (N. C.) 10; *Ohio*, *Kelsey v. Hibbs*, 13 Ohio St. 340; *Easter v. White*, 12 Ohio St. 219. But see *Mays v. Joseph*, 34 Ohio St. 221. *Pennsylvania*, *Nugent v. Wolfe*, 111 Pa. St. 471; s. c., 56 Am. Rep. 291; *Townsend v. Long*, 77 Pa. St. 143; s. c., 18 Am. Rep. 438; *Maule v. Bucknell*, 50 Pa. St. 39; *Miller v. Long*, 45 Pa. St. 350; *Shoemaker v. King*, 40 Pa. St. 107; *Allshouse v. Ramsay*, 6 Whart. (Pa.) 331; s. c., 37 Am. Dec. 417; *South Carolina*, *Simpson v. Nance*, 1 Spear (S. C.) 4. But see *Adkinson v. Barfield*, 1 McCord (S. C.) 575; *Tindal*

tor undertakes to protect his promisee against is unlawful, the promise of indemnity is tainted with illegality, and is void as against public policy;¹ but if the act is not known at the time to be unlawful and is performed under a claim of right, and in the belief on the part of the promisee that it is lawful, the contract of indemnity is not invalid.² If the contract is to indem-

v. Touchberry, 3 Strobb. (S. C.) 177.

1. *Collier v. Windham*, 27 Ala. 291; *Prewitt v. Garrett*, 6 Ala. 128; *Buffendeau v. Brooks*, 28 Cal. 641; *Stark v. Raney*, 18 Cal. 622; *Porter v. Stapp*, 6 Colo. 32; *Nelson v. Cook*, 17 Ill. 443; *Babcock v. Terry*, 97 Mass. 482; *Vincent v. Inhabitants of Nantucket*, 66 Mass. (12 Cush.) 103; *Ayer v. Hutchings*, 4 Mass. 370; *Jose v. Hewett*, 50 Me. 248; *Riley v. Whittiker*, 49 N. H. 145; *Hinds v. Chamberlin*, 6 N. H. 225; *Griffiths v. Hardenbergh*, 41 N. Y. 464; *Pierson v. Thompson*, 1 Edw. (N. Y.) Ch. 212; *Coventry v. Barton*, 17 Johns. (N. Y.) 142; *Richmond v. Roberts*, 7 Johns. (N. Y.) 319; *Love v. Palmer*, 7 Johns. (N. Y.) 159; *Webbers v. Blunt*, 19 Wend. (N. Y.) 188; *Cumpston v. Lambert*, 18 Ohio 81; *Hopkinson v. Leeds*, 78 Pa. St. 396; *Lea v. Collins*, 4 Sneed (Tenn.) 393; *Kemper v. Kemper*, 3 Rand. (Va.) 8; *Atkins v. Johnson*, 43 Vt. 78; s. c., 5 Am. Rep. 260; *Bierbauer v. Wirth*, 5 Fed. Rep. 336; *Hayden v. Davis*, 3 McLean, C. C. 276; *Shackell v. Rosier*, 2 Bing. N. C. 634; *Ligeart v. Wischam*, Dyer, 323 b; *Pitcher v. Bailey*, 8 East 171; *DeMesnil v. Dakin*, L. R., 3 Q. B. 18; *Bell v. Ridde*, 2 Ont. Rep. 25; *Arnold v. Clifford*, 2 Sumner 238; *Samuel v. Evans*, 2 T. R. 569.

Assault.—An indemnity against the consequences of an assault is invalid; *Hinds v. Chamberlin*, 6 N. H. 225; and consequently there can be no recovery upon a bond of indemnity for the damages a servant has been compelled to pay for an assault and battery he has committed. *Babcock v. Terry*, 97 Mass. 482; *Pierson v. Thompson*, 1 Edw. (N. Y.) Ch. 212.

Libel.—An undertaking to indemnify a publisher against the consequences of an article which is libellous upon its face is invalid. *Lea v. Collins*, 4 Sneed (Tenn.) 393; *Atkins v. Johnson*, 43 Vt. 78; s. c., 5 Am. Rep. 260; *Shackell v. Rosier*, 2 Bing. N. C. 634; *Arnold v. Clifford*, 2 Sumner 238. But if the article is apparently innocent, and the publisher has no reason to believe it to be in fact libellous, a

contract of indemnity is valid. *Smith v. Ashley*, 52 Mass. (11 Met.) 367.

Statutory Prohibition.—If a statute prohibits the directors of a bank from becoming sureties for the cashiers thereof, a director cannot give a bond of indemnity to persons who at his request become sureties for the cashier. *Jose v. Hewett*, 50 Me. 248. And where the law prohibited banks from issuing paper not payable on demand, a bond of indemnity to the drawer of certain time drafts which came within the prohibition was held to be invalid. *Hayden v. Davis*, 3 McLean, C. C. 276.

Evasion of Process.—A promise by an employer to his servant that if the latter would go beyond the reach of process issuing from the court the employer would pay all his expenses, the object being to deprive the employer's adversary of the servant's testimony in a suit, is invalid. *Bierbauer v. Wirth*, 5 Fed. Rep. 336.

Breach of Duty.—A contract to indemnify one for the consequences of a breach of duty is invalid. *Gleason v. Briggs*, 28 Vt. 135.

2. *Moore v. Appleton*, 26 Ala. 633; *Anderson v. Farns*, 7 Blackf. (Ind.) 343; *Jacobs v. Pollard*, 64 Mass. (10 Cush.) 287; *Avery v. Halsey*, 31 Mass. (14 Pick.) 174; *Forniquet v. Tegarden*, 24 Miss. 96; *Shotwell v. Hamblin*, 23 Miss. 156; *Stone v. Hooker*, 9 Cow. (N. Y.) 154; *Pierson v. Thompson*, 1 Edw. (N. Y.) Ch. 212; *Coventry v. Barton*, 17 Johns. (N. Y.) 142; s. c., 8 Am. Dec. 376; *Cumpston v. Lambert*, 18 Ohio 81; *Acheson v. Miller*, 2 Ohio St. 203; *Armstrong Co. v. Clarion Co.*, 66 Pa. 218; s. c., 5 Am. Rep. 368; *Jameison v. Calhoun*, 2 Spear (S. Car.) 19; *Kemper v. Kemper*, 3 Rand. (Va.) 8; *Merryweather v. Nixan*, 8 T. R. 186.

Permission to Bring a Suit.—Where one requested and obtained permission to bring an action for his own benefit in the name of another against a third person to recover a debt supposed to be due, promising to indemnify the nominal plaintiff against all damage,

nify the promisee against the consequences of an illegal act already committed, and which was committed under the belief that it was legal, the promise of indemnity is valid.¹

III. Indemnity for Trespass.—Although a promise of indemnity against the consequences of an act which is palpably a trespass is void, yet if the act be apparently legal, the promise is valid and will sustain an action;² and if an agent by the direction of his

such promise is lawful and binding, and not against good morals or public policy as being in the nature of champerty or relating to a malicious prosecution, providing always reasonable grounds for the suit existed. *Knight v. Swain*, 6 Me. 361.

Fraud in connection with the transaction against the consequences of which the indemnity is given will not invalidate the promise of indemnity. *Kneeland v. Rogers*, 2 Hall (N. Y.) 579; *Thomas v. Brady*, 10 Pa. St. 164.

A guarantee policy given by a third person to sureties upon the bond of a tax collector to protect them against loss is valid. *Towle v. National Guardian Assurance Society*, 5 L. T., N. S. 193; 30 L. J., Ch. N. S. 900; 7 Jur., N. S. 1109.

A policy of reinsurance for the purpose of protecting the company insuring against loss is valid. *New York Bowery Fire Ins. Co. v. New York Fire Ins. Co.*, 17 Wend. (N. Y.) 359; *Eastern R. Co. v. Relief Fire Ins. Co.*, 98 Mass. 420, 423.

Support of Pauper.—A bond to indemnify a town against expenses attending the support of a pauper is valid. *Inhabitants of Palmer v. Ferry*, 72 Mass. (6 Gray) 420; *Turner v. Had-den*, 62 Barb. (N. Y.) 480; *Williston v. White*, 11 Vt. 40.

A mail carrier agreed to assign to another his mail contract, and the assignee agreed if he should not be accepted by the post office department as a substitute he would indemnify the assignor from all damage and charges resulting from non-performance. It was held that the promise of indemnity was valid. *Whitehouse v. Langdon*, 10 N. H. 331. The fact that the act against the consequences of which the promisor undertakes to indemnify the promisee is unlawful, does not invalidate the promise of indemnity. Thus, where a person contrived a scheme for smuggling into this country his own goods and the goods of another importer, such importer having no under-

standing with him in regard thereto, and the goods were seized and condemned, but the guilty person entered into a bond on their release to pay their appraised value to the government, and the other importer agreed to pay him his portion of such sum, it was held that he could recover under the bond of indemnity. *Armstrong v. Toler*, 24 U. S. (11 Wheat.) 258.

A city applied to the State quartermaster for the loan of certain arms; the quartermaster being doubtful whether he had authority to make such a loan, had a bond to secure their return. The city having failed to return the arms, it was held, that although the quartermaster had no authority to make the loan, it was liable on its bond. *State v. Buffalo*, 2 Hill (N. Y.) 434.

Indemnity for Delivery of Stolen Property.—A bond given by the alleged owner of stolen property to the magistrate before whom the alleged thief had been tried, to keep the magistrate harmless against any damages incurred by reason of the surrender of the property, is valid. *Ballard v. Pope*, 3 U. C. Q. B. 317.

Breach of Trust.—A devised his real and personal estate to D and R upon trust to sell, and to invest £10,000 arising therefrom in the public funds or real securities for the benefit of persons mentioned in the will. The money was not so invested, but with D's consent was received by R, and used by him in a private trade; and R gave to D a bond conditioned to keep him harmless and indemnified against all actions, suits, proceedings, claims, demands, loss, costs, charges, damages and expenses on account of the £10,000, or by reason of R's being permitted to hold the same. Held, that this bond was valid in law. *Warwick v. Richardson*, 10 M. & W. 284.

1. *Hacket v. Tilly*, 11 Mod. 93; *Griffiths v. Hardenbergh*, 41 N. Y. 464; *Kneeland v. Rogers*, 2 Hall (N. Y.) 579; *Kemper v. Kemper*, 3 Rand. (Va.) 8; *Hall v. Huntton*, 17 Vt. 244.

2. *Moore v. Appleton*, 26 Ala. 633;

principal do an act which is not manifestly illegal, but proves to be a trespass, a promise by the principal to indemnify him is implied.¹

IV. Indemnities Against Expense of Highway.—An undertaking by a land owner to indemnify a municipality against the expense of laying out a highway is against public policy and void if given as an inducement for and as the basis upon which the highway is to be laid out;² but the mere fact that a bond was taken

Marcy v. Crawford, 16 Conn. 549; *Nelson v. Cook*, 17 Ill. 443; *Stanton v. McMullen*, 7 Ill. App. 326; *Avery v. Halsey*, 31 Mass. (14 Pick.) 174; *Stone v. Hooker*, 9 Cow. (N. Y.) 154; *Coventry v. Barton*, 17 Johns. (N. Y.) 142; *Allare v. Ouland*, 2 Johns. (N. Y.) Cas. 52; *Ives v. Jones*, 3 Ired. (N. C.) 538.

Test.—The question is not whether the act turns out to be a trespass, but whether the parties knew it was a trespass and contemplated it as such, or whether they contemplated the commission of an act which they supposed they had a right to do, and did it under such claim of right. *Marcy v. Crawford*, 16 Conn. 549.

Distinction Between Valid and Invalid Promises.—It is a just and true distinction between promises which are and those which are not void, that if the act directed or agreed to be done is known at the time to be a trespass, an express promise to indemnify would be illegal and void; but if it was not known at the time to be a trespass, the promise of indemnity is a good and valid promise. *Stone v. Hooker*, 9 Cow. (N. Y.) 154; *Coventry v. Barton*, 17 Johns. (N. Y.) 142. See also *Cowp.* 343.

Removal of Turnpike.—A promise of indemnity to a person who was directed by the overseer and commissioners of highways to remove a turnpike, is valid if the person to whom it was given acted in the belief that he had a legal right to do so. *Coventry v. Barton*, 17 Johns. (N. Y.) 142.

Entry for Purpose of Fishing.—An indemnity given to one who entered upon lands for the purpose of asserting on behalf of the indemnitor the right to fish in certain waters is valid. *Marcy v. Crawford*, 16 Conn. 549; *Stone v. Hooker*, 9 Cow. (N. Y.) 154.

Knowledge of Promisee.—There is no decision which lays down that the intention of both parties must be innocent, and it might be inferred from the

language of the court in *Avery v. Halsey*, 31 Mass. (14 Pick.) 174; *Stone v. Hooker*, 9 Cow. (N. Y.) 154; and *Coventry v. Barton*, 17 Johns. (N. Y.) 142, that although the promisor may have contemplated a wilful trespass, that fact will not avoid the promise, if the act was not palpably illegal and the promisee acted in the belief that he was entitled to perform it.

1. *Moore v. Appleton*, 26 Ala. 633; *Nelson v. Cook*, 17 Ill. 443; *Gower v. Emery*, 18 Me. 79. See also *Adamson v. Jarvis*, 4 Bing. 66.

2. *State v. Poland* (N. J.), 22 Am. and Eng. Corp. Cas. 366; *Webb v. Albertson*, 4 Barb. (N. Y.) 51. See also *Conv. v. Cambridge*, 7 Mass. 158; *Dudley v. Butler*, 10 N. H. 281; *Dudley v. Cilley*, 5 N. H. 558; *Smith v. Applegate*, 23 N. J. L. 352.

Promise of Indemnity.—"There is no doubt that the members of the committee as individuals, as well as representing that body, were opposed to the alteration of this road, on the ground that in their belief the public interest did not require it, and had taken steps to oppose the road before the surveyors. It is equally clear that the promise to make the road and save the township from expense induced them to withdraw their opposition. They opposed the road from the conviction either that the change was not warranted by any public necessity or that the necessity was not commensurate with the expense that would result. And as the law has entrusted to private hands not only the advocacy but also the opposition to public roads, it was an injury to the land owner as well as to the public to suppress an honest expression of these convictions by a promise to pay money in the public relief, for, if the applicant, moved by a private interest, may buy off that opposition springing from public considerations, it will not be impossible or perhaps difficult to appropriate private

will not invalidate the laying out of the highway, if it was not given and received for the purpose of inducing the construction of the highway, and it appears that there was such a public necessity as justified laying it out.¹

V. Indemnities to Bail.—An express contract by a prisoner to indemnify his bail against loss is against public policy and void,² and such contracts are to be deemed unexecuted so long as the bail has not been discharged of his liability, and until that event has happened, any moneys paid to him to secure him against loss may be recovered by the prisoner or his legal representative.³

property to what is in essence a mere private use." *State v. Poland* (N. J.), 22 Am. and Eng. Corp. Cas. 366.

Duty of Commissioners.—In *Webb v. Albertson*, 4 Barb. (N. Y.) 51, it was held that a bond taken to the commissioners of highways of a town to relieve the town from any tax for the extension of a street, was invalid and could not be enforced. The court say: "The commissioners ought to have no other inducement for action than their regard for the public good. It is their duty to decide whether public convenience requires a new road or highway to be laid out or not. If they determine erroneously, either in making the order or in refusing to make it, an appeal lies. They have no business to be tampering with parties and making conditions. They have no right to say that if they order a highway to be laid out, individuals shall assume or become bound to pay the expense. If the convenience or interest of the public requires it, and the commissioners are honestly of that opinion, the expense should be left where the law places it, a public charge upon the town. On the other hand, if, in the opinion of the commissioners, the public good does not require the laying out of a new road as applied for, they ought not to swerve from their opinions by the offer of individuals to bear the expense. Such a step would look very much like surrendering their opinions and judgment to the highest bidder. If allowed to be practiced, it might become the means of the grossest injustice, dishonesty and oppression."

1. *Parks v. Boston*, 25 Mass. (8 Pick.) 218; *Copeland v. Packard*, 33 Mass. (16 Pick.) 217; *Jones v. Andover*, 26 Mass. (9 Pick.) 146; *Com. v. Sawin*, 19 Mass. (2 Pick.) 547; *Jewett v. Somerset Co.*, 1 Me. 125.

In many cases, the indemnity has been sustained, even where it formed

the inducement, but, in such cases, there was usually a statute authorizing the improvement to be made, provided the indemnity was given. See *Partridge v. Ballard*, 2 Me. 50; *Carpenter v. Mather*, 4 Ill. 374; *State v. Collins*, 6 Ohio 126; *Canal Fund Com. v. Perry*, 5 Ohio 56.

Indemnity for Refusal to Perform Road Labor.—If a person with the view of compelling a change in the location of a road, give a bond of indemnity against the consequences of a refusal to perform the statutory labor upon the roads, the bond is against public policy and void. *James v. Hendree*, 34 Ala. 488.

2. *Wilson v. Strugnell*, L. R. 70, B. D. 548; *Jones v. Orchard*, 16 C. B. 614.

But it must be noticed that in many American cases contracts to indemnify bail have been sued upon without any question being raised as to their invalidity on the ground of public policy. See *Anderson v. Spence*, 72 Ind. 315; *s. c.*, 37 Am. Rep. 162; *Aldrich v. Ames*, 75 Mass. (9 Gray) 76; *Holmes v. Knights*, 10 N. H. 175; *Harrison v. Sawtel*, 10 Johns. (N. Y.) 242.

In *Jones v. Orchard*, 16 C. B. 614, the court say that "such a contract would be contrary to public policy, inasmuch as it would be in effect giving the public the security of one person only, instead of two." It is to be noticed that both that case and *Wilson v. Strugnell*, L. R., 7 Q. B. Div. 548, are cases of indemnities given by the prisoner. Whether the reason assigned above would apply when the indemnity is given by a third person does not appear to have been decided.

In *Simpson v. Robert*, 35 Ga. 180, it was held that a mortgage given to indemnify a surety in a recognizance was not against public policy, and was valid.

3. **When Contract Executed.**—In *Wilson v. Strugnell*, L. R., 7 Q. B. Div. 548, one Manners was charged with embez-

In England a distinction seems to have been made between an indemnity to bail against liability occasioned by the non-appearance of the prisoner, and liability for costs incurred through becoming bail, and it has been held that in the latter case there is an implied promise on the part of the prisoner to indemnify his bail;¹ and in South Carolina it has been held that the surety in a recognizance in a criminal case has an implied indemnity in the same manner as bail in a civil action.²

VI. Construction.—A covenant of indemnity, unlike a release,

zlement and was liberated on procuring bail for £100. Strugnell, who became his bail, received £100 from him to indemnify him against any loss. Before the liability of the bail had been determined, Manners' trustee in bankruptcy brought a suit against Strugnell to recover the £100. STEPHEN, J., said: "The principle is that where money has actually been paid upon an immoral or illegal consideration fully executed and carried out, it cannot be recovered by the person who paid it from the person to whom it was paid; but that where money has been paid to a person in order to effect an illegal purpose with it, the person making the payment may recover the money back before the purpose is effected. The question, therefore, in the present case appears to me to reduce itself to this: Has the arrangement made between Manners and Strugnell been executed or not? I think it has not. In one sense, no doubt, Strugnell is indemnified so long as he holds the £100, but it is only against any risk to which he is exposed by having become bail for Manners; that is to say, he has the means of repaying himself for any loss to which he may be put hereafter; but I do not think the matter can be said to have been fully completed until the sum has been actually, and finally applied to the purpose of repaying him for a loss actually sustained by him. Till his recognizance is forfeited and the money applied to the payment of the sum for which he is liable, the transaction, as it seems to me, is still incomplete, and either Manners or his trustee (for I do not rely on any distinction between them) has a right to require the repayment of the money."

1. Implied Indemnity for Costs.—In *Jones v. Orchard*, 16 C. B. 614, A had entered into a recognizance of bail for B on the removal of an indictment for conspiracy from the central criminal

court to the Queen's Bench. By statute persons entering into such recognizances were liable for the prosecutor's costs in the event of a conviction being obtained. B was convicted and the recognizance was estreated for the non-payment of the prosecutor's costs. It was held that A might maintain an action against B as upon an implied indemnity. The court, in discussing B's liability, were careful to distinguish between contracts to indemnify for liability occasioned by non-appearance and liability for costs. JERVIS, C. J., said: "The rule to reduce damages recovered in the suit was moved on the ground that a contract, in a criminal case, to indemnify bail against the consequences of a default of the principal's appearance on the trial of the indictment is contrary to public policy, and, therefore, that the law will not presume any such contract. It is unnecessary to decide that point on the present occasion, although we are inclined to think the objection well founded and that such a contract would be contrary to public policy, inasmuch as it would be in effect giving the public the security of one person only, instead of two. But as it is admitted that there is nothing illegal or contrary to public policy in the other alternative, viz:—the contract to indemnify the bail against the prosecutor's costs, we need not embarrass ourselves with the consideration of whether or not the law would infer an indemnity as to the rest. An express contract to indemnify against costs would not be illegal, and consequently there can be no reason why the law should not imply an indemnity under the circumstances."

2. Reynolds v. Harral, 2 Strobb. (S. C.) 87. In *May v. Williams*, 61 Miss. 125; s. c., 48 Am. Rep. 80, 83, the Mississippi supreme court announce their preference for the same rule. But see *Cripps v. Hartnoll*, 4 B. & S. 414; *Jones v. Orchard*, 16 C. B. 614.

cannot, when it is clear in its terms, be restricted by a recital.¹ A contract by an assignee to indemnify the assignor upon the assignment of a chose in action is usually construed to be prospective only, and to relate to acts done under the assignment, unless language be used expressive of an intent to give the indemnity a broader scope.² In the case of a bond of indemnity against an encumbrance, a court of equity will take jurisdiction of the whole parties interested, and will make the party immediately liable, who is or may be ultimately made liable.³ If the condition of the undertaking is that the obligor will indemnify

1. *In re Baker*, 51 L. J., Ch. 315.

2. *Warwick v. Hutchinson*, 45 N. J. L. 61; s. c., 46 N. J. L. 200. See also *Hart v. Messenger*, 2 Lans. (N. Y.) 446.

Natural and Proximate Consequence.

—In *Warwick v. Hutchinson*, *supra*, the facts were as follows: The seller of a horse received as part of the price two notes and a bill of sale to secure the same. He afterwards assigned the notes and bill of sale to the defendant, who promised to save him harmless. The purchaser of the horse brought a suit against his vendor, founded upon averments that the sale had been effected by false and fraudulent representations on the part of the agent who had been employed by the latter. The seller brought an action for indemnity against assignee of the notes and bill of sale, but it was held that the acts out of which the plaintiff's loss had arisen having occurred prior to the assignment, the action could not be maintained, although the suit by the purchaser had been brought because of the seizure of the chattels by the defendant upon a writ of replevin. The court say: "It is a fundamental principle of law, applicable alike to breaches of contract of this description and to torts, that in order to found a right of action there must be a wrongful act done and a loss resulting from that wrongful act; the wrongful act must be the act of the defendant, and the injury suffered by the plaintiff must be the natural and not merely a remote consequence of the defendant's act. The wrong done and the injury sustained must bear to each other the relation of cause and effect; and the damages, whether they arise from withholding a legal right or the breach of a legal duty, to be recoverable, must be the natural and proximate consequence of the act complained of." 2 Greenl. Ev., §§ 254, 256; Sedg. Dam., 31; Stevenson

v. Newnham, 13 C. B. 285; *Burton v. Pinkerton*, L. R., 2 Ex. 340; *Glover v. L. & S. W. R. Co.*, L. R., 3 Q. B. 250; *Byard v. Holmes*, N. J. L. (5 Ves.) 296; *Cuff v. N. & N. Y. R. Co.*, 35 N. J. L. (6 Ves.) 17; *Kuhn v. Jewett*, 32 N. J. Eq. (5 Hew.) 647. The acts of the defendant complained of were his refusal to give up the horses on demand by Magahan, and the steps taken by him to enforce the lien of the bill of sale.

The defendant was under no obligation to give up the horses. If he had given them up without the plaintiff's consent he would still have been liable for the consideration of the assignment. Whatever the defendant did in prosecuting and in selling the horses were lawful acts done in the enforcement of the rights he acquired under the assignment of the bill of sale.

The loss sustained by the plaintiff in being mulcted in damages in the Magahan suit was caused solely by the fraudulent representations by means of which the sale of the horse to Magahan was effected. It was not in any legal sense the act of the defendant."

3. *Smith v. Peace*, 1 Lea (Tenn.) 586. See also *Carpenter v. Bowen*, 42 Miss. 28; *Martin v. Campbell*, 29 Barb. (N. Y.) 188.

Purchaser of Encumbered Lands.—At the sale of the lands of a decedent by the court of chancery they were purchased by P, one of the heirs. The amount payable depended on an account between the parties in interest, and a lien was retained for the portion of the price that was left unpaid. P afterwards sold the lands to B, making him a bond for title and receiving his notes for the price. B filed a bill alleging the existence of the purchase-money lien, and praying that the collection of his notes be enjoined. P thereupon gave B a bond with surety to indemnify him from loss on account of the lien, and to make him a title free

the purchaser of lands against the acts of any person, the obligors are only liable in the event of a lawful entry by a third person and the consequent eviction of the purchaser; but if the indemnity is directed against the acts of a particular person, the condition is broken in the event of the possession of the purchaser being interrupted by such person, whether lawfully or unlawfully.¹

An undertaking by the grantees in a deed to save their grantor harmless "from any personal liability for any suits or liens *against* said property," does not oblige the grantees to make payment of a sum for which a mechanics' lien had existed, but which had

from incumbrances. B abandoned his bill and paid the price in full. He afterwards sold the land to S & G, receiving payment in full. The land was afterwards held liable for a balance of unpaid purchase money due from P and S & G paid off the same. S & G thereupon filed a bill in equity against the obligors in the bond of indemnity, making B a party, and it was *held* that they could recover the amount directly from the obligors in the bond. *Smith v. Peace, 1 Lea (Tenn.) 586.* The court say: "Peace (the original purchaser) has not complied with the bond by making to Burwell a title free from this incumbrance. It is true Burwell is not asking for the relief, nor has he been compelled to pay off the prior incumbrance, and therefore he has not suffered. He has not suffered because he has sold the land and received payment. But he or his representative is liable to the complainants. The contract between them remained executory, and undoubtedly the complainants would be entitled to a decree against Burwell compelling him to discharge the prior incumbrance and make them a title. As between complainants and Burwell the latter was first bound to pay off this prior incumbrance. The complainants having paid it, are entitled to the benefit of the security held by Burwell, upon the principle that a party secondarily liable, paying off a liability, is entitled to the benefit of the securities held by the party primarily liable. We think this cause properly falls within the principle laid down in *Story Eq. Jur., § 1250*.

Here Burwell was bound to the complainant to remove the prior incumbrance and make them a title, or if they were compelled to pay off the incumbrance, Burwell would be bound to indemnify them. But Peace and his sure-

ties on his bond were bound to Burwell by the same measure of obligation, and complainants being the parties ultimately entitled, and Peace and his sureties ultimately liable, a direct recovery does justice to all."

1. Lawful Title or Unlawful Entry.—

The condition of a bond, which recited the purchase of lands from one W, by plaintiffs, was to save them and the lands harmless from all manner of mortgages, judgments, extents, executions, and other incumbrances had and obtained, or thereafter to be had and obtained by T, or any other person. It was *held* that the obligor was liable for the wrongful entry of T, under a judgment of ejectment obtained without right, being particular against the acts of a particular person. *LORD ELLENBOROUGH, C. J., said:* "The question is as to the extent of the defendant's undertaking to indemnify; as to which the rule has, I think, been correctly stated at the bar, that where a man covenants to indemnify against all persons, this is but a covenant to indemnify against lawful title. And the reason is, because, as it regards such acts as may arise from rightful claim, a man may well be supposed to covenant against all the world; but it would be an extravagant extension of such a covenant if it were good against all the acts which the folly or malice of strangers might suggest; and, therefore, the law has properly restrained it within its reasonable import; that is, to rightful title. It is, however, different where an individual is named; for, there, the covenantor is presumed to know the person against whose acts he is content to covenant, and may, therefore, be reasonably expected to stipulate against any disturbance from him, whether by lawful title or otherwise."

Nash v. Palmer, 5 M. & S. 374.

been cut off by the foreclosure of a prior mortgage.¹ A promise to indemnify against a certain specified debt subjects the promisor to liability for any damages sustained by the promisee, although the reason that the promisor failed to make payment before suit is that his undertaking is to indemnify against a smaller sum than is actually due, and the creditor refuses to accept payment of less than the full amount due.² An indemnity against any liability that might fall upon an indorser of a note in consequence of his indorsement, extends to a note given and endorsed by the same parties in renewal of the first note;³ but a bond conditioned to save the obligee harmless from loss, damage or expense by reason of any indebtedness incurred by a third party, does not render the obligors responsible for a debt owing by a firm of which such third person is a member.⁴

VII. Breach of Condition.—If a bond of indemnity is conditioned to save the obligee harmless against damage, actual damage must be suffered by the obligee before he can maintain an action upon the bond;⁵ but an obligee in an indemnity bond being damaged

1. *Condict v. Flower*, 106 Ill. 105. The court in interpreting this covenant, say: "The property was to be taken subject to the liens and incumbrances upon it, and the situation was that Prussing's (the grantor's) personal liability in respect to such liens and incumbrances still existed, which might be enforced against him, and he be made to pay the liens and incumbrances subject to which the law was taken, and it was to meet such event that it was stipulated in Prussing's proposition that he should be kept harmless from any personal liability for any actual liens or incumbrances, not for any simple debt, unaccompanied with any lien or incumbrance upon the property, although it may have been incurred in respect of the property."

A covenant to keep harmless "from all liens and claims of liens" is a simple contract of indemnity, and is only broken when the covenantee is actually damaged. *Carson Opera House Assoc. v. Miller*, 16 Nev. 327.

2. **Misstatement of Amount.**—A engaged to indemnify B against a debt due from A and B to C of £50. A and B in fact owed C £74, and C refused to accept £50 from A without the remainder of his debt. B was thereafter arrested for the whole debt. *Held*, that A was liable to B on his engagement to indemnify him. *LORD ELLENBOROUGH* said: "The obligation is to discharge all debts due and owing, the particulars

of which are set forth in the schedule, and the £50 specified there cannot be separated from the remainder, and so long as it subsisted as a ground for arresting the plaintiff he was entitled to insist on the indemnity."

3. *Sutton v. Mulford*, 2 Harr. (Del.) 72.

Indemnity Against Single Renewal.—When the grantors in a bond of indemnity expressly undertake to indemnify an accommodation indorser against his liability on certain promissory notes and a single renewal thereof, their liability is discharged by a second renewal. *Moorehead v. Duncan*, 82 Pa. St. 488.

4. **Bond Against Individual Indebtedness.**—A bond was executed in a penal sum conditioned that the obligors would indemnify the obligee and save him harmless "from all loss, damage and expense by reason of said or any indebtedness incurred by D." Subsequently a promissory note was made and delivered to the obligee for value by a firm of which D was a member, and for its use, but which was endorsed by D in his individual name. *Held*, that the note was not within the condition of the bond, and that an action upon the bond was not maintainable. *Donley v. Liberty Improvement Bank*, 40 Ohio St. 47.

5. *Taliaferro v. Brown*, 11 Ala. 702; *Israel v. Reynolds*, 11 Ill. 218; *Loyd v. Marvin*, 7 Blackf. (Ind.) 464; *Gennings v. Norton*, 35 Me. 308; *Valentine v.*

Wheeler, 122 Mass. 566; Hough v. Perkins, 3 Miss. 724; Carson Opera House Assoc. v. Miller, 16 Nev. 327; Jones v. Childs, 8 Nev. 121; Jeffers v. Johnson, 21 N. J. L. 73; Gilbert v. Wiman, 1 N. Y. 550; Crippen v. Thompson, 6 Barb. (N. Y.) 532; Aberdeen v. Blackmar, 6 Hill (N. Y.) 324; Chace v. Hinman, 8 Wend. (N. Y.) 452; Douglass v. Clark, 14 Johns. (N. Y.) 177; Pond v. Warner, 2 Vt. 532; Farnsworth v. Nason, Brayt. (Vt.) 102; St. Albans v. Curtis, 1 D. Chip. (Vt.) 164; Thompson v. Taylor, 30 Wis. 68.

Mere Indemnities.—Where the obligation is that the person indemnified shall not sustain "damage or molestation" by reason of the acts or omissions of another, or by reason of any liability incurred through such acts or omissions, there is no breach until actual damage is sustained, and the fact that a judgment has been recovered against the obligee does not entitle him to maintain an action. *Gilbert v. Wiman*, 1 N. Y. 550. Similarly, an action can only be maintained on a bond conditioned to indemnify and save harmless against "all damages, costs and charges" upon showing that the obligee has been damaged; *Jeffers v. Johnson*, 21 N. J. L. 73; or upon a contract to indemnify and "save harmless against the claim or demand" of a third person. *Aberdeen v. Blackmar*, 6 Hill (N. Y.) 324. And in *Pond v. Warner*, 2 Vt. 532, it was held that a contract by a principal to his surety to pay a note, "so as to wholly indemnify and save harmless said surety from his liability on said note" was a common contract of indemnity, and that the surety must have sustained actual damage before he could sue.

Liability to Loss.—Under a bond conditioned to save the obligee harmless from a certain mortgage, although the right of action does not accrue until the obligee has been subjected to some harm, a liability to loss, if attended with inconvenience, constitutes a breach. *Gennings v. Norton*, 35 Me. 308.

Claim Against Decedent's Estate.—A demand against the estate of a surety which has been allowed by the commissioners, reported to the probate court and registered among claims against the estate, is a damnification which will entitle the administrator to maintain a suit upon the indemnity. *Pond v. Warner*, 2 Vt. 532.

Indemnity Against Mortgage.—If the vendee of lands agrees to assume and

pay off a certain mortgage on the lands sold, as part of the consideration for the sale of the same, and the vendor is, through the vendee's fault, obliged to give a new mortgage therefor, the vendor is sufficiently damnified to give him a right of action on the vendee's agreement to indemnify. *Bolles v. Beach*, 22 N. J. L. 680.

Personal Liability.—The purchaser of the interest of the lessee in leasehold premises took a bond of indemnity from the vendor to save him harmless against arrears of rent. To prevent a distress the purchaser paid certain arrears. It was held that he was entitled to recover in an action against the vendor, although he was not personally liable for the arrears, and although at the time of payment there was nothing upon the premises liable to a distress. *Vechte v. Brownell*, 8 Paige (N. Y.) 212.

Partnership Obligations.—In *Emerson v. Torrey*, 10 Vt. 323, the defendants had executed a bond to indemnify the plaintiff against all claims due from a firm of which both plaintiff and defendants were liable. The firm executed notes to another firm at Boston, of which plaintiff was also a partner, and failed to pay them at maturity. It was held that the plaintiff might pay the notes and recover upon his bond, and that the fact that he was a member of both firms did not vary the liability of the defendants. It was also held that the fact that the payees of the notes charged the notes to the private account of the obligee in the bond, with his consent, and gave them up to him, showed a payment of the notes, so far as concerned the obligors in the bond.

Indemnity Against Liens.—A contracted with B that B should build a house for A, and B agreed to furnish a bond with sureties to "secure A and keep him harmless from all liens and claims of liens." In a suit upon the bond against the sureties therein, it was held that the covenant in the bond was one of indemnity, and was not violated by simply permitting liens to be filed, but only when the plaintiff was actually damnified by reason of liens or claims of liens. *Carson Opera House Assoc. v. Miller*, 16 Nev. 327. A bond conditioned to indemnify the obligee and to save him harmless "from the operation of" certain judgments, which were liens on land purchased by him is only a bond of indemnity against damages

has an immediate right to be reimbursed,¹ and the obligor is bound to save him harmless from expense or damage as it runs at the time.² If the undertaking is conditioned to save the promisee harmless against "liability" for a debt, there is a breach as soon as the debt becomes legally enforceable against the promisee, and he need not aver and prove payment in order to maintain an action.³ Similarly, if the obligation is to perform some specific act and thereby protect the obligee, the contract is broken

arising from the judgments. *Lloyd v. Marain*, 7 Blackf. (Ind.) 464.

Indemnity to Bail.—A cause of action does not accrue against the obligor in an indemnity for becoming bail, until the bail is compelled to pay the money, and actually does pay it. *Reynolds v. Magness*, 2 Ired. (N. Car.) L. 26.

Evidence of Damification.—In an action on a bond to save harmless a surety on another bond, it is sufficient that a judgment given in evidence shows the plaintiff to have been damaged by reason of his suretyship, without showing that there had actually been a breach of the bond signed by the plaintiff. *Spratlin v. Rudspeth*, *Dudley* (Ga.) 155.

Remedy in Court of Equity.—Notwithstanding the rule of the courts of law, the obligee in an agreement for an indemnity has the right, without waiting for actual loss, to call upon the obligor, in a court of equity, to indemnify him against impending injury, and, to that extent, enforce the specific execution of the agreement between them. *Burroughs v. McNeill*, 2 Dev. & B. Eq. (N. Car.) 297.

Payment Without Suit.—A bond conditioned to save A harmless from all actions, legal proceedings and costs which might be the consequence of A's delivering over to the defendant a bill of exchange, part of the proceeds of which a third person is entitled to, is forfeited by a payment over to A to such third person of his share of the proceeds, upon his demanding the same, without his bringing an action, although A gave no notice of the payment to the defendant. *Ker v. Mitchell*, 2 Chit. 487.

1. *Challoner v. Walker*, 1 Burr. 574.

2. *Sparkes v. Martindale*, 8 East 593; *Challoner v. Walker*, 1 Burr. 574.

Immediate Damage.—Bail, in a civil action, being sued upon the bail-bond, filed a bill in equity for injunction, suggesting want of consideration in the

original debt, and an injunction was granted *pro tem.* on condition of paying the debt into court, which was done accordingly, and afterwards the money was paid over. *Held*, that the bail were damaged by such payment into court after notice to the debtor and no fund provided by him, and not merely from the time when the money was taken out of court upon dissolving the injunction. *Sparkes v. Martindale*, 8 East 593.

Indemnity Against Several Notes.—If the obligor promise to pay and save harmless his obligee from three notes payable in three successive years, the obligee may pay each as it falls due, and he may bring a suit on each payment and recover thereon, without barring or prejudicing his right of action upon the remaining notes. *Hosford v. Foote*, 3 Vt. 391.

3. *Gage v. Lewis*, 68 Ill. 604; *Jones v. Childs*, 8 Nev. 121; *Gilbert v. Wiman*, 1 N. Y. 550; *McGee v. Raen*, 4 Abb. Pr. (N. Y.) 8; *Rockfeller v. Donnelly*, 8 Cow. (N. Y.) 623; *Churchill v. Hunt*, 3 Den. (N. Y.) 321; *Webb v. Pond*, 19 Wend. (N. Y.) 423; *Chace v. Hinman*, 8 Wend. (N. Y.) 452; *Carman v. Noble*, 9 Pa. St. 366; *Stroh v. Kimmel*, 8 Watts (Pa.) 157; *Leber v. Kauffelt*, 5 Watts & S. (Pa.) 440; *Ramsay v. Gervais*, 2 Bay (S. Car.) 145; *Bellune v. Wallace*, 2 Rich. (S. Car.) 80; *Smith v. Chicago & N. W. R. Co.*, 18 Wis. 17. But see *Tate v. Booe*, 9 Ind. 13; *Weller v. Eames*, 15 Minn. 461; s. c., 2 Am. Rep. 461.

Liability of Obligee.—To sustain an action on a covenant to indemnify and save harmless the covenantee from his liability on a bond and mortgage executed by him, it is not necessary to show that the covenantee has been compelled to pay the debt. It is enough that it appear that money has become due upon the bond. *Webb v. Pond*, 19 Wend. (N. Y.) 423.

Bond to Indemnify Against Liability.—Upon a bond conditioned to save

and a cause of action accrues as soon as there is a failure to do the specific act.¹ A bond to save harmless against judgments is broken the moment a judgment is recovered against the obligee,² although the obligor had no notice of the action in

harmless and indemnify the obligee "against his liability as the maker" of a promissory note and to "pay or cause to be paid" the said note, the obligee may maintain an action without the necessity of showing payment. *Churchill v. Hunt*, 3 Den. (N. Y.) 321.

Indemnity Against Maintenance of Bastard.—A bond to indemnify a town for all expense concerning a bastard child is broken, and an action may be maintained upon it, as soon as the town becomes liable or bound to maintain the child, without the necessity of averring and proving actual disbursement. *Rockfeller v. Donnelly*, 8 Cow. (N. Y.) 623.

Bond Against Consequences of Endorsement.—The obligee in a bond to save the obligee harmless against the "consequences" and damages arising from the endorsement of a note may bring an action against the obligor as soon as suit is brought against him on his endorsement. *Ramsay v. Gervais*, 2 Bay (S. Car.) 145.

Indemnity Against Debt.—An agreement to indemnify against debt or damage is broken by the recovery of a judgment against the surety, although he has not paid the same. *Carman v. Noble*, 9 Pa. St. 366.

General Indemnity.—A cause of action accrues upon a promise of general indemnity from all costs, liabilities, damages and injuries when a judgment is recovered against the promisee, and such judgment is evidence in a suit against the promisor, without proof of payment. *Stroh v. Kimmel*, 8 Watts (Pa.) 157.

1. *Gilbert v. Wiman*, 1 N. Y. 550; *Hume v. Hendrickson*, 79 N. Y. 117, 127; *St. Albans v. Curtis*, 1 D. Chip. (Vt.) 164; *Penny v. Foy*, 2 M. & R. 181; *Carr v. Roberts*, 5 B. & Ad. 78.

Obligation to Pay Debt.—If the condition of a bond of indemnity be that the obligor shall pay a certain debt, and discharge the obligee therefrom, there is a breach when the debt becomes due and is allowed to remain unpaid. *Pierce v. Plumb*, 74 Ill. 326; *Hume v. Hendrickson*, 79 N. Y. 117, 127; *Crofoot v. Moore*, 4 Vt. 204; *St. Albans v. Curtis*, 1 D. Chip. (Vt.) 164. But a covenant to indemnify against a debt is

not necessarily a covenant to pay the debt. *Hoy v. Hansborough*, 1 Freem. Ch. (Miss.) 533.

Distinction Between Covenant to Pay Debt and Covenant Against Damages.—In *St. Albans v. Curtis*, 1 D. Chip. (Vt.) 164, the court say: "There is a clear distinction to be made, and which has not been attended to in all the cases, or perhaps in the abridgment of the cases. Where the condition is simply to save harmless from the payment of a debt, the condition is not broken until the obligee has been compelled to pay, or having become liable, has actually paid or been put to expense. But, if the condition be that the obligor shall pay the debt when it shall become due, and discharge the obligee from the debt, and also save him harmless, in such case, if the obligor shall not pay the debt, or procure the obligee to be discharged therefrom when it shall fall due, the obligation is forfeit; for it is sufficient if one condition be broken."

Bond to Pay Annuity.—A, being principal, and B, surety, in an annuity bond to C, A gave B a bond conditioned to pay the annuity to C, and to indemnify B from any claims of C. *Held*, that this was not a mere indemnity bond, and that B, therefore, might put it in suit as soon as A made default in payment of the annuity, without proving that he had actually been damnified. *Penny v. Foy*, 2 M. & R. 181.

Covenant to Pay Debts.—Where a bond is given, intended as a bond of indemnity, but containing a covenant that the obligor will pay certain debts for which the obligee is liable, and the obligor fails to perform, an action lies for the breach, and the obligee is entitled to recover the sums agreed to be paid, although it is not shown that he has been damnified, unless from the whole instrument it manifestly appears that its sole object was a covenant of indemnity. *Gage v. Lewis*, 68 Ill. 604; *Negus' Case*, 7 Wend. (N. Y.) 499.

2. *Conner v. Reeves*, 103 N. Y. 527; *Smith v. Eubanks*, 9 Yerg. (Tenn.) 20.

Judgment by Default.—A judgment

which the judgment was rendered;¹ and in the absence of fraud or collusion the judgment is conclusive as to the existence and extent of the obligee's liability in the action in which it was obtained.² When the bond contains a proviso that the obligor shall save the obligee harmless from liability to do a specific thing upon request to do so, there is no breach of the condition until after a request in terms of the proviso.³ Where the obligee, besides the undertaking of indemnity, receives the note of the obligor, he may bring a suit directly upon the note without reference to the special agreement; but the rule is otherwise when the liability of the defendant is founded solely upon an agreement collateral in its terms.⁴

VIII. Notice of Suit Against Obligee.—To entitle the obligee to maintain an action upon a general promise of indemnity against damage or liability, it is not necessary that he should have given notice of a suit against him in which the judgment, upon which the breach is predicated, was rendered.⁵ If, however, no notice is given, the judgment is only *prima facie* evidence against the obligors, and may be attacked on the ground that the obligee failed to avail himself of a good defence, or that it was obtained by fraud or collusion.⁶ When notice is given, the judgment ob-

by default is not in itself fraudulent, and, unless fraud is averred, is within a condition to keep harmless the plaintiff from what he might be obliged to pay "after due proceedings had against him, and adjudged and decreed." *Given v. Driggs*, 1 Cai. (N. Y.) 450. See also *Lee v. Clark*, 1 Hill (N. Y.) 56.

Judgment by consent is within the protection of the indemnity, but forms presumptive evidence only in an action upon the bond. *Conner v. Reeves*, 103 N. Y. 527.

1. *Train v. Gold*, 22 Mass. (5 Pick.) 380; *Conner v. Reeves*, 103 N. Y. 527.

Without notice to the promisor of the pendency of an action against the promisee, the judgment is *prima facie* evidence of the liability and the amount thereof; and with notice it is conclusive, if there was no fraud or collusion in the suit. *Train v. Gold*, 22 Mass. (5 Pick.) 380.

2. *Conner v. Reeves*, 103 N. Y. 527.

Effect of Judgment.—In an action upon a bond of indemnity against judgments, a judgment is conclusive not only as against the principal, but also as against the sureties. But if it was taken by consent of the obligee it is presumptive evidence only against the sureties, and they are at liberty to show

that it was not founded upon any legal liability, or that it exceeds such liability. *Conner v. Reeves*, 103 N. Y. 527. In Massachusetts, it has been held that the judgment is only conclusive in the event of notice of the suit having been given to the indemnitors. *Train v. Gold*, 22 Mass. (5 Pick.) 380.

3. *Jones v. Cooper*, 2 Aik. (Vt.) 54.

4. *Wagman v. Hoag*, 14 Barb. (N. Y.) 232.

5. *Bridgeport Ins. Co. v. Wilson*, 34 N. Y. 275. See also *Curtis v. Banker*, 136 Mass. 355; *Ker v. Mitchell*, 2 Chit. 487.

Payment Without Notice of Intention.

—Under a bond conditioned to save harmless A from all actions, legal proceedings, and costs, etc., which may be the consequence of A's delivering over to defendant a bill of exchange, part of the proceeds whereof a third person is entitled to, A may pay over to such third person his share of the proceeds upon demand, without the necessity of any action, or of notice to the obligee of his intention to make the payment. *Ker v. Mitchell*, 2 Chit. 487.

6. *Train v. Gold*, 22 Mass. (5 Pick.) 380; *Bridgeport Ins. Co. v. Wilson*, 34 N. Y. 275; *Stewart v. Thomas*, 45 Mo. 42.

Opportunity to Defend.—An insurance

tained is conclusive as to the obligor's liability.¹ In the case of indemnities against judgments, a different rule seems to govern, and it would appear that a judgment being the event covenanted against, it is conclusive if rendered in a contested suit, but presumptive evidence only, if entered by consent, even when no notice is given.²

Notwithstanding the absence of notice, the obligee is entitled to recover his costs in a suit against him,³ provided the jury are satisfied that it was reasonable to defend the action under all the circumstances of the case.⁴

IX. Measure of Recovery.—In actions upon bonds of indemnity, damages are always assessed up to the time of trial.⁵ When the indemnity is conditioned to save the obligee harmless against judgments, the damages upon a breach thereof are measured by the amount of the judgment.⁶ If the bond binds the obligor to the payment of a penal sum, the recovery of the obligee is limited only by the amount of the penalty. Within that sum he may recover whatever damages he is able to establish;⁷ and he

company, which had become liable to pay a sum on account of a loss, paid it over to certain attaching creditors of the insured upon their executing a bond of indemnity against any claims or suits against the company for the money. Subsequently a judgment was rendered against them, under which they were obliged to pay the sum in dispute to one Barnum, the assignee of the insured. No notice of the suit in which the judgment was obtained was given to the attaching creditors. In an action upon the bond of indemnity it was held that the judgment was *prima facie* evidence only of the liability of the obligors, and that it might be impeached. The court say: "It is apparent that the obligors did not, in terms, stipulate to abide by the result of a suit to which they were not parties, and of which they had no notice, and, therefore, they are not concluded by the judgment in favor of Barnum. They entered into a general covenant of indemnity against suits, and they were entitled to an opportunity to defend. Although they had no opportunity to defend the Barnum suit during its progress, yet if they are allowed in this action to avail themselves of any defence that might have been interposed successfully in that suit, they are not prejudiced by the want of notice. Such opportunity is given them by holding that the judgment in the Barnum suit, although *prima facie* evidence of the validity of

the claim thereby established, is not conclusive against them, and they may be let in to show that it was obtained by collusion, or that a valid defence existed to the claim, which the insurance company neglected to set up." *Bridgeport Ins. Co. v. Wilson*, 34 N. Y. 275, 279.

In an early Vermont decision it was held that if the obligee fail to notify the obligor, a judgment obtained against the former is *res inter alios acta*, and does not bind the obligor. *Castleton v. Miner*, 8 Vt. 209.

1. *Train v. Gold*, 22 Mass. (5 Pick.) 380; *Stewart v. Thomas*, 45 Mo. 42.

2. *Conner v. Reeves*, 103 N. Y. 527.

3. *Curtis v. Banker*, 136 Mass. 355.

4. *Caldbeck v. Boon*, 7 Ir. R., C. L. 32.

5. *Spear v. Stacy*, 26 Vt. 61.

6. *Train v. Gold*, 22 Mass. (5 Pick.) 380; *Conner v. Reeves*, 103 N. Y. 527.

7. *Griffiths v. Hardenbergh*, 41 N. Y. 464; *Warwick v. Richardson*, 10 M. & W. 284; *Osborne v. Eales*, 2 Moore P. C. C., N. S. 125; *Wood v. Wade*, 2 Stark 146.

Bond to Purchaser of Lands.—A bond of indemnity given to protect a purchaser of land against adverse claims threatened at the time of the purchase is valid to the full amount of the penal sum named in it, notwithstanding that such sum greatly exceeded the original purchase money; there being no equity in the circumstances of the case to

may also recover interest thereon, even though the interest should increase the sum payable to him beyond the amount of the penalty.¹ As part of the damages, the obligee in an express obligation may generally recover any costs to which he has been put,² even though the action in which they were incurred was brought against him groundlessly.³ In England it has been held that upon an implied indemnity arising out of the responsibility of a sub-contractor to his principal, the principal contractor cannot recover the costs of a suit against him for damages arising from the sub-contractor's negligent act, except such costs can be considered the natural consequence of the default of the latter.⁴

justify an interference with the legal right, and the purchaser having, in discharge of the claim and expenses incidental, expended a larger sum than the full amount of the penal sum in the bond. *Osborne v. Eales*, 2 Moore P. C. C., N. S. 125.

1. *Griffiths v. Hardenbergh*, 41 N. Y. 464; *Lyon v. Clark*, 8 N. Y. 148; *Mower v. Kip*, 6 Paige Ch. (N. Y.) 88; *Smedes v. Hooghtaling*, 3 Cal. (N. Y.) 48; *Francis v. Wilson, Ryan & M.* 105.

Damages for Detention of Debt.—In *Mower v. Kip*, 6 Paige Ch. (N. Y.) 88; WALWORTH, CHANCELLOR, said: "By the common law, the plaintiff in an action upon a penal bond is entitled to recover damages for the detention of the debt beyond the amount of the penalty in the bond. And although the damages usually recovered in such cases are merely nominal, as the penalty of the bond is generally sufficient to cover the sum actually due, with the interest thereon, yet the amount of such damages may be increased by the jury upon a trial, or added to the damages and costs upon taxation, where there is a judgment by default, whenever the justice of the case requires the judgment to be entered up in that form." *Moffatt v. Barnes*, 3 Cal. (N. Y.) 49 n.; *Holdipp v. Otway*, 7 T. R. 447, n.

2. *Mott v. Hicks*, 1 Cow. (N. Y.) 513; *Howard v. Lovegrove*, L. R., 6 Ex. 43.

Costs of Obligee's Attorney.—In an action by a lessee against the assignee of the lease for a breach of a contract by the assignee to indemnify the lessee against a failure to perform the covenants in the lease, he sought to recover the whole costs, both those paid by him on taxation and extra costs paid by him to his own attorney, incurred in unsuccessfully defending an action brought against him for a breach of a cove-

nant in the lease, committed after the assignment. It was held that the lessee was entitled to recover both the extra costs paid by him to his attorney and the taxed costs. *Howard v. Lovegrove*, L. R., 6 Ex. 43.

3. *Trustees of Newburgh v. Galation*, 4 Cow. (N. Y.) 340; *Chilson v. Downer*, 27 Vt. 536.

4. *Baxendale v. London C. & D. Ry. Co.*, L. R., 10 Ex. 35; *Fisher v. Val de Traver's Asphalte Co.*, L. R., 1 C. P. Div. 511.

Reasonable Grounds for Defence.—In *Mors-Le-Blanch v. Wilson*, L. R., 8 C. P. 227, it was held that when an action is brought against A to recover unliquidated damages for which he has become liable through the default of B, notice being given to B, who declines to intervene, A is justified in defending the action, and is not bound to let judgment go by default or to pay money into court; that A's right to recover the costs of such action depended on the questions whether it was a reasonable thing to defend the action, and whether the defence was conducted in a proper manner; and that these questions were for the determination of the jury.

This decision was, however, overruled in the subsequent case of *Baxendale v. London C. & D. Ry. Co.*, L. R., 10 Ex. 35. The circumstances in that case were as follows: One Harding, having contracted with the plaintiffs, who were carriers, for the carriage of two pictures from London to Paris, the plaintiffs contracted with a railway company for the carriage by them of the pictures over a part of the distance. The pictures were damaged on the journey by the negligence of the company. Harding thereupon brought an action against the plaintiffs, who gave notice of it to the company and

X. Indemnities to Sheriff.—1. *When Sheriff May Demand Indemnity.*—According to the English practice, if the sheriff had a reasonable doubt as to his power to seize property on execution, and the plaintiff refused to indemnify him, the courts would, on his application, extend the time for the return until the indemnity was given;¹ and in some American cases a similar course has been adopted.² It has, however, been very generally held by the

requested them to defend it. They refused and told the plaintiffs to take their own course. The plaintiffs defended the action brought against them by Harding without success, and then brought an action against the company to recover not only the damages found by the jury to have been sustained by Harding, but also the costs of the unsuccessful defence. The company paid the damages into court and disputed their liability as to the costs. *Held*, that the costs were not recoverable, inasmuch as they could not be considered as the natural consequence of the defendant's default, the contracts between Harding and the plaintiffs and between the plaintiffs and the defendants having been separate and independent. LORD COLERIDGE, C. J., said: "The defence was not, in my judgment, a reasonable defence. It was without any foundation in law, and there was no authority from the defendants, either express or implied, to set it up. This, however, does not dispose of the whole of the plaintiff's claim. For it may be said, 'True, the defence was ill-advised and unauthorized; still the plaintiffs were obliged to do something to ascertain their liability, and they at least are entitled to such an amount of costs as they would have incurred had they allowed judgment to go by default upon a writ of inquiry.' But I think this contention fails also, because it seems to me that the whole of the costs were incurred for the plaintiffs' own benefit, and were not, in my sense, the natural and proximate results of the defendants' breach of duty." QUAIN, J., said: "If this were a contract of indemnity where, although there may be two contracts in form there is only one in substance, our decision might be in favor of the plaintiffs. In such a case a surety who is called upon to pay the debt due in duty owing from the principal may well be justified in defending an action at the principal's expense. The cases which have been referred to, with one

exception, are all cases of indemnity, and really have no application here. For we have to deal with two separate and independent contracts, and it would, it seems to me, be very unreasonable to hold that the plaintiffs should be able to charge the defendants, against their will and without their sanction, with the costs of an action brought upon a contract made by the plaintiffs with Harding, to which the defendants were not parties and with which they had no concern whatever. This case, then, is not one of principal and surety, and the only ground on which the plaintiffs can recover these costs is that the costs are the natural and reasonable consequence of the defendants' breach of contract, and therefore within the well-known rule laid down in *Hadley v. Baxendale*, 9 Ex. 341. But I am clearly of opinion that they cannot be so considered."

This decision was followed in *Fisher v. Val de Traver's Asphalte Co., L. R., 1 C. P. Div. 511*, a case in which the plaintiffs, who had contracted to construct and maintain a street railroad, sought to recover from the defendants, to whom they had sublet the contract for certain paving, the damages and costs to which they had been subjected in consequence of the defendants' default. It was *held* that the plaintiffs could not recover the costs even though by defending the action against them, and subsequently compromising it, they did in fact benefit the defendants in incurring them by reducing the amount of the claim.

In the earlier case of *Ronneberg v. Falkland Islands Co., 17 C. B., N. S. 1*, it was *held* under somewhat analogous circumstances that the plaintiff could not recover the costs of the suit because the defence ought never to have been undertaken.

1. See 2 Freeman on Executions (2nd ed.), §§ 254, 275, and cases there cited.

2. See *Jessop v. Brown*, 2 Gill & J. (Md.) 404; *Spangler v. Com.*, 16 Serg.

American courts that in cases of reasonable doubt as to his power to levy and sell, the sheriff may demand an indemnity, and that the refusal or failure of the plaintiff in execution to give it will justify his refusal further to proceed;¹ and it would appear to be his duty to demand the bond, otherwise in a proceeding against him for a failure to make the money, the burden will be

& R. (Pa.) 68; s. c., 16 Am. Dec. 548; *Forniquet v. Tegarden*, 24 Miss. 96.

1. *McGehee v. Chandler*, 15 Ala. 659; *Ogden v. Powell*, 7 Ala. 243; *Pickard v. Peters*, 3 Ala. 493; *Minter v. Bigelow*, 9 Port. (Ala.) 481; *Hall v. McHenry*, 5 Port. (Ala.) 123; *Long v. Neville*, 36 Cal. 455; s. c., 95 Am. Dec. 199; *Porter v. Stapp*, 6 Colo. 32; *Board v. Helm*, 2 Metc. (Ky.) 500; *Marsh v. Gold*, 19 Mass. (2 Pick.) 285, 290; *Bond v. Ward*, 7 Mass. 125; s. c., 5 Am. Dec. 28; *Marshall v. Hosmer*, 4 Mass. 60; *Crossman v. Owen*, 62 Me. 528; *Smith v. Cicotte*, 11 Mich. 383; *Forniquet v. Tegarden*, 24 Miss. 96; *Smith v. Osgood*, 46 N. H. 178; *Perkins v. Pitman*, 34 N. H. 261; *Harrison v. Allen*, 40 N. J. L. 556; *Chamberlain v. Beller*, 18 N. Y. 115; *O'Donohue v. Simmons*, 31 Hun (N. Y.) 267; *Com. v. Vandyke*, 57 Pa. St. 34; *Patterson v. Anderson*, 40 Pa. St. 359; s. c., 80 Am. Dec. 579; *Shriver v. Harbaugh*, 37 Pa. St. 399; *Fitler v. Fossard*, 7 Pa. St. 540; *Spangler v. Com.*, 16 Serg. & R. (Pa.) 68; s. c., 16 Am. Dec. 548; *Bryan v. Bridge*, 6 Tex. 137; *Huffman v. Leffell's Exr.*, 32 Gratt. (Va.) 41; *Grace v. Mitchell*, 31 Wis. 533; s. c., 11 Am. Rep. 613. But see *Adair v. McDaniel*, 1 Bailey (S. Car.) 158; s. c., 19 Am. Dec. 664.

In Indiana the court holds that the sheriff has no right to demand an indemnity; *State v. Sandlin*, 44 Ind. 504; *Bosley v. Farquar*, 2 Blackf. (Ind.) 61; although a bond of indemnity voluntarily given is valid. *Allwein v. Sprinkle*, 87 Ind. 240.

In Tennessee the right of the officer is derived from statute; *Saunders v. Harris*, 4 Humph. (Tenn.) 72; *State v. Sharp*, 2 Sneed (Tenn.) 615; and as the statute does not authorize him to demand indemnity in attachment proceedings, it has been held that he is liable to an action for a false return if he release property attached on information of an adverse claim and return *nulla bona*, because the plaintiff does not indemnify him. *Shaw v. Holmes*, 4 Heisk. (Tenn.) 692.

In New York, in the event of an adverse claim being made, the sheriff is

authorized to empanel a jury for the purpose of trying it, and upon a decision being rendered in favor of the claimant he is authorized to demand an indemnity. Code Civ. Proc., §§ 1418, 1419; *Curtis v. Patterson*, 8 Cow. (N. Y.) 65; *Platt v. Sherry*, 7 Wend. (N. Y.) 236.

In Minnesota and Missouri it is by statute provided that if a third person shall make a claim upon the property levied on, and shall swear to it, the sheriff may demand an indemnity bond from the execution plaintiff, and if the latter fail or refuse to give such bond within a reasonable time, the sheriff is directed to release the property. Minn. Gen. St. 1878, ch. 66, § 154, p. 730; Mo. Rev. St. 1879, § 2366. The *Missouri* statute only refers to executions, and has been held to have no application to writs of attachment. *State v. Koontz*, 83 Mo. 323; *State v. Fitzpatrick*, 64 Mo. 185. The courts of that State have adopted the view that, except as authorized by statute, a sheriff cannot demand an indemnity. *State v. Koontz*, 83 Mo. 323; *Bradley v. Holloway*, 28 Mo. 150; *State v. Rayburn*, 22 Mo. App. 303. In *Minnesota* the court holds that the act applies only where the property was levied upon or taken by the sheriff while in the possession of the defendant in the process, or his agent, under circumstances which would create a presumption *prima facie* of ownership in him, and that when so taken no action resting upon a claim of title to or interest in the property can be maintained by any person except the defendant or his agent against the sheriff, unless the affidavit mentioned in the act is made and served before the sale or other legal disposition of the property by the sheriff. *Barry v. McGrade*, 14 Minn. 163; *Livingstone v. Brown*, 18 Minn. 308. See also *Williams v. McGrade*, 13 Minn. 174.

Sufficiency of Bond.—If the indemnity of the plaintiff in execution is sufficient to secure the sheriff, he has no right to demand a surety. *Harrison v. Allen*, 40 N. J. L. 556. A sheriff is not bound to take the bond of a co-defendant who is the surety of the

cast upon him of showing that the property really was not liable.¹

2. *Validity*.—If the sheriff has a reasonable doubt as to his power to execute a writ, and the indemnity bond is intended to protect him in enforcing a claim of right, the fact that in executing it he committed a trespass does not invalidate the bond;²

defendant whose property is levied upon. The only indemnity he is bound to accept is that of the execution plaintiff. *Hall v. McHenry*, 5 Port. (Ala.) 123.

1. *McGehee v. Chandler*, 15 Ala. 659; *Ogden v. Powell*, 7 Ala. 243; *Minter v. Bigelow*, 9 Port. (Ala.) 481.

In *Minter v. Bigelow*, *supra*, the court said: "If a sheriff return an execution of *no property*, it is incumbent on the plaintiff to show that the return is presumptively false. This may be done by showing that the defendant was in possession of property, and if he is not the owner of it, or if it is not subject to the payment of the defendant's debts, it will devolve on the sheriff to show that such was its condition. But he will, however, be relieved from this burden if he has used the precaution, whilst the execution was in his hands, to require a bond of indemnity from the plaintiff, who has declined to give it."

2. *Stark v. Raney*, 18 Cal. 622; *Wolfe v. McClure*, 79 Ill. 564; *Stanton v. McMullen*, 7 Ill. App. 326; *Anderson v. Farns*, 7 Blackf. (Ind.) 343; *Train v. Gold*, 22 Mass. (5 Pick.) 380; *Marsh v. Gold*, 19 Mass. (2 Pick.) 285; *Forniquet v. Tegarden*, 24 Miss. 96; *McCartney v. Shepard*, 21 Mo. 573; *Mays v. Joseph*, 34 Ohio St. 22; *Miller v. Rhoades*, 20 Ohio St. 494; *Davis v. Arledge*, 3 Hill (S. Car.) 170; *Jameison v. Calhoun*, 2 Spear (S. Car.) 19; *Stevens v. Bransford*, 6 Leigh (Va.) 246; *Arundel v. Gardiner*, Cro. Jac. 652; *Blackett v. Crissop*, 1 Ld. Raym. 278; *Plackett v. Gresham*, 3 Salk. 75; *Robertson v. Broadfoot*, 11 U. C., Q. B. 407.

Knowledge and Intention of Parties.—In *Stanton v. McMullen*, 7 Ill. App. 326, the plaintiff in execution indemnified the sheriff against any damage resulting from the levy. It was subsequently found that the goods were not subject to the execution. An action having been brought against the sheriff for the wrongful levy, and judgment having been recovered therein, he brought an action upon the indemnity. It was held that he was entitled to recover.

The court said: "It is contended by defendant in error that at the time the bond was executed, the plaintiff in error knew he would commit a trespass in selling the property, and therefore the bond is void, upon the principle that a promise to indemnify another for known acts of trespass cannot be enforced, as such contracts are contrary to public policy. This is undoubtedly a rule of the common law, where the proposed act is a palpable wrong, and so known to be by the parties at the time of the agreement to perform such act. But it is believed this rule has never been extended to cases where parties, in the prosecution of their legal rights in good faith, have committed an unintentional wrong against another. We understand the rule to be limited to those cases where the intention is to commit a trespass, and does not include cases where the parties are actuated by honest motives in the assertion of what they believe to be their rights under the law, although it should subsequently transpire that they were not justified in doing the acts contemplated by them when the bond was executed."

Rule of Construction.—Although a bond of indemnity, when literally construed, would make the grantors responsible for trespasses which they did not direct, and could not prevent, such construction will not be adopted when it may reasonably be construed otherwise. *Clark v. Woodruff*, 83 N. Y. 518.

Levy Upon Exempt Property.—An indemnity given to induce the sheriff to levy upon property claimed by the defendant in execution is not invalid as against public policy, if given and received in the *bona fide* belief that the property is subject. *Stanton v. McMullen*, 7 Ill. App. 326; *McCartney v. Shepard*, 21 Mo. 573; *Mays v. Joseph*, 34 Ohio St. 22; *Miller v. Rhoades*, 20 Ohio St. 494; *Davis v. Arledge*, 3 Hill (S. Car.) 170. See also *Jameison v. Calhoun*, 2 Spear (S. Car.) 19. But the bond is invalid if the circumstances were such that the sheriff must have known that the property was exempt,

and a bond of indemnity given to a person assisting the sheriff, either by the sheriff himself or by a third party is governed by the same rules, and will be sustained or held to be invalid according to the knowledge and intention of the parties.¹ But if the

and that the seizure was illegal. *Renfro v. Heard*, 14 Ala. 23; *Hunter v. Agee*, 5 Humph. (Tenn.) 57.

In *Stanton v. McMullen*, 7 Ill. App. 326, it was *held* that, in an action upon the indemnity, a judgment in trespass against the officer for selling exempt property was not conclusive evidence that the officer and creditor intended to commit a wilful trespass; and that the fact that the debtor, though claiming an exemption, failed to furnish the officer with the statutory schedule of his property, might be given in evidence for the purpose of showing the good faith of the parties.

Claim by Stranger to the Writ.—A bond of indemnity conditioned to save the sheriff harmless from any liability in consequence of a levy upon and sale of property claimed by a third party, but whose claim is disputed by the plaintiff in execution, is valid. *Stark v. Raney*, 18 Cal. 622; *Anderson v. Farns*, 7 Blackf. (Ind.) 343; *Train v. Gold*, 22 Mass. (5 Pick.) 380; *Chamberlain v. Beller*, 18 N. Y. 115; *Ball v. Pratt*, 36 Barb. (N. Y.) 402; *Robertson v. Broadfoot*, 11 U. C. Q. B. 407.

Arrest of Debtor.—When it is alleged by the creditor in good faith that a certain person is a stockholder in a corporation against which he holds a judgment, a bond of indemnity to the sheriff to protect him against the consequences of his arrest is valid. *Marsh v. Gold*, 19 Mass. (2 Pick.) 285.

Return of Writ.—In *Kemper v. Kemper*, 3 Rand. (Va.) 8, the sheriff was induced, upon receiving a bond of indemnity, to return "ready to satisfy," although he had not levied the execution. It was *held* that this return was not a false return in the legal sense, and that the bond was valid.

Application of Money Recovered.—A sheriff, having levied several executions, applied the money received to a junior writ, upon the creditor therein giving him a bond of indemnity against the consequences of doing so. *Held*, that the bond was valid. *Shotwell v. Hamblin*, 23 Miss. 156.

Release of Execution.—A bond of indemnity conditioned to save the sheriff harmless from any damages incurred by

releasing an execution is void. *Wright v. Lord Verney*, 3 Doug. 240; *Griffin v. Hasty*, 94 N. Car. 438. But see *Foster v. Clark*, 36 Mass. (19 Pick.) 329.

Irregular Levy.—A bond to protect the sheriff in sale of property, the levy upon which is irregular and of doubtful validity, is not against public policy. *Davis v. Arledge*, 3 Hill (S. Car.) 170.

1. *Fletcher v. Harcot*, Hutt. 55; s. c., *sub nom. Battersey's Case*, Winch. 49; *Cumpston v. Lambert*, 18 Ohio 81.

In *Battersey's Case*, *supra*, a prisoner who had been arrested by the sheriff on a commission of rebellion was taken to an inn, and there detained by the innkeeper over night, upon the sheriff promising to indemnify him against the consequences. Judgment for damages for false imprisonment having been recovered against the innkeeper, he brought an action against the sheriff upon his indemnity, and it was *held* that he was entitled to recover.

In *Cumpston v. Lambert*, 18 Ohio 81, a justice of the peace called upon a person to assist a constable in making an arrest upon a *ca. sa.*, stating that such arrest was lawful, and promising to indemnify such person for assisting to make the arrest and prevent a rescue. It turned out that the arrest was illegal, and a judgment was recovered against the person assisting, for the trespass. He thereupon brought suit upon the promise of indemnity, and it was *held* that the promise was void as against public policy, being for the performance of an illegal act. *Battersey's Case* was distinguished, and the rule as stated in the text was not disputed, but would rather appear to have been admitted, and the case decided on the ground simply that the indemnity was to protect a person in the commission of an unlawful act, and therefore illegal. The court say that in *Battersey's Case* "the innkeeper did not assist in the first instance in depriving the prisoner of his liberty—he had nothing to do with the arrest, but in the course of his business a prisoner is brought to his house. His business compels him to keep such persons as stop at his house;

bond is given to induce the sheriff to do an act which is a palpable wrong, and plainly a breach of his duty, it is against public policy and void.¹ On the other hand, a bond or promise of

it is his duty to keep prisoners as well as others who must have some place to lodge, and who have to receive the necessities of life in their transit from one point to another. Humanity, if nothing else, would require the innkeeper to receive him. We have seen no case where it has been held that a contract to deprive a person of his liberty in the first instance, or to commit an actual assault on the person, where such arrest or assault was illegal, has been held to be binding. We do not suppose that such case comes within the rule, except in cases where the person committing the arrest is an officer, whose duty it is in a proper case to arrest persons, and who acts by some supposed legal authority. We do not think that the fact that the plaintiff in this case acted under the direction of a justice will avail him for doing an illegal act. Most of the tyranny and cruelty that has been practised in the world over the persons and property of men has been done under some kind of official sanction. I could much sooner sympathize with a person that had committed an illegal act on his own responsibility than with one who did it because he had the backing or countenance of official power. If a person (as the plaintiff in this case did) commits an assault on another, either for the purpose of depriving him of his liberty or to hold him in custody after he has been taken prisoner, he should be satisfied that such interference is legal, otherwise he should heed the consequences."

1. Voluntary Escapes.—A bond of indemnity given to a sheriff to induce him to release a prisoner is against public policy and void. *Kenworthy v. Stringer*, 27 Ind. 498; *Denny v. Lincoln*, 5 Mass. 385; *Churchill v. Perkins*, 5 Mass. 541; *Ayer v. Hutchins*, 4 Mass. 370; *Fanshor v. Stout*, 4 N. J. L. (1 South.) 319; *Richmond v. Roberts*, 7 Johns. (N. Y.) 319; *Love v. Palmer*, 7 Johns. (N. Y.) 159; *Webbers v. Blunt*, 19 Wend. (N. Y.) 188; *Lowrey v. Barney*, 2 D. Chip. (Vt.) 11; *Featherston v. Hutchinson*, Cro. Eliz. 199; *Ligeart v. Wissham Dyer*, 323 b; *Pitcher v. Bailey*, 8 East 171; *Thompson v. Rock*, 4 M. & S. 338; *Mosedel v. Middleton*, T. Raym. 222; *Samuel v. Evans*, 2 T.

R. 569; *Lawson v. Haddock*, 2 Vent. 237; *Martyn v. Blithman*, Yelv. 197. But if the indemnity is given to protect the officer against an involuntary escape it is valid. *Ayer v. Hutchins*, 4 Mass. 370.

Against Failure to Arrest.—An indemnity given to save the sheriff harmless from the consequences of a failure to arrest a debtor by allowing the execution to "run down" is void. *Hodsdon v. Wilkins*, 7 Me. 113.

Failure to Return Executions.—A deed executed to a sheriff for the purpose of indemnifying him for the fines, etc., incurred by him for the consequences of any prospective failure of duty, *e. g.*, from his failure to return an execution, is void. *Kemper v. Kemper*, 3 Rand. (Va.) 8; *Greenwood v. Colcock*, 2 Bay (S. Car.) 67.

To Induce Levy Upon Exempt Property.—If a bond or promise of indemnity is given for the purpose of inducing the sheriff to levy upon property known to be exempt, it is against public policy and void. *Renfro v. Heard*, 14 Ala. 23.

Levy and Sale of Stranger's Property.—A bond given to an officer to induce him to levy upon and sell the property of a stranger to the writ is void. *Prewitt v. Garrett*, 6 Ala. 128; *Morgan v. Hale*, 12 W. Va. 713; *Chapman v. Douglass*, 5 Daly (N. Y.) 244.

Violation of Injunction.—A bond of indemnity given to a sheriff for the purpose of protecting him in selling property in violation of an order enjoining the sale is void. *Buffendeau v. Brooks*, 28 Cal. 641.

Void Execution.—If a bond of indemnity is given to protect an officer in the levy of an execution which is void upon its face, the bond is against public policy and void. *Collier's Admr. v. Windham*, 27 Ala. 291; *Porter v. Stapp*, 6 Colo. 32. But if the writ is regular on its face and is in the hands of the proper officer, it will entitle him to an indemnity even though it in fact be invalid. *Porter v. Stapp*, 6 Colo. 32. In this case it was also held that an officer is bound to know the statute law of the State, and if, by statute, he has no power to execute a writ, he ought to know that fact; and even if ignorant and acting *bona fide*, he occu-

indemnity is valid and enforceable if it is given to protect the sheriff against the consequences of a wrongful act already committed,¹ *e. g.*, a wrongful escape,² attachment,³ levy⁴ or sale.⁵ It would appear that a bond can only be demanded by the sheriff in a sum sufficient to secure him—at all events where the right to demand the bond is governed by statute.⁶ In States in which it is held that the sheriff has no right at common law to demand a bond of indemnity, it would appear that a bond given in response to a demand made without statutory authority is invalid.⁷

A statute which simply provides that the sheriff may, under certain circumstances, demand a bond of indemnity does not limit the bond authorized to be taken to a bond by the plaintiff, and a bond by a third party is not invalid.⁸ Although the parties should have intended the bond given to conform to the statutory provision, the fact that it does not comply therewith will not invalidate it, if it can be sustained under the rules of the common law.⁹ There is no rule of law which invalidates a bond

pies the position of one who founds his course of action upon an illegal act known to be such when committed.

False Return.—A bond given to a sheriff to save him harmless for making a false return on *fi. fa.* is void. *Knipe v. Hobart*, 1 *Lutw.* 593.

1. *Griffiths v. Hardenbergh*, 41 *N. Y.* 464.

2. *Given v. Driggs*, 1 *Cai. (N. Y.)* 450; *Doty v. Wilson*, 14 *Johns. (N. Y.)* 378.

3. *Knight v. Nelson*, 117 *Mass.* 458.

4. *Griffiths v. Hardenbergh*, 41 *N. Y.* 464; *Hunter v. Agee*, 5 *Humph. (Tenn.)* 57.

5. *Westervelt v. Frost*, 1 *Abb. Pr. (N. Y.)* 74; *Hall v. Huntoon*, 17 *Vt.* 244.

6. **Bond for Excessive Amount.**—In *Wadsworth v. Walliker*, 51 *Iowa* 605, it was held that an officer cannot demand an indemnifying bond in excess of the sum necessary to secure him, and that an agreement to give such a bond cannot be enforced. It is to be remarked that by the *Iowa Code*, § 3056, it is provided that a bond to indemnify the sheriff "against the damages which he may sustain in consequence of" the seizure and levy, and it appears from the report that the bond in question was demanded by the sheriff presumably under that provision, the court make no reference to the statutory provision in rendering their decision, but it must be presumed that they had it in view. Otherwise the decision would seem to conflict with the rule that the penalty merely limits the right of re-

covery, and does not form the measure of the damages.

7. **Absence of Statutory Authority.**

—In *Gibson v. Lock*, 58 *Miss.* 298, a sheriff, before attaching property upon demised premises under a distress warrant, demanded and received a bond of indemnity. The Mississippi statute only authorized the sheriff to demand a bond of indemnity in proceedings in execution and made no provision for such a demand in attachment. It was held that one whose property on demised premises was exempt from distress for rent had no remedy in case of a levy, except by replevying the property before the sale under the distress warrant, and the sheriff, therefore, before levying upon such property, had no right to demand a bond of indemnity, and the bond was therefore void.

8. *Jobe v. Sellars*, 9 *Humph. (Tenn.)* 178.

9. *Wolfe v. McClure*, 79 *Ill.* 564; *Pritchett v. People*, 6 *Ill.* 525; *Flint v. Young*, 70 *Mo.* 221; *Griffiths v. Hardenbergh*, 41 *N. Y.* 464; *Aylett v. Roane*, 1 *Gratt. (Va.)* 282; *Dabney v. Catlett*, 12 *Leigh (Va.)* 383; *Porter v. Daniels*, 11 *W. Va.* 250. But see *Purple v. Purple*, 22 *Mass. (5 Pick.)* 226.

Omission of Statutory Conditions.—A bond given by the plaintiff in execution to indemnify the claimant of the property levied on, but which omits the statutory clause indemnifying the sheriff, is valid as a common law bond notwithstanding the omission. *Flint v. Young*, 70 *Mo.* 221.

taken by a sheriff from his deputy to indemnify him for the deputy's misconduct.¹

3. *Duty and Liability of Officer Receiving Bond.*—The claimant of property seized in execution cannot constitutionally be deprived of his right to recover possession of it, and a statute depriving him of any action against the officer and confining him to an action upon the bond of indemnity is, in so far as infringes upon his right of property, unconstitutional and void.² If an

In *Aylett v. Roane*, 1 Gratt. (Va.) 282, a bond of indemnity was given to the sheriff to save him harmless against the consequences of the sale of the property levied on. The bond omitted a statutory condition protecting the purchaser at the sale. It was held that the bond was valid and would protect the sheriff for the sale, though he would be responsible to the purchaser for the omission. See also *Dabney v. Catlett*, 12 Leigh (Va.) 383.

In *Purple v. Purple*, 22 Mass. (5 Pick.) 226, a bond given to the replevying officer instead of to the defendant in replevin was held to be void, because the purpose and effect of it were to aid and abet the officer in a trespass.

Color of Office.—The words "color of office" in the New York statute which prohibits a sheriff from taking any bond, etc., by color of his office in any other case or manner than such as are provided by law, and declares bonds otherwise taken to be void, have reference to bonds taken corruptly under an illegal claim of right or authority to take the security. The statute does not avoid a bond which is valid at common law. *Griffiths v. Hardenbergh*, 41 N. Y. 464; *Chamberlain v. Beller*, 18 N. Y. 115; *Mott v. Robbins*, 1 Hill (N. Y.) 21; *Burrall v. Acker*, 23 Wend. (N. Y.) 606.

1. *Norton v. Simmes*, Hob. 126.

Such a bond is not in violation of the New York statute prohibiting sheriffs from taking by color of their office any bonds not authorized by law. *Mott v. Robbins*, 1 Hill (N. Y.) 21.

2. **Due Process of Law.**—The Iowa Code, § 3058, provides that the claimant or purchaser of any property for the seizure and sale of which an indemnifying bond has been taken and returned by the officer, shall be barred of any action against the officer levying on the property, and shall be confined to an action on the bond as his only remedy. In *Foule v. Mann*, 53 Iowa

42, it was held that this provision in so far as it prohibits one claiming to be the owner from maintaining an action for the recovery of the specific property taken, is unconstitutional and void, its effect being to deprive him of his property without due process of law, and compel him, even if he establishes his ownership, to accept instead its market value. The court say: "Under the pretence that the property in question belonged to the defendants in execution, the officer levied upon and took possession of the property of the plaintiffs. The latter are thereby deprived of such property without a trial, 'without having had their day in court,' without a pretence that the forms and proceedings known to the law of the land have been complied with, and in effect the plaintiffs are compelled to sell their property on the market whether they so desire or not. The process in the defendant's hands did not authorize him to take the plaintiff's property, and therefore, for the purposes of this case, it cannot be regarded as due process of law. There is no rule or principle known to our system under which private property can be taken from one man and transferred to another for the private use and benefit of such other person, whether by general laws or special enactment. Cooley on Constitutional Limitations, 357. If the plaintiffs cannot recover the specific property taken, they are deprived thereof without their consent under and by virtue of a general statute. If this had been done directly, that is, if the statute had so provided in terms, no one would claim it was constitutional. In effect, this precise thing has been done, and the plaintiffs' property has been transferred to another, unless they can have their day in court and their right to the specific property adjudicated. The rule must be applicable to all property, and, therefore, such as may be valuable only for its associations may be taken as well as that which possesses an in-

officer levying on property demands and receives a bond of indemnity, he is bound, at his peril, to sell the property whether it belongs to the debtor or not.¹ But the fact that the officer has received a bond of indemnity does not subject him to liability for a surrender of the property or refusal to levy if the property really was not subject to the execution.² Having obtained indemnity, the sheriff cannot defend an action for the amount realized at the sale on the ground that the property was not subject or belonged to a third person,³ unless he has been sued by the adverse claimant, and a recovery has been had against him for wrongfully selling the property.⁴

A distinction has been drawn between the liability of a sheriff levying an attachment when a bond of indemnity has been given, and his liability under similar circumstances when levying an execution; and it has been held that in the former case he might free himself from liability by showing sufficient cause for a release, but that in the latter he is estopped by receiving the bond from showing title to the property was not in the debtor.⁵

4. *Power of Attorneys*.—An attorney may execute a bond of indemnity under seal on behalf of his client, although his author-

trinsic value. Heirlooms, pictures of deceased friends, family bibles, and many other articles of property that might be named, must share the fate of other property but for the statute exempting them, or some of them, from execution. It may be said that the statute does not apply to actions to recover specific personal property, but only to actions brought against the officer to recover the value of the property taken. But it has been held otherwise in *Kaster v. Pease*, 42 Iowa 488; *Finch v. Hollinger*, 43 Iowa 598, and it has been so ruled in Missouri under a similar statute. *Bradley v. Holloway*, 28 Mo. 150; *St. Louis, A. & C. R. Co. v. Castello*, 30 Mo. 124."

1. *Evans v. Thurston*, 53 Iowa 122; *Waterman v. Frank*, 21 Mo. 108; *Harrison v. Allen*, 40 N. J. L. 556; *Van Cleef v. Fleet*, 15 Johns. (N. Y.) 147; *Connelly v. Walker*, 45 Pa. St. 449; *Corson v. Hunt*, 14 Pa. St. 510; *Fitler v. Fossard*, 7 Pa. St. 540; *Watmough v. Francis*, 7 Pa. St. 206, 215; *Stone v. Pointer*, 5 Munf. (Va.) 287. But *Fisher v. Gordon*, 8 Mo. 386.

Effect of Inquisition.—Although a statute permits a delivery bond to be given for property seized, it does not take away a trial of the claim of right to the property seized interposed by a third party, and it follows as a conse-

quence that the plaintiff in execution may compel the officer, by giving an indemnity bond, to sell notwithstanding a verdict in favor of the claimant. *Waterman v. Frank*, 21 Mo. 108; *Van Cleef v. Fleet*, 15 Johns. (N. Y.) 147.

2. *Lummiss v. Kasson*, 43 Barb. (N. Y.) 373; *Com. v. Vandyke*, 57 Pa. St. 34; *Com. v. Watmough*, 6 Whart. (Pa.) 117; *Hamblet v. Herndon*, 3 Humph. (Tenn.) 34.

Burden of Proof.—In *Lummiss v. Kasson*, 43 Barb. (N. Y.) 373, it was held that after a sheriff has seized property upon a warrant of attachment, and has advertised the same for sale upon an execution issued in the attachment suit, upon receiving an indemnity from the plaintiff he is at liberty to return the execution *nulla bona*, on the property being taken out of his possession, provided he acts in good faith, but in so doing he assumes the responsibility of proving property out of the defendant in the execution, and thus supporting his return. See also *Ansonia B. & C. Co. v. Babbitt*, 74 N. Y. 395, 401.

3. *Adams v. Disston*, 44 N. J. L. 662.

4. *Newland v. Baker*, 21 Wend. (N. Y.) 264.

5. *Evans v. Thurston*, 53 Iowa 122, 124; *Wadsworth v. Walliker*, 45 Iowa 395; s. c., 51 Iowa 605.

ity is only verbal,¹ and attorneys employed by non-resident clients to collect debts have implied authority to indemnify an officer making a levy, and are entitled to reimbursement of any sums they may pay thereunder.²

5. *Effect of Refusal of Indemnity.*—Statutes which authorize the sheriff to demand a bond of indemnity from the plaintiff in execution, usually empower him, in the event of a failure to give the required bond, to deliver the chattels levied to the person from whom they were taken; but if the sheriff does not do so but retains the property, the lien of the execution continues.³ If, however, the creditor fails or refuses to give the necessary bond, and the property is thereupon delivered to a claimant, the lien of the execution is destroyed, but the sheriff is not estopped

1. *Ford v. Williams*, 13 N. Y. 577; s. c., 67 Am. Dec. 83.

2. *Schoregge v. Gordon*, 29 Minn. 367; *Clark v. Randall*, 9 Wis. 135; s. c., 76 Am. Dec. 252. See also *Davidson v. Dallas*, 8 Cal. 227.

Implied Authority of Attorney.—In *Clark v. Randall*, 9 Wis. 135; s. c., 76 Am. Dec. 252, an attorney employed by non-residents to collect a debt, gave the marshal his bond of indemnity. It was held that he had an implied authority to bind his clients in that respect, and that his clients must reimburse him for any sums which he paid to the marshal thereunder. The court say: "Living at a distance, they are unable to give specific instructions as to the means to be employed, or the steps to be taken to secure and collect their claims. Neither are they at hand to give special directions to officers as to the levying of executions, or serving attachments, when such directions are absolutely necessary to secure the debts. Besides, unforeseen emergencies frequently arise which require the adoption of some decided line of action to prevent some tricky and dishonest debtor from placing his means entirely beyond the reach of his creditors. In such cases it is manifestly for the interests of the client that the fullest and largest discretion be given to attorneys in the transaction of the business entrusted to them. They are generally authorized to secure and collect debts, and are clothed with the power of employing all the necessary and usual means for the accomplishment of this object. An authority is always to be construed as including the usual means of executing it with effect. Paley on Agency, ch. 3, pt. 1, § 5; Story on Agency, § 58. Now, we presume it to be the general

understanding and quite uniform practice in this State, when prosecuting suits for non-residents, to give directions to officers about serving attachments and levying executions, when any instructions are called for. We do not suppose it is customary to write to clients living at a great distance, who can possibly know but little, if anything, of the situation of their debtor's property, for special directions upon these points. The attorney on behalf of and as agent of the principal gives all proper instructions; and great prejudice, inconvenience and loss would ensue to the latter if the attorney did not do so. And we think all this comes fairly within the scope of his authority, and that it is necessary he should possess this power, in order to protect and preserve the interests of his foreign client.

. . . We think, therefore, that the defendants in error had an implied authority, by virtue of their employment as attorneys in the suits, to indemnify the marshal when about to make a levy under the execution, and that their acts in this behalf were binding upon their clients, and if they executed their own indemnifying bond to the officer, and have, in consequence, suffered from it, it is no more than just and proper that their clients reimburse them for all damages they have sustained thereby."

3. *Pickard v. Peters*, 3 Ala. 493; *Clark v. Reiniger*, 66 Iowa 507.

In *South Carolina* the court adopt the view that a sheriff is not, at common law, entitled to demand indemnity, but must make the money at his peril. As a corollary it is held that the refusal of the plaintiff in the senior writ, where two or more writs have been levied to give the

thereby from levying a second execution under the same judgment on the same property.¹ Such second seizure is, however, subject to any rights which may have been acquired in the property while the claimant was in possession.²

If the sheriff has levied upon two or more writs, upon one of which he has received an indemnifying bond, it will be presumed that a sale, subsequently made, was made under the execution the plaintiff indemnified him for, rather than under that for which he had no indemnity,³ and the execution for which he was indemnified will take priority, even though it was junior so far as concerns the date of the levy.⁴ If bonds of indemnity have been given to the sheriff by all the creditors, the proceeds of the sale are payable according to the seniority of the levy.⁵

6. *Liability of Obligors to Claimants.*—If the judgment creditor gives a bond of indemnity to the sheriff to induce him to levy upon or sell certain property, in the event of such property not being subject to execution, he becomes a joint trespasser with the sheriff, and liable for the tort.⁶ And not only are the

bond, does not affect his lien as in a question with the junior writ or writs. *Adair v. McDaniel*, 1 Bailey (S. Car.) 158; s. c., 19 Am. Dec. 664.

1. *Cotten v. Thompson*, 25 Ala. 671; *Otey v. Moore*, 17 Ala. 280; *Clark v. Reiniger*, 66 Iowa 507.

2. *Cotten v. Thompson*, 25 Ala. 671; *Otey v. Moore*, 17 Ala. 280.

Bona-fide Purchasers.—In *Otey v. Moore*, 17 Ala. 280, it was held that a bona-fide purchaser who acquired title from the defendant after the property had been surrendered to him, and before the second levy, was entitled to the preference. The court say: "After the property is returned and the levy is discharged the plaintiff cannot compel the sheriff to levy again unless he executes the bond of indemnity which has been required of him. He has not, therefore, the right to subject the property to the satisfaction of his execution until the bond is given, for it would be absurd to say that a plaintiff had the right to subject property to the satisfaction of his execution, but not the right to coerce the sheriff to make the levy. The right or lien of the plaintiff is, therefore, suspended from the time the property is restored to the possession of him from whom it was taken, and can only be revived by the subsequent giving of the bond or a subsequent levy without it, which the sheriff may but is not compelled to make. The defendant purchased the slave when the lien of the plaintiff was suspended or

destroyed from his own neglect to give the bond required. We, therefore, hold that the title of the defendant, he being a bona-fide purchaser, is superior to the lien of the plaintiff's execution."

3. *Hartman v. Campbell*, 5 W. Va. 394; *Smith v. Osgood*, 46 N. H. 178.

4. *Burnett v. Handley*, 8 Ala. 685; *Pickard v. Peters*, 3 Ala. 493; *Davidson v. Dallas*, 8 Cal. 227; *Townsend v. Henry*, 26 Miss. 203; *Smith v. Osgood*, 46 N. H. 178; *Griffin v. Hasty*, 94 N. Car. 438; *Dewey v. White*, 65 N. Car. 225. But if the sale is made under all the writs, the fact that the holder of the junior has given, while the holder of the senior has refused, an indemnity, does not deprive the latter of his priority. *Girard Bank v. Philadelphia & N. R. Co.*, 2 Miles (Pa.) 447. See also *Adair v. McDaniel*, 1 Bailey (S. Car.) 158; s. c., 19 Am. Dec. 664.

5. *Schuylkill Co.'s App.*, 30 Pa. St. 358.

6. *Lewis v. Johns*, 34 Cal. 629; *Knight v. Nelson*, 117 Mass. 458; *Elliott v. Hayden*, 104 Mass. 180; *Ball v. Loomis*, 29 N. Y. 412; *Herring v. Hoppock*, 15 N. Y. 409; *Davis v. Newkirk*, 5 Denio (N. Y.) 92; *Root v. Chandler*, 10 Wend. (N. Y.) 111; *Weber v. Ferris*, 37 How. (N. Y.) Pr. 102; *Lovejoy v. Murray*, 2 Cliff. 191; s. c., 70 U. S. (3 Wall.) 1.

Indemnitors as Causa Causans.—In *Herring v. Hoppock*, 15 N. Y. 409, a claimant sued the sheriff and his indemnitor for the conversion of a safe. It was

creditors liable for the trespass, but also any persons who become sureties upon the bond.¹ The fact that the claimant has obtained a judgment against the sheriff for the trespass does not bar a subsequent action against the creditor therefor;² but on

held that the latter was the moving cause of the trespass, and was therefore liable. The court say: "The only serious question in the cause is, whether the defendant, by his actual co-operation with the sheriff in his wrongful levy upon and sale of the plaintiff's property, renders himself also liable to the plaintiff as a wrongdoer, for the sale of the property. The case shows that the sheriff refused to sell the safe until he was indemnified. The indemnification, therefore, must be regarded as a ratification of the levy, and as the cause of the sale. The indemnitors were the *causa causans*, inducing and requesting the sheriff to do the wrongful act. Their indemnity naturally produced the act of the wrongful sale, and must be regarded as the principal if not the sole cause of it. All persons who direct or request another to commit a trespass, are liable as cotrespassers. The bonds of indemnity in this case were a virtual request to the sheriff to sell the safe, and the act of the sale was, in effect, done under the direction and with the advice and concurrence of the obligors in the bonds, and they are therefore equally liable with the sheriff to the plaintiff as trespassers."

Giving Bond Equivalent to Personal Interference.—In *Lovejoy v. Murray*, 70 U. S. (3 Wall.) 1, the plaintiff sued the plaintiff in execution for a trespass committed by the sheriff. It was *held* that the creditor having given bond of indemnity was liable. The court say: "It is contended by counsel that a trespass cannot be ratified like a contract so as to make the party liable *ab initio*. But it is not necessary to decide, in this case, whether the defendants by giving the bond became liable for what had been done previous to that time. It is sufficient if they become liable for what was done by the sheriff after they gave the instrument. The trespass complained of was a continuing trespass, and consisted of a series of proceedings ending in the sale of the plaintiff's property under execution. At the time the bond was given, the sheriff had merely taken possession of the goods under the attachment. No great injury had, probably, been done. The demand for

indemnity, and the giving of it by the defendants, proceeded upon the supposition that the sheriff would without it go no further in that direction, but would give up the property to the claimant, the present plaintiff, and make his peace on the best terms he could. By the present statute of Iowa he had a right to do this, if the plaintiff in attachment refused to assume the hazard of indemnifying him. And if there were no such statute, he had a right to deliver the property to the claimant, and risk a suit by the plaintiff in attachment, rather than a contest with a rightful claimant of the goods. The giving of the bond by the present defendants must, therefore, be held equivalent to a personal interference in the course of the proceeding, by directing or requesting the sheriff to hold the goods as if they were the property of the defendants in attachment. In doing this, they assumed the direction and control of the sheriff's future action, so far as it might constitute a trespass, and they became to that extent the principals and he their agent in the transaction. This made them responsible for the continuance of the wrongful possession, and for the sale and conversion of the goods; in other words, for all the real damages which plaintiff sustained."

Application of Proceeds of Sale.—The liability of the creditor is governed by the fact that he gave the indemnity and is not affected by the fact that no part of the proceeds has been paid to him. Thus, a creditor who has indemnified the sheriff and directed him to sell property in the possession of and claimed by a third party, is liable as a trespasser, although the proceeds of the sale have been applied to an execution levied prior to that of the indemnity. *Weber v. Ferris*, 37 How. (N. Y.) Pr. 102. See also *Watmough v. Francis*, 7 Pa. St. 206.

1. *Screws v. Watson*, 48 Ala. 628; *Wetzell v. Waters*, 18 Mo. 396; *Herring v. Happock*, 15 N. Y. 409; *Ford v. Williams*, 13 N. Y. 577, 584; s. c., 67 Am. Dec. 83; *Davis v. New Kirk*, 5 Den. (N. Y.) 92.

2. *Elliott v. Hayden*, 104 Mass. 180.
Effect of Judgment Against Sheriff.—

the contrary, if the latter took upon himself the defence of the suit against the officer, he is, in a subsequent suit in which he is the defendant, concluded by the judgment against the sheriff.¹ The liability of the obligor is limited, however, to such acts as by the giving of the bond he must have been deemed to have knowledge and to have authorized. For acts which it cannot reasonably be supposed he was aware of or intended, no liability attaches to him.²

In some States claimants are by statute limited to an action against the obligors in the bond, and are barred of all right of

In *Lovejoy v. Murray*, 70 U. S. (3 Wall.) 1; s. c., 1 Cliff. 191, a plaintiff in attachment indemnified the sheriff against any liability for the sale of property attached, which was claimed by a stranger to the writ. A suit having been brought against the officer for the trespass, it was held that the judgment therein against the sheriff did not bar a subsequent action by the claimant against the plaintiff in attachment. The court say: "It is said that the judgment represents the price of the property, and as plaintiff has the judgment, the defendant should have the property. But if the judgment does not represent the price of the goods, does it follow that the defendant shall have the property before he has paid that price? The payment of the price and the transfer of the property are, in the ordinary contract of sale, concurrent acts. But in all such cases, what has the defendant in such second suit done to discharge himself from the obligation which the law imposes upon him to make compensation? His liability must remain in morals and on principle until he does this. The judgment against his cotrespasser does not affect him so as to release him on any equitable consideration. It may be said that neither does the satisfaction by his cotrespasser or a release to his cotrespasser do this; and that is true. But when the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience that the law will not permit him to recover again for the same damages. But it is not easy to see how he is so affected until he has received full satisfaction, or that which the law must consider as such. We are, therefore, of opinion that nothing short of satisfaction or its equivalent can make good a plea of former judgment in trespass offered as a bar in an

action against another joint trespasser who was not party to the first judgment."

1. *Lovejoy v. Murray*, 70 U. S. (3 Wall.) 1; s. c., 2 Cliff. 191.

2. *Contents of Safe*.—A sheriff levied an attachment on a safe which did not belong to the judgment debtor, and in which certain goods belonging to still another person, the present plaintiff, were locked up. The safe and its contents were removed to an auction room, where the sheriff took the goods, marked his own name upon the package, and deposited it with the auctioneer. He then sold the safe under the process. In an action against the sheriff and his indemnitors for the wrongful levy, it was held that the seizure of the safe being wrongful, the seizure of the contents was wrongful also, but that the obligors in the indemnity bond were not liable in respect of the contents without proof that they had knowledge thereof. *Chapman v. Douglas*, 15 Abb. Pr. (N. Y.) N. S. 421. The court say: "If the defendants knew that the safe could not be taken by the sheriff without his taking the contents of it also, and they had, with that knowledge, directed him to take it, they would undoubtedly have been liable. But there is nothing in the bond or in the evidence from which it can be inferred that they contemplated, meant or directed that the contents should be taken if the safe could not be taken without doing so. . . . What was contained in the safe was worth six times as much as the safe itself, and, before the defendant could be held answerable for this large amount of property, there should, in my opinion, be some evidence to show that they knew before they gave the bond of indemnity, or before the safe was taken, that it was locked, that the plaintiff had the key of it and would not open it, so as to show that they were apprized that

action against the sheriff;¹ but in the absence of an express prohibition of actions against the officer, such a statute will not restrict the claimant to his remedy on the bond, and he may sue the sheriff for the trespass or conversion.² A statute restricting the right of the claimant to an action upon the bond cannot, constitutionally, affect his right to bring an action to recover the specific property; such a statute is a violation of the constitutional prohibition against the deprivation of property without due process of law.³

7. *Breach of Condition.*—If the bond be a simple bond of indemnity,—i. e., to save the sheriff harmless from any damages occasioned by a levy or sale,—there is no breach of condition until the sheriff has suffered actual damage by the payment of a claim against him.⁴ But if the condition of the bond is framed in such terms as to import an undertaking to save the officer harmless from any liability, the obligee has a right of action upon it as soon as a liability is incurred without the necessity of showing any payment.⁵

it could not be taken away and sold without also taking whatever was in it."

1. *Chisholm v. Gooch*, 79 Ky. 468; *Gunn v. Gudehus*, 15 B. Mon. (Ky.) 447; *Shattuck v. Miller*, 50 Miss. 386; *Moore v. Allen*, 25 Miss. 363.

2. *State v. McBride*, 81 Mo. 349.

3. *Foule v. Mann*, 53 Iowa 42.

In *Belkin v. Hill*, 53 Mo. 492, it was held that the mere fact that claimants were given a remedy on the bond did not deprive them of their right to bring replevin.

4. *Recovery of Judgment.*—A bond of indemnity was given to a sheriff against "any damage or molestation by reason of any act done or liability incurred" by or through a deputy. Judgments were recovered against the sheriff for the deputy's breach of duty. Held, that without payment of the judgments there was no breach of the bond, and that the sheriff could not maintain an action thereon. *Gilbert v. Wiman*, 1 N. Y. 550.

Assignment of Bond as Damnification.

—A constable received from the plaintiff in an execution a bond conditioned to save him harmless "from all damages and costs" which should be occasioned to him by the levy of the execution. The judgment debtor brought an action against the constable for damages and recovered judgment therein. He thereafter discharged the judgment in consideration of the assignment to him of the bond. In an action upon the bond at his instance, it was held

that by the assignment of the bond in satisfaction of the judgment the constable had been damnified, and that the defendant in the execution might, as the constable's assignee, maintain an action upon it. *Howe v. Freidheim*, 27 Minn. 294. The court say: "The effect of this transaction is that Paddleford (the constable) has paid the judgment recovered against him on account of his levy by parting with the bond—a thing of value. To the extent of that value he has suffered and paid, in the words of the bond, 'damages and costs occasioned to him by the levy of the execution.' . . . It follows that the condition of the bond is broken, and that plaintiff, as Paddleford's assignee, has a right of action upon it."

5. *Cask v. Merrifield*, 139 Mass. 139; *White v. French*, 81 Mass. (15 Gray) 339; *Jones v. Childs*, 8 Nev. 121; *Bancroft v. Winspear*, 44 Barb. (N. Y.) 209; *Westervelt v. Smith*, 2 Duer (N. Y.) 449; *Johnson v. Gilbert*, 9 Hun (N. Y.) 469.

When Condition Broken.—In *Jones v. Childs*, 8 Nev. 121, it was held that in an action on a bond given to a sheriff to indemnify him against "all damages, expenses, costs and charges, and against all loss and liabilities which said sheriff shall sustain or in any wise be put to," it is sufficient to show a liability by way of judgment against him without showing payment thereof. The court say: "It is undoubtedly the rule of the common law courts that to authorize a recovery upon a mere bond

A bond of indemnity is, of course, to be construed according to the intention of the parties as evidenced by the language used; but a construction will not be given to it which will make the obligors liable for a trespass which they neither directed nor contemplated, if it can reasonably be construed otherwise.¹ When granted at the request of an officer levying an execution it will in the absence of any showing to the contrary, be presumed to relate only to property already levied upon,² and only under the execution described in it.³ Any provisos contained in it must be complied with by the officer before he can bring a suit against the obligors.⁴

8. *Measure of Recovery.*—The recovery upon a bond for a

of indemnity actual damage must be shown. If the indemnity be against the payment of money, the plaintiff is generally required to prove actual payment, or that which the law considers equivalent to actual payment. But it has very generally been held that if the indemnity be not only against actual damage or expense, but also against any liability for such damage or expense the party need not wait until he has actually paid the demand against him, but his right of action is complete when he becomes legally liable for damages. This is in strict conformity with the letter of the bond or undertaking, for, if the indemnity be given against any liability, clearly when the liability is legally imposed the condition is broken and a right of action is at once created. *Webb v. Pond*, 19 Wend. 423; *Chace v. Hinman*, 8 Wend. 452. See also the question considered in *Gilbert v. Wiman*, 1 N. Y. 550. Thus the difference in the language of obligations has given rise to the two classes of decisions, those holding that no cause of action arises until there is actual damage, which are cases arising upon obligations of indemnity purely; and the other class, like *Chace v. Hinman*, where the bond or undertaking is not only of indemnity, but also against liability, in which cases it is very generally held that the cause of action is complete when the liability is established, and therefore that no actual damage or payment of the liability need be shown."

It has been held that the sheriff may bring an action as soon as he is subjected to any legal liability, when the obligation is to save him harmless "from all suits, damages and costs whatever whereto he may be liable or obliged by law to pay," etc.; *White v.*

French, 81 Mass. (15 Gray) 339; *Cook v. Merrifield*, 139 Mass. 139; or from "all damages, costs, charges, trouble," etc. *Bancroft v. Winspear*, 44 Barb. (N. Y.) 209; or from all "demands, damages, costs and charges," etc. *Westervelt v. Smith*, 2 Duer (N. Y.) 449; or from all "damages, costs, suits, actions, judgments and executions." *Johnson v. Gilbert*, 9 Hun (N. Y.) 469.

1. *Clark v. Woodruff*, 83 N. Y. 518.

2. *Clark v. Woodruff*, 18 Hun (N. Y.) 419. See also *Reilly v. Coleman*, 62 How. Pr. (N. Y.) 289.

3. *Alston v. Conger*, 66 Barb. (N. Y.) 272.

Condition Interpreted Disjunctively.

—A bond was issued to an officer by a principal obligor and surety, reciting that the officer had levied an execution on property claimed by a third party, wherefore, it was stipulated that "if the said officer is kept harmless, and all damages paid by the said bounden, in case said execution be levied on wrong property, and the same sold," the bond should be void. Held, that the bond did not protect the officer merely against a wrongful levy and sale, but against either of these contingencies, and that the obligors were bound to indemnify him, although the property was replevied from him by the claimant, the owner, before the sale had been made. *Finckh v. Evers*, 25 Ohio St. 82.

4. **Notice of Suit.**—If an indemnifying bond given to a sheriff by the plaintiff in an execution contains a proviso that the grantor should be notified of any suit against the sheriff, and allowed to defend it, a failure to comply with such proviso will debar the officer from bringing an action upon the bond; nor can he sue upon an implied promise of indemnity, the express contract preventing any implication. *Preston v. Yates*, 24 Hun (N. Y.) 534.

penal sum conditioned to indemnify the sheriff for the consequences of his acts is limited to the amount of the penalty specified, with interest thereon from the date of the recovery against the sheriff.¹ If a sum in excess of the amount required to satisfy the amount of the execution is realized upon the sale, the indemnifying creditors are liable for the whole damages caused, and not merely for the amount due under the execution,² and generally the sheriff can recover not only the principal sum in a judgment rendered against him, but also the costs of defending the action.³

A creditor who has indemnified the sheriff for the sale of property is liable for the whole amount of the costs incurred by him in the successful defence of an action, notwithstanding the fact that a surplus which remained after satisfying his claim was paid over to junior lienors, who gave no indemnity;⁴ but an indemnifying creditor may prove, in mitigation of the damages, the amount received by the sheriff from the sale, and the *onus* is then upon the latter of showing that he has paid, or is liable to pay, the proceeds to another.⁵

9. *Assignment of Bond to Claimant.*—The claimant may take an assignment of the bond in discharge of his judgment against the sheriff, and may bring a suit upon the bond against the obligors therein.⁶ The fact that the claimants on receiving the assignment agreed to release the officer from any liability on the judgment does not release the obligors from their liability on the bond;⁷ and in the case of pure bonds of indemnity, the assign-

1. Griffiths v. Hardenbergh, 41 N. Y. 464.

2. Secrets v. Markwell, 11 Bush (Ky.) 316.

3. Graves v. Moore, 58 Cal. 435; Stark v. Raney, 18 Cal. 622. See also Chamberlain v. Beller, 18 N. Y. 115.

Notice to Indemnifying Creditor.—A sheriff being sued for a wrongful arrest, defended the action without communicating with the execution creditor, who was liable to indemnify him. *Held*, in a subsequent action by the sheriff against the execution creditor, that to entitle the sheriff to recover the costs of defending the former action, it should be submitted to the jury to say whether the course pursued in defending the former action was reasonable under all the circumstances of the case. *Caldbeck v. Boon*, 7 Ir. R., C. L. 32.

4. Chamberlain v. Beller, 18 N. Y. 115.

5. O'Brien v. McCann, 58 N. Y. 373.

6. McBeth v. McIntyre, 57 Cal. 49; White v. French, 81 Mass. (15 Gray)

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Measure of Recovery.—A judgment

having been recovered against the sheriff for an amount in excess of the penalty in the bond, he satisfied it by paying \$40 and assigning the bond of indemnity. In a suit by the claimant, as assignee of the bond, it was urged that the recovery should be restricted to the actual damage suffered by the sheriff, viz, the \$40 which he had paid, but it was *held* that the plaintiff could recover to the amount of the penalty. *White v. French*, 81 Mass. (15 Gray) 339. See also *Howe v. Freidheim*, 27 Minn. 294.

7. **Effect of Release.**—A constable had levied upon certain property claimed and actually owned by others than the execution debtor. Before selling he received a bond of indemnity from the plaintiff. The owners sued the constable and recovered judgment against him. The latter thereupon assigned the bond to them and they released him from liability on the judgment. It was *held* that the release of the constable did not operate as a release of the obligors on the bond. The court say: "The indemnity given the constable was

ment will operate as a payment of the judgment and will constitute such a damnification of the officer, as will amount to a breach of the condition, and thus enable his assignees to maintain an action.¹

10. *Implied Indemnities.*—If the plaintiff in an execution simply place the writ in the sheriff's hands with general instructions to make the money, there is no implied indemnity under which the sheriff can have recourse against him for the consequences of a wrongful levy or sale;² but if the execution is, by the express direction of the creditor, levied in a particular manner or upon property pointed out to the officer by him, the creditor by implication undertakes to indemnify the officer against any claims arising therefrom.³ Similarly, if the officer is induced by misrepresentations as to the ownership of property, to seize it, and is compelled to pay damages therefor, the parties who falsely misrepresented the ownership must indemnify him.⁴ The implied indemnity is to be treated as a contract of pure indemnity, and the officer cannot bring a suit upon it until he has satisfied the claim for damages against him, and been damnified thereby.⁵

XI. Indemnity Mortgages.—A mortgage given to indemnify a

not only against actual damage, etc., but also against all liability therefor, and therefore the moment the judgment was entered in favor of McBeth and Compton against the constable the latter became liable for the amount of it, and thereupon a cause of action arose in his favor upon the bond. . . . It is argued that the obligation to pay the judgment to McBeth and Compton was the liability against which the constable was indemnified, and that the cause of action expired with the release of the latter from all liability on the judgment. The argument is more specious than sound. The consideration for the release was the assignment by the constable of his cause of action on the bond to McBeth and Compton. Substantially he paid the judgment against him to them in that way. . . . Of course the obligation was extinguished by the release, but in consideration of that release, as already observed, he assigned to the plaintiffs his cause of action on the bond."

1. *Howe v. Freidheim*, 27 Minn. 294.
2. *Nelson v. Cook*, 17 Ill. 443; *Fitler v. Fossard*, 7 Pa. St. 540; *Wilson v. Milner*, 2 Camp. 452.

3. *Stoyel v. Cady*, 4 Day (Conn.) 222, 226; *Nelson v. Cook*, 17 Ill. 443; *Sanders v. Hamilton*, 3 Dana (Ky.) 550; *Gower v. Emery*, 18 Me. 79; *Marshall v. Hosmer*, 4 Mass. 60; *Fitler v. Fossard*, 7 Pa. St. 540; *Rawlings v.*

Bell, 1 C. B. 951; *Humphrys v. Pratt*, 2 Dow & C. 288; *Collins v. Evans*, 5 Q. B. 820.

4. *Kenyon v. Woodruff*, 33 Mich. 310.

5. *Williams v. Mercer*, 139 Mass. 141.

In this case a constable, who held a replevin writ obtained by the mortgagee of certain chattels, allowed the agent of the mortgagee to remove certain articles, which were not named in the writ, upon his representing that they were subject to the mortgage. The mortgagor sued the constable and recovered judgment against him. The constable brought an action as upon the implied indemnity, and it was *held* that the action could not be maintained. The court say: "Although a liability over on the part of the plaintiff alone may perhaps be taken into account by the jury in estimating the damages for breach of an express warranty (*Randall v. Raper*, E. B. & E. 84, and *New Haven & Northampton Co. v. Hayden*, 117 Mass. 433), we cannot admit that the defendant's implied undertaking, if any, extends to paying for an unsatisfied judgment for damages against the plaintiff when the defendant remains liable to have a similar judgment recovered against him, satisfaction of which will discharge the plaintiff without his being called upon for any part of what he now seeks to recover."

person against loss or damage growing out of indorsements there-after to be made by the mortgagee for the mortgage, is supported by a sufficient consideration and is valid.¹ When the mortgage upon its face appears to be given for a sum of money advanced, it may be shown by parol that it was in fact given to save the mortgagee harmless against liabilities incurred by him at the request of the mortgagor.²

The fact that the debt or obligation against which the mortgage was intended to protect the mortgagee is not described with absolute precision, does not invalidate the mortgage. It is sufficient that it be so described that it appear with reasonable certainty to be the debt or obligation intended to be secured in the mortgage.³

When the mortgage is intended as an indemnity against liability upon certain notes, it will operate as a continuing security, and will protect the mortgage not only against liability upon the original notes, but also against any liability upon renewals thereof.⁴ The lien of an indemnity mortgage attaches upon execution

1. *Kramer v. Farmers and Mechanics' Bank*, 15 Ohio 253; *Lyle v. Ducomb*, 5 Binn. (Pa.) 585.

2. *McKinstier v. Babcock*, 26 N. Y. 378; *Bank of Utica v. Finch*, 3 Barb. Ch. (N. Y.) 293; *Lawrence v. Tucker*, 23 How. (U. S.) 14; *Shirras v. Caig*, 7 Cranch (U. S.) 34.

3. *Utley v. Smith*, 24 Conn. 290; *Ketchum v. Jauncey*, 23 Conn. 123; *Lewis v. De Forest*, 20 Conn. 427; *Burdett v. Clay*, 8 B. Mon. (Ky.) 287; *Goddard v. Sawyer*, 91 Mass. (9 Allen) 78; *Benton v. Sumner*, 57 N. H. 117; *Gilman v. Moody*, 43 N. H. 239; *First Nat. Bank of Paterson v. Byard*, 26 N. J. Eq. 255; *Patterson v. Johnston*, 7 Ohio 225.

Intent of Parties.—In *Gilman v. Moody*, 43 N. H. 239, the discrepancy complained of consisted in the signing of a note for \$71 instead of \$60, as specified in the mortgage. It was held that the mortgage was valid. The court say: "We must enquire whether the intent of the parties to the instrument cannot be so far ascertained and enforced as that the thing designed to be done may be fully perfected without violating the acknowledged principles of law governing the construction of deeds of this nature. Where a part of the description of the note mentioned in the condition of the deed is actually incorrect and untrue, the court simply reject the incorrect parts and are governed by the residue. This principle of construction is familiar in its application to the names of persons in the in-

strument and to the description of property intended to be conveyed. The description may not agree in some particulars, and one part may be inconsistent with another; but if the description be sufficient to ascertain the property or person intended, the inconsistent part may be rejected. The same principles apply with equal force to the description of the debt in the condition of the deed as to the property or person named in the deed. It is not necessary that all the particulars of it should be specified in order to identify it as the note intended to be secured. It is sufficient that it be so far described that it appear with reasonable certainty to be the note intended to be secured in the mortgage. *Webb v. Stone*, 24 N. H. 282. A general accordance in the description of the note is sufficient."

Parol Evidence.—Parol evidence is admissible to show what notes have been endorsed by the mortgagees, and are intended to be secured by a mortgage conditioned to indemnify them against loss by reason of their having endorsed certain notes "now payable at" a certain place. *Benton v. Sumner*, 57 N. H. 117.

4. *Mayer v. Grottendick*, 68 Ind. 1; *Burdett v. Clay*, 8 B. Mon. (Ky.) 287; *Commercial Bank v. Cunningham*, 41 Mass. (24 Pick.) 270; *Chapman v. Jenkins*, 31 Barb. (N. Y.) 164; *Babcock v. Morse*, 19 Barb. (N. Y.) 140; *Bank of Utica v. Finch*, 3 Barb. Ch. (N. Y.) 293; *Dunham v. Dey*, 15 Johns. (N. Y.)

and delivery, and is not in abeyance until the payment of the debt indemnified against.¹ If the condition of the mortgage is only against loss or damage, there is no breach until an actual payment has been made by the mortgagee,² but if the condition be against liability as well as damage, there is a breach as soon as the mortgagee becomes liable upon the obligation indemnified against.³

INDENT.—A certificate issued by the government at the close of the revolution, to public creditors.⁴

INDENTURE.—For definition see vol. 5, p. 453.⁵

554; *Brinckerhoff v. Lansing*, 4 Johns. Ch. (N. Y.) 65; *Nesbit v. Worts*, 37 Ohio St. 378; *Bobbitt v. Flowers*, 1 Swan (Tenn.) 511.

Joint Liability.—Where an indemnity mortgage is conditioned to save the mortgagee harmless, and to pay the note on which the mortgagee is surety, the protection of the mortgage extends to a liability incurred by the mortgagee jointly with the mortgagor, for money borrowed to pay the first note, and with which such note was paid. *Nesbit v. Worts*, 37 Ohio St. 378.

1. *Krutsinger v. Brown*, 72 Ind. 466; *Brinkmeyer v. Helbling*, 57 Ind. 435; *Brinkmeyer v. Browneller*, 55 Ind. 487; *Watson v. Dickens*, 20 Miss. 608; *Smith v. Harry*, 91 Pa. St. 119.

In several cases, however, it is said the lien comes into existence on from the time when the liability is incurred. See *Choteau v. Thompson*, 2 Ohio St. 114; *Taylor v. Cornelius*, 60 Pa. St. 187; *Appeal of Bank of Commerce*, 44 Pa. St. 423; *Bank of Montgomery County's Appeal*, 36 Pa. St. 170.

Obligation Upon Mortgagee.—In *Brinkmeyer v. Browneller*, 55 Ind. 487, the court say: "The following propositions, we think, are settled by the authorities: First—Where the mortgagee has bound himself to make advances or incur liabilities, such advances, when made, shall relate back, and the mortgage will be a valid lien for advances made or liabilities incurred against subsequent purchasers or incumbrancers with notice, actual or constructive, of the mortgage. Second—Where there is no obligation on the mortgagee, and such advances or liabilities are merely optional with him, and he has actual notice of a subsequent incumbrance or conveyance of the mortgaged premises before making advances or incurring liabilities, his lien is not good, as against the subsequent purchaser or incumbrancer.

See 11 Am. Law Reg., N. S. 273, and authorities there cited." In support of these propositions, see *Burdett v. Clay*, 8 B. Mon. (Ky.) 287; *Ladue v. Detroit & M. R. Co.*, 13 Mich. 380; *Kramer v. Farmers & Mechanics' Bank*, 15 Ohio 253; *Taylor v. Cornelius*, 60 Pa. St. 187; *Lyle v. Ducomb*, 5 Binn. (Pa.) 585.

2. *McLean v. Ragsdale*, 31 Miss. 701; *Ide v. Spencer*, 50 Vt. 293.

Fulfillment of Condition.—In a suit to have an indemnity mortgage declared satisfied and discharged, it appeared that plaintiffs, who were mortgagees in a second mortgage, assigned it to the defendants and gave them a mortgage to indemnify them against loss. The defendants subsequently transferred the assigned mortgage to a third person, who foreclosed, and at the sale bid in the premises for the full amount due on the mortgage, the first mortgage still remaining a subsisting lien. *Held*, that the condition of the indemnity mortgage had been fulfilled, and that the plaintiffs were entitled to have it declared satisfied. *Sergeant v. Ruble*, 33 Minn. 354.

3. *Gunel v. Cue*, 72 Ind. 34; *Nat. Bank of Newburgh v. Bigler*, 83 N. Y. 51; *In re Jaycox*, 8 Nat. Bank Reg. 241, 263.

Limitation of Recovery.—Where a mortgage is made to indemnify one against loss by reason of becoming surety upon a note executed to negotiate a loan to carry on business and the mortgagor makes default, although a provision in the deed restricting the liability of the property to "no more than \$5,000" is a limitation upon any increase of the debt, yet interest is recoverable as an incident of the debt. *Stafford v. Jones*, 91 N. Car. 189.

4. *United States v. Irwin*, 5 McLean 183.

5. An indenture is a deed, and must be sealed. *Overseers of Hopewell v.*

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1. Legal Position of the Indians.—The Supreme Court of the United States has defined the Indians to be “domestic dependent nations.”¹ They are “wards of the nation,” and as such are entitled to the care and protection due from a guardian to a ward.² Individually they owe allegiance to their several tribes and are not a part of the people of the United States. Where

Overseers of Amwell, 1 Halst. (N. J.) 169; North Brunswick v. Franklin, 1 Harr. (N. J.) 535. The term, when used in pleading, imports that the instrument referred to is sealed. Note to Cabell v. Vaughan, 1 Wms. Saund. 290; Heaton v. Wolff, Cro. Eliz. 737; Bond v. Moyle, 6 Mod. 306; Woodcock v. Morgan, 1 Str. 512; Moore v. Jones, 2 Str. 815; Atkinson v. Coalworth, 2 Ld. Raym. 1538; Phillips v. Clift, 4 H. & N. 173; Beardsley v. South Mayd, 2 Gr. (U. J.) 542; *Contra*, Magee v. Fisher, 8 Ala. 320, where it was held that indenture was not a technical term and might refer to any indented instrument.

“I will not say that the word *indenture* in its largest sense might not comprehend a writing indented though not under seal. But certain it is that when an indenture is spoken of, and peculiarly an indenture of apprenticeship, an instrument under seal is generally understood.” Com. v. Wilbanks, 10 S. & R. (Pa.) 416.

The calling an instrument an indenture in the body of it is not a sufficient recognition of a scroll as a seal to make it a deed. Walker v. Keile, 8 Mo. 301.

Indenture is no longer necessary. Currie v. Donald, 2 Wash. (Va.) 63.

1. In *Cherokee Nation v. Georgia*, 5 Pet. (U. S.) 1, CHIEF JUSTICE MARSHALL said: “Though the Indians are acknowledged to have an unquestionable and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes

which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility. These considerations go far to support the opinion that the framers of our constitution had not the Indian tribes in view when they opened the courts of the union to controversies between a state or the citizens thereof and foreign states.”

2. “These Indians are the wards of the nation. They are communities dependent on the United States; dependent largely for their daily food, dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the peo-

their persons or property are exempt from taxation by treaty or statute of the United States, they cannot be taxed by any State, and general acts of congress do not apply to them.¹ Their title to land is a mere title by occupancy, the fee being in the United States.² Where they are not within the limits of a State the power of congress to legislate for them is supreme.³ Where they are within the limits of a State the power of congress is probably restricted to a mere regulation of intercourse.

An Indian is a "person" within the meaning of the Habeas

ple of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protecting, and with it the power. This has always been recognized by the executive and by congress, and by this court whenever the question has arisen.

. . . The power of the general government over [them] . . . is necessary to their protection as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else; because the theatre of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes."

Per JUSTICE MILLER, in *United States v. Kagama*, 118 U. S. 375. See also *Choctaw Nation v. United States*, 119 U. S. 1.

1. *Elk v. Wilkins*, 112 U. S. 94; *Cherokee Nation v. Georgia*, 5 Pet. (U. S.) 1; *Worcester v. Georgia*, 6 Pet. (U. S.) 515; *United States v. Rogers*, 4 How. (U. S.) 567; *United States v. Holliday*, 3 Wall. (U. S.) 407; *Case of the Kansas Indians*, 5 Wall. (U. S.) 737; *Case of the New York Indians*, 5 Wall. (U. S.) 761; *Case of the Cherokee Tobacco*, 11 Wall. (U. S.) 616; *United States v. 43 Gallons of Whisky*, 93 U. S. 188; *Pennock v. Commissioners*, 103 U. S. 44; *Crow Dog's Case*, 109 U. S. 556; *Goodell v. Jackson*, 20 Johns. (N. Y.) 693; *Hastings v. Farmer*, 4 N. Y. 293.

2. *Johnson v. McIntosh*, 8 Wheat. (U. S.) 543; *Fletcher v. Peck*, 6 Cranch (U. S.) 87; *Cherokee Nation v. Georgia*, 5 Pet. (U. S.) 1; *United States v. Cook*, 19 Wall. (U. S.) 591. In *United States v. Kagama*, 118 U. S. 375, MR. JUSTICE MILLER said: "Fol-

lowing the policy of the European governments in the discovery of America towards the Indians who were found here, the colonies before the Revolution, the States and the United States, since, have recognized in the Indians a possessory right to the soil over which they roamed and hunted and established occasional villages. But they asserted an ultimate title in the land itself by which the Indian tribes were forbidden to sell or transfer it to other nations or peoples without the consent of this paramount authority. When a tribe wished to dispose of its land, or any part of it, or the State or the United States wished to purchase it, a treaty with the tribe was the only mode in which it could be done. The United States recognized no rights in private persons, or in other nations, to make such a purchase by treaty or otherwise. With the Indians themselves these relations are equally difficult to define. They were, and always have been, regarded as having a semi-independent position when they preserve their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they reside."

3. The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States; because it never has been denied, and because it alone can enforce its laws on all the tribes. *United States v. Kagama*, 118 U. S. 375.

Corpus act;¹ but he is not a citizen under the Fourteenth Amendment to the Constitution,² and he cannot be naturalized without the special consent of congress.³

The status of the Indians in the civil courts of the United States and the State and territorial courts is involved in some doubt. The right of the Indians to sue and be sued has been recognized in *Kansas*;⁴ and a strong argument in favor of their right has recently been made.⁵ It has been expressly decided

1. This was decided by the celebrated "Ponca Case." Several Ponca Indians, after their removal from Dakota to the Indian Territory, left their tribe and went upon the reservation of the Omaha Indians, who gave them land to cultivate. They were arrested by order of the United States government, to be carried back to the Indian Territory. On a writ of *habeas corpus* it was held that they should be released. *United States v. Crook*, 5 Dill. (U. S.) 453.

2. In *Elk v. Wilkins*, 112 U. S. 94, an Indian brought an action against the registrar of one of the wards of the city of Omaha for refusing to register him as a qualified voter. The petition alleged that the plaintiff was an Indian, and was born within the United States, that he had severed his tribal relation with the Indian tribes, and had fully and completely surrendered himself to the jurisdiction of the United States, and was a *bona fide* resident of the State of Nebraska and city of Omaha. The court held that the facts were not sufficient to constitute the plaintiff a citizen of the United States under the Fourteenth Amendment; and that he was deprived of no right secured by the Fifteenth Amendment. See also *McKay v. Campbell*, 5 Am. L. T. R. 407. Where, however, Indians have severed their tribal relations and have become residents of a state or territory, their children are born "within the jurisdiction," and are, by force of the amendment, citizens. *Ex parte Reynolds*, 18 Albany L. J. 8.

3. *United States v. Osborne*; 6 Sawy. (U. S.) 406.

4. *Wiley v. Keokuk*, 6 Kan. 94; *Wiley v. Manatowah*, 6 Kan. 111; *Swartzel v. Rogers*, 3 Kan. 374. See also *Lowry v. Weaver*, 4 McLean (U. S.) 82.

5. Professor Thayer, in 1 Harvard Law Rev. 149, discussed the question whether a tribal Indian off his reservation and within a State is protected by the Fourteenth Amendment of the

Constitution as being a person entitled to the equal protection of the laws. He says: "What, then, is there in the character of a tribal Indian to take him out from these clauses of the constitution? He is a 'person,' in the sense of being a human being; and why are we to give to the term in this part of the constitution any narrower meaning than that which includes all human beings. It is said that a tribal Indian living on a reservation is neither a citizen of this country nor a member of any foreign state. That is true. Indian tribes are not foreign states. *The Cherokee Nation v. Georgia*, 5 Pet. (U. S.) 1. And the members of them are not citizens or subjects of a foreign state. *Karrahoo v. Adams*, 1 Dill. (U. S.) 344. And if it were true that all persons must be either citizens here or citizens or subjects of a foreign country, then, indeed, tribal Indians would not be 'persons.' But it would be a begging of the question to say that. We have, in these tribal Indians, a class of human beings who are neither one nor the other. No doubt their position is very peculiar, and various phrases have been invented to describe it, such as 'domestic dependent nations.' *Cherokee Nation v. Georgia*, 5 Pet. (U. S.) 17; and 'wards of the nation.' *United States v. Kagama*, 118 U. S. 375, 383. But both in the constitution and the statutes of the United States they are referred to as 'persons.' Const. U. S., art. 1, § 2; *Elk v. Wilkins*, 112 U. S. 112. In large numbers they have been made citizens of the United States. *Dred Scott v. Sandford*, 19 How. (U. S.) 393, 587; *Elk v. Wilkins*, 112 U. S. 94, 112. They may, when off their reservations, sue in the courts, and are fully recognized as having legal rights and duties. This last statement is sometimes denied; but the denial is ill considered, and proceeds upon a misunderstanding of a certain peculiar class of cases, such as that of the *Cherokee Nation v. Georgia*, 5 Pet. (U.

that the jurisdiction of the United States courts does not extend to cases by or against Indians where jurisdiction depends solely on the status of the parties as citizens of the United States or of a foreign state. In such cases Indians cannot be considered either as citizens of the United States or of a foreign country. But in other cases, where jurisdiction depends on the subject-matter of the controversy and not upon the status of the parties, the weight of authority seems to favor the right of an Indian to a standing in both the United States courts and the State courts.¹

The general Land in Severalty act, approved February 8th, 1887, seems destined to work a revolution in Indian affairs, and to settle many troublesome and vexatious questions.² The act provides that all Indian reservations, whether such by treaty, act of congress or executive order, whenever advantageous for agricultural or grazing purposes, may be surveyed by direction of the secretary of the interior, and allotments in severalty made to the Indians in quantities as specified in the various treaties, or, in default of any treaty provision, as follows: to each head of a family, one-fourth of a section; to each single person over eighteen years of age, one-eighth of a section; to each orphan child under eighteen years of age, one-eighth of a section; to each person under eighteen years now living, or who may be born prior to date of order of the secretary of the interior, one-sixteenth of a section. All allotments are to be selected by the Indians, heads of families selecting for their minor children. In case any Indian fails to select within five years, the secretary of the interior may direct the agent to select for him. Allotments

S.) 1, and *Karraho v. Adams*, 1 Dill. (U. S.) 344, turning wholly upon the limitations of the jurisdiction of the courts of the United States. In the last case, for instance, it was admitted that the court had no jurisdiction of the case, if the plaintiff, a tribal Indian woman, were not a foreigner, and it was *held* that she was not. And so in any like case in the United States courts, wherever jurisdiction depends wholly on the fact that a party has the status either of a citizen of the United States or of a foreign state. It is true that an Indian cannot sue. But there are many cases in which jurisdiction does not depend upon the party having such a status, and in all such cases an Indian off his reservation can sue in the United States court as well as in the courts of the States. *Fellows v. Blacksmith*, 19 How. (U. S.) 366; *Elk v. Wilkins*, 112 U. S. 94; *Pka-o-wah-ash-kum v. Sorin*, 8 Fed. Rep. 740; *Waupe-mau-qua v. Aldrich*, 28 Fed. Rep. 489; *Swartzel v. Rogers*, 3 Kan. 374; *Wiley v. Keokuk*, 6 Kan. 94. It

appears, then, to be true that the clauses of the Fourteenth Amendment, now under consideration, are, in the language of the Supreme Court of the United States (MATTHEWS, J.), 'universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, color or nationality.' *Yick Wo v. Hopkins*, 118 U. S. 356, 369." See also *Dred Scott v. Sandford*, 19 How. (U. S.) 403. "Legal Position of the Indian," by George F. Canfield, 15 Am. Law Rev. 21. *Contra*: "The Indian before the Law," by H. S. Pancoast. "Law for the Indian," North Am. Rev., March 1882.

1. See Abbott's "Judge and Jury," ch. 7, and authorities mentioned in previous note.

2. "The bill for the allotment of Indian lands in severalty . . . now constitutes, in many important particulars, the fundamental law for the Indian." Report of the Law Committee of the Indian Rights Association for 1887.

are to be under such rules as the secretary of the interior may prescribe, by agents especially appointed by the president. Any Indian not residing upon a reservation or belonging to a tribe for which no reservation has been provided is entitled to allotments from the unappropriated lands of the United States. Patents are to be issued in the name of the allottees declaring that the United States will hold the land allotted for the period of twenty-five years, in trust for the benefit of the individual Indians; or in case of their decease, to their heirs, according to the laws of the state or territory where the land is located. At the expiration of the twenty-five years, the United States will convey the land to the individual Indians and to their heirs in fee, free of charge or incumbrance. After all the lands on a reservation have been allotted, or sooner, if the president deem it for the best interest of the Indians, the secretary of the interior may negotiate with the tribe for the purchase of any unallotted portion of its reservation, and the purchase money shall be invested for the benefit of the Indians.

Upon the completion of the allotments and the patenting of the lands to the allottees, each person to whom allotments have been made is entitled to the benefit of the laws, both civil and criminal, of the state or territory in which he may reside; and no territory is permitted to pass any law denying any such Indian the equal protection of the law. Every Indian born within the territorial limits of the United States to whom allotments have been made, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within such limits, his residence separate and apart from any tribe, and has adopted the habits of civilized life, is declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens, without impairing his right to tribal or other property.¹

2. Crimes Committed By or Against Indians.—By the Intercourse act of 1834 the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, is extended to the Indian country; but it is provided that this "section shall not be construed to extend to any Indian committing any offence in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offences is or may be secured to the Indian tribes respectively."² This act extended the law to the Indians in their relations to the whites or other races. It did not extend the law to the punishment of crimes committed by Indians against Indians. This defect was supplied

1. The provisions of the act do not apply to the territory occupied by the Peorias, Sacs and Foxes in the Indian Territory, nor to any of the reservations of the Seneca Nation in New York. Cherokeees, Creeks, Choctaws, Chickasaws, Seminoles, and Osages, Miamis,

2. Rev. Stat., §§ 2145, 2146.

by the act of March 3rd, 1885, which gave the territorial and United States courts jurisdiction over such offences.¹

Where crimes are committed by whites against Indians, or by Indians against whites, outside the limits of a reservation that is situated within a State, the jurisdiction is in the State courts. Where such crimes are committed within the reservation, the jurisdiction is in the federal courts, the "Indian country" being within the exclusive jurisdiction of the United States.² Where a crime is committed by a white man against a white man on a reservation within the limits of a State, to which jurisdiction over the Indian country has been granted by the federal government, the State courts have jurisdiction.³

3. Protection of Indians.—Every person who makes a settlement on any lands belonging to any Indian tribe, or surveys or attempts to survey such lands, or to designate the boundaries by marking trees or otherwise, is liable to a penalty of \$1,000, and the president may take such measures and employ such military force as he may judge necessary to remove any such person from the lands.⁴

A penalty of one dollar is enacted for every head of cattle driven on Indian lands without the consent of the tribe.⁵

1. The act of 1885 is as follows: "That immediately upon and after the date of the passage of this act all Indians committing against the person or property of another Indian or other person any of the following crimes, namely: murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny, within any territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner, and shall be subject to the same penalties as are all other persons charged with the commission of said crimes respectively; and the said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any State of the United States, and within the limits of any reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

It will be observed that the act of 1885 specifies certain crimes only, of which the territorial and United States

courts shall have jurisdiction. There are still a number of acts of a criminal nature when committed by whites for which the Indians cannot be punished. Bigamy and various offences of a social nature are still left to tribal regulation.

The act of 1885 is constitutional. *U. S. v. Kagama*, 118 U. S. 375.

2. *United States v. Yellow Sun*, 1 Dill. (U. S.) 271; *United States v. Bridleman*, 7 Fed. Rep. 898; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 189; *United States v. Holliday*, 3 Wall. (U. S.) 406, 416; *State v. McKenney*, 18 Nev. 182; *Ex parte Crow Dog*, 109 U. S. 556. See "The Indian Before the Law," by Henry S. Pancoast, p. 10: "The Legal Position of an Indian," by Geo. F. Canfield, 15 Am. Law Rev. 30.

3. *U. S. v. McBratney*, 104 U. S. 622.

4. Rev. Stat. § 2118; *Worcester v. Georgia*, 6 Pet. (U. S.) 515; *Clark v. Smith*, 13 Pet. (U. S.) 195; *Lattimer v. Poteet*, 14 Pet. (U. S.) 4; *Lowry v. Weaver*, 4 McLean (U. S.) 82; *Langford v. Monteith*, 1 Idaho, N. S. 612. An occupation of Indian lands for grazing purposes only, with the consent of the Indians and in recognition of their title, is not forbidden. *United States v. Hunter*, 4 Mackey (D. C.) 531; 21 Fed. Rep. 615.

5. *United States v. Joseph*, 94 U. S.

Whenever any Indian who is a member of a tribe in treaty relations with the government desires to adopt the habits of civilized life, and has had allotted to him in severalty a portion of the land belonging to his tribe, he is protected in the enjoyment of such lands.¹

Hunting on Indian lands is prohibited,² and there is a heavy penalty for removing cattle from the Indian country.³ The purchase from the Indians of guns, traps, agricultural implements or cooking utensils is prohibited.⁴

4. Instruction of Indians.—The president is empowered, in every case where he shall judge improvements in the habits and condition of the Indians practicable, and that the means of instruction can be introduced with their own consent, to employ capable persons of good moral character to instruct them in the mode of agriculture suited to their situation; and to instruct their children in reading, writing and arithmetic.⁵ The agent in his annual report is required to submit a census of the number of children between the ages of six and sixteen years, the number of school-houses at his agency, the number of schools in operation and the attendance at each, and the names of the teachers employed and salaries paid such teachers.⁶ Where any of the tribes are competent, in the opinion of the secretary of the interior, to direct the employment of their blacksmiths, mechanics, teachers, farmers, or other persons engaged for them, the direction of such person may be given to the proper authority of the tribe.⁷

5. Treaties.—Until the year 1871 the United States conceded to the Indian tribes the right to treat with the United States upon terms of national equality, and numbers of treaties were made in reference to lands, supplies, education, intercourse and other matters. The act of March 3rd, 1871, however, provided that no Indian nation or tribe within the territory of the United States should be acknowledged or recognized as an independent nation, tribe or power with whom the United States might con-

614; Rev. Stat., § 2117. See *United States v. Mattock*, 2 Sawyer (U. S.) 148.

1. Rev. Stat., §§ 2119, 2120.

2. Rev. Stat., § 2137. Fishing is contrary to law. *United States v. Sturgeon*, 6 Sawyer (U. S.) 29.

3. Rev. Stat., § 2138.

4. Rev. Stat., § 2135.

5. Rev. Stat., § 2071. The Indians, neither by treaty nor statute, have surrendered to the United States the right to compel their children to attend school. Hence a writ of *habeas corpus* will not lie in favor of an Indian agent to recover the custody of Indian children taken from an agency school by a Roman Catholic priest; it not appearing to have been done against the con-

sent of their parents. *United States v. Imoda*, 4 Mont. 38.

6. Act of July 4th, 1884, § 9.

7. Rev. Stat., § 2072.

Large appropriations are made by Congress every year for the education of the Indians. Training schools have been established at Carlisle and other places, and a special appropriation is made for the school at Hampton, Virginia, for the support and education of a certain number of Indian children. In 1882 the president was authorized to appoint "a person to inspect all Indian schools." The title of this officer is "Indian School Superintendent." For full information on the subject of Indian education, reference is made to the recent reports of the Indian school

tract by treaty. The act further provided that no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3rd, 1871, should be invalidated or impaired.¹ Since the passage of this act no formal treaties have been made with the Indian tribes, but agreements or contracts have been made with them which have practically amounted to treaties.²

6. Sale of Liquors to Indians.—It is forbidden, under a penalty of two years' imprisonment and a fine of not more than \$300, to introduce ardent spirits, under any pretence, into the Indian country.³ Ample power is given to agents and other government officials to search for and seize liquor,⁴ and to destroy and break up distilleries.⁵

7. Contracts.—Contracts with Indians must be in writing. They must be executed before a judge of a court of record, and must bear the approval of the secretary of the interior and commissioner of Indian affairs. The writing must contain the names of all the parties in interest, their residence and occupation; and if made with a tribe, by their tribal authorities, the scope of superintendent, especially to the report for 1885.

1. Rev. Stat., § 2079.

2. "This act appears to have left the actual situation almost absolutely unchanged. Since its passage the government has continued to make agreements or contracts with the tribes as organized bodies of men—agreements which are treaties in all but name. Nor has the right of the tribes to self-government ever, so far as I am aware, been taken away by legislation or questioned in any court. The act of 1871 does not appear to destroy the tribal nationality, unless, indeed, the taking from the tribes the right to *treat with us as nations* be considered so by implication." "The Indian Before the Law," by Henry S. Pancoast, p. 6.

3. Rev. Stat., § 2139. American Fur Co. v. U. S., 2 Pet. (U. S.) 358. The power to regulate intercourse between the tribes and individual Indians includes the power to prohibit the traffic in spirituous liquors. U. S. v. Shaw-mux, 2 Sawyer (U. S.) 364. The power may be exercised although the traffic is conducted wholly within the territorial limits of a State. U. S. v. Holliday, 3 Wall. (U. S.) 407. The federal courts alone have jurisdiction. United States v. Burdick, 1 Dakota 142.

To warrant a conviction under the act of March 15th, 1864 (13 Stat. at L. 29), prohibiting the sale of liquor to any Indian under the charge of an Indian

agent, it is not necessary that such agent should have actual control or immediate personal superintendence over the Indian to whom liquor has been sold. The facts that the tribe to which he belongs is under the charge of the agent, and that the Indian himself still maintains tribal relations, are sufficient to constitute him under the agent's charge, within the meaning of the statute. United States v. Flynn, 1 Dill. (U. S.) 451. See also United States v. Earle, 17 Fed. Rep. 75; United States v. Osborne, 6 Sawyer (U. S.) 406. As to what constitutes "Indian Country" in the sense of the Intercourse act, see note to Forty-three Cases of Cognac Brandy, 14 Fed. Rep. 539. See also United States v. Knowlton, 3 Dakota 58; Kie v. United States, 27 Fed. Rep. 351; United States v. Richard, 1 Ariz. 31; Pelcher v. United States, 3 McCrary (U. S.) 510; United States v. Leathers, 6 Sawyer (U. S.) 17; United States v. Sturgeon, 6 Sawyer (U. S.) 29. In an indictment under U. S. Rev. Stat., § 2139, it is necessary to allege that the defendant is not an "Indian in the Indian country." United States v. Winslow, 3 Sawyer (U. S.) 337.

Citizens of the United States and persons who have declared their intention to become citizens, may lawfully carry spirituous liquors through the Indian country to sell them elsewhere. United States v. Carr, 2 Mont. 234.

4. Rev. Stat., § 2140.

5. Rev. Stat., § 2141.

authority and the reason for exercising that authority must be stated specifically. The time when and place where the contract was made must be stated and all the particulars of the agreement must be set forth. It is provided that all such contracts shall have a fixed limited time to run, which shall be distinctly set forth. The judge before whom the contract was executed must certify officially the time when and place where the contract was executed, and that it was in his presence, and who are the interested parties thereto, as stated to him at the time; the parties present making the same; the source and extent of authority claimed at the time by the contracting parties to make the contract or agreement, and whether it was made in person or by agent or attorney of either party or parties. All contracts not made in accordance with these provisions are void.¹

Moneys due the Indians under contracts properly made must be paid to them through the United States authorities; and moneys due to persons contracting with the Indians is paid by the United States upon proof of the due performance of the contract.²

By the act of April 29th, 1874, contracts entered into with Indians prior to May 21st, 1872, cannot be recognized by public officers except in certain cases specified by the act.

8. Indian Traders.—The commissioner of Indian affairs has the sole power and authority to appoint traders to the Indian tribes, and to make such rules and regulations as he may deem just and proper, specifying the kind and quantity of goods, and the prices at which such goods shall be sold to the Indians.³ Any person other than an Indian who attempts to trade with the Indians without a licence is punished by a forfeiture of the goods offered for sale and by a fine of \$500.⁴

The president is authorized, whenever in his opinion the public interest may require it, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe, and to direct all licences to trade with such tribe to be revoked, and all applications therefor to be rejected.⁵

1. Rev. Stat., § 2103; *Godfroy v. Scott*, 70 Ind. 259.

2. Rev. Stat., § 2104. If an Indian sustaining tribal relations hires work to be done, he may be sued for the price. *Gho v. Jules*, 1 Wash. (Ter.) 325. The Cherokee Indians in *North Carolina* have been placed upon the same footing with other tribes by an act of congress, passed in pursuance of the power granted by the constitution in reference to "regulating commerce with foreign nations, among the several States, and with the Indian tribes," and their contracts made with a person to prosecute and collect claims alleged to be due them cannot be enforced

against them in a state court without the consent of congress. The jurisdiction to determine such matters is lodged in the interior department. *Rollins v. Cherokee Indians*, 87 N. Car. 229.

3. Act of August 15th, 1876.

4. Rev. Stat., § 2133. Where a person who had a licence authorizing him to trade with the Pottawotamie Indians upon their reservation, took a partner, and procured a permit for him to live upon the reservation, and both sold goods, it was held that nothing in the acts of congress prohibited this. *Dunn v. Carter*, 30 Kan. 294.

5. Rev. Stat., § 2132.

Traders are forbidden to sell arms and ammunition to hostile Indians.¹

9. Homestead Laws.—Indians may avail themselves of the provisions of the homestead laws, but the United States holds the lands in trust for them for twenty-five years.²

10. Officers of Indian Affairs.—The principal officers of Indian affairs are the commissioner of Indian affairs, the board of Indian commissioners, superintendents, inspectors and agents.

a. Commissioner of Indian Affairs.—The commissioner of Indian affairs is appointed by the president with the consent of the senate.³ He has, under the direction of the secretary of the interior, and in accordance with such regulations as the president may prescribe, the management of all Indian affairs⁴. All accounts are to be transmitted to him,⁵ and he is obliged to submit an annual report of his department to congress.⁶ He has sole authority to appoint traders to the Indian tribes, and to make such rules and regulations as he may deem just and proper, specifying the kind of goods and prices at which such goods shall be sold to the Indians.⁷

b. Board of Indian Commissioners.—The board of Indian commissioners is composed of not more than ten persons, appointed by the president solely from men eminent for intelligence and philanthropy, and who shall serve without pecuniary compensation.⁸ They are empowered to appoint one of their number as secretary, who is entitled to a reasonable compensation.⁹ Their general duties are to supervise all expenditures of money appropriated for the benefit of the Indians, and to inspect goods purchased by the Indian department.¹⁰

c. Superintendents.—The president is authorized, with the advice and consent of the senate, to appoint four superintendents of Indian affairs who may be assigned to jurisdiction over such agencies as the president may deem proper. The president is further authorized in his discretion to dispense with any or all of the superintendents and their clerks.¹¹ The superintendents are invested with a general supervision and control, within their superintendencies, over the official conduct and accounts of all

1. Rev. Stat., § 2136.

2. Act of March 3rd, 1875. The act of July 4th, 1884, provides that "all patents therefor shall be of legal effect, and declare that the United States does and will hold the land thus entered for the period of twenty-five years, in trust for the sole use and benefit of the Indian by whom such entry shall have been made, or, in case of his decease, of his widow and heirs, according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said

Indian, or his widow and heirs, as aforesaid, in fee, discharged of said trust and free from all charge or incumbrance whatsoever."

3. Rev. Stat., § 462.

4. Rev. Stat., § 463.

5. Rev. Stat., § 464.

6. Rev. Stat., §§ 468, 469.

7. Act of August 15th, 1876. Supplement to Rev. Stat., vol. 1, p. 246.

8. Rev. Stat., § 2039.

9. Rev. Stat., 2040.

10. Rev. Stat., §§ 2041, 2042.

11. Rev. Stat., §§ 2046, 2047.

officers and persons employed by the government in Indian affairs. They have power to suspend officers or employes.¹

d. Inspectors.—Three Indian inspectors are appointed by the president with the advice and consent of the senate.² The duties of the inspectors are to visit and examine each Indian agency and superintendency; to make a full investigation of all matters pertaining to the business of the superintendency or agency, including an examination of accounts, the manner of expending money, the number of Indians provided for; contracts of all kinds connected with the business; the condition of the Indians, their advancement in civilization; the extent of the reservations; what use is made of the lands set apart for that purpose, and generally all matters pertaining to the Indian service. The inspectors have power to examine all books and accounts, to administer oaths, and to examine on oath all officers and persons employed in the superintendency or agency, and all such other persons as he may deem necessary or proper. The inspectors, or any of them, have power to suspend any superintendent or agent or employe, and to designate some person in his place temporarily, subject to the approval of the president. Immediate report of such suspension must be made to the president. The inspectors have power to institute proper legal proceedings to enforce the laws, and to prevent the violation of law in the administration of affairs in the several agencies and superintendencies. So far as practicable, the examinations of the agencies and superintendencies are required to be made alternately by different inspectors.³

e. Agents.—Indian agents are appointed by the president with the advice and consent of the senate.⁴ They are required to give bonds for the faithful performance of their duties, and they hold office for the term of four years.⁵ They are required by law to reside within their agencies, and cannot depart from them without permission.⁶ The president may require any military officer of the United States to execute the duties of an Indian agent; and when such duties are required of any military officer, he is obliged to perform the same without any other compensation than his actual travelling expenses.⁷ The duties of an Indian agent are to manage and superintend the intercourse with the Indians within his agency agreeably to law; and to execute and perform such regulations and duties, not inconsistent with law, as may be prescribed by the president, the secretary of the interior, the commissioner of Indian affairs, or the superintendent of Indian affairs.⁸ The agents are authorized to take acknowledgments of deeds and other instruments of writing, and to ad-

1. Rev. Stat., § 2050.

2. Rev. Stat., § 2043. Act of March 3rd, 1875, Sup. to Rev. Stat., vol. 1, p. 168.

3. Rev. Stat., § 2045.

4. Rev. Stat., § 2052.

5. Rev. Stat., §§ 2056, 2057.

6. Rev. Stat., § 2060.

7. Rev. Stat., § 2062.

8. Rev. Stat., § 2058.

minister oaths in investigations committed to them in the Indian country.¹ Agents and other persons employed in Indian affairs are forbidden, under a penalty of \$5,000, from trading with the Indians. Agents are required to make out, at the commencement of each fiscal year, rolls of the Indians entitled to supplies at the agency, with the names of the Indians and of the heads of families, or lodges, with the number in each family or lodge, and to give out supplies to the heads of families, and not to the heads of tribes or bands, and not to give out supplies for a greater length of time than one week in advance.² Agents are required to keep a book of expenditures, and to forward a transcript of the same to the commissioner of Indian affairs.³ They are also required to submit, in their annual reports, a census of the Indians under their charge.⁴

1. Rev. Stat., § 2064.

2. Act of March 3rd, 1875, § 4.

3. Act of March 3rd, 1875, § 10.

4. Act of July 4th, 1884, § 9.

Jurisdiction.—The act of congress of 1885, providing that the trials of Indians for offences therein specified committed "within any territory of the United States, and either within or without an Indian reservation," shall take place within the "same courts and in the same manner" as the trials of other persons charged with said crimes respectively, necessitates that the trial of any Indian charged with having committed any such specified offence within any United States territory, whether within or without a reservation, shall be had in the district court of the territory sitting as a territorial court; and a trial of such an Indian is invalid when had in the district court of the territory sitting as a United States and not as a territorial court. There are important differences between the two courts. The district court sitting as a territorial court is attended by jurors from the county in which the offence is charged to have been committed, and the trial must take place in such county. Whereas, when the trial takes place while the court is sitting as a United States court the jury is summoned by the United States marshal and is not drawn wholly from the county, and the trial may not take place in such county. It is a matter of great importance to an indicted person whether or not he and his witnesses must go several hundred miles for the presentation of his defence in court. *Gon-shay-ee*, 130 U. S. 343.

The fact that the sentence of the condemned is to a penitentiary within a

state, and that the offence was committed within a judicial district instead of on an Indian reservation, will make no difference. *Captain Jack*, 130 U. S. 353.

Act 1834, June 30th, § 1, was not re-enacted in the Revised Statutes, and is repealed. Nevertheless, the definition therein contained of "Indian country" controls the interpretation of that phrase in sections of Revised Statutes which were re-enactments of sections of the repealed statute. *U. S. v. Le Bris*, 121 U. S. 278.

Register's Certificate.—The certificate of the register of the land office at Pontotoc is evidence of the location of Indian lands in pursuance of grant. *DAVIS, J.*, said: "It would be a hard rule to hold that the reservees under this treaty, in case of contest, were required to prove not only that the locations were made by the proper officers, but that the conditions on which these officers were authorized to act had been observed by them. . . . It has been frequently held by this court that a grant raises a presumption that the incipient steps required to give it validity have been taken. *Polk v. Wendell*, 5 Wheat. (U. S.) 293; *Bagnell v. Broderick*, 13 Pet. (U. S.) 436. . . . The same effect was given to a similar certificate of this same officer by the High Court of Errors and Appeals of Mississippi as early as 1848, . . . and this decision was reaffirmed by the same court in 1854. *Wray v. Doe*, 10 Smed. & M. 460; *Hardin v. Ho-yo-pu-nubby*, 27 Miss. 567.

"After such a length of acquiescence, it would produce great mischief to hold this evidence to be incompetent."

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I. DEFINITION.—An indictment has been defined to be a written accusation against one or more persons of a crime or misdemeanor preferred and prosecuted upon oath or affirmation by a grand jury legally convoked.¹ It has been said that the indictment intended by the fifth amendment to the federal constitution is "the presentation to the proper court under oath by grand jury duly empanelled by the charge describing an offence against the law for which the party may be punished."²

1. 4 Bl. Com. 299, 302. See Co. Litt. 126; 2 Hale, P. C. 152; Bacon's Abr., tit. Indictment; Comyn's Dig., tit. Indictment; 1 Chitty, Cr. L. 168; People v. White, 24 Wend. (N. Y.) 520, 570; People v. Gates, 13 Wend. (N. Y.) 311, 317; Lougee v. State, 11 Ohio 68, 71; Wolf v. State, 19 Ohio St. 248, 255.

Bill of indictment is a written accusation presented to the grand jury and found by them to be a "true bill," or rejected by them as "not a true bill." See Anderson's Dict. 537.

A presentment and an indictment differ in this: a presentment is properly one which the grand jurors find and present to the court from their own knowledge or observation, while every indictment which is found by the grand jurors is presented by them to the

court; consequently every indictment is a presentment, but every presentment is not an indictment. See 2 Co. Inst. 739; Comb. 22; 5 Story, Const., § 1784; 4 Bl. Com. 301; Com. v. Keefe, 75 Mass. (9 Gray) 291.

2. See *Ex parte Bain*, 121 U. S. 1.

Object of indictment.—The object of every indictment is to make known to the defendant the charge for which he is to be prosecuted and thereby be enabled to meet the same; that he may pledge a formal acquittal or conviction; that he may take the opinion of the court before which he is indicted, either by demurrer or motion in arrest of judgment, or the opinion of the court of error on the sufficiency of the statements in the indictment. See U. S. v. Bennett, 16 Blatchf. C. C. 350; Brad-

II. ESSENTIALS.—To be valid an indictment must be presented to some court having jurisdiction of the offence stated therein; it must appear to have been found by a grand jury of the proper county or district; that the indictment was found to be a true bill, and must be signed by the foreman of the grand jury. The indictment should be framed with certainty; and the charge must contain a certain description of the crime or misdemeanor of which the defendant is accused, and the statement of the facts by which it is constituted, so as to identify accusation.¹

laugh v. Reg., L. R., 3 Q. B. Div. 616. Another function of the indictment is to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction if one should be had. *U. S. v. Cruikshank*, 92 U. S. 542, 558; bk. 23, L. ed. 588.

Change in Indictment.—In the absence of a statute providing therefor, no change can be made in the body of an indictment without a resubmission of the grand jury which found such indictment; but changes in the "caption" may be made without such resubmission. *Com. v. Drew*, 57 Mass. (3 Cush.) 279; *Com. v. Mahar*, 33 Mass. (16 Pick.) 120; *Com. v. Child*, 30 Mass. (13 Pick.) 200; *State v. Sexton*, 3 Hawks (N. C.) L. 184; *Ex parte Bain*, 121 U. S. 1; bk. 30, L. ed. 849.

Hawkins said, in his well known treatise on the "Pleas of the Crown," bk. 2, ch. 25, § 97: "I take it to be settled that no criminal prosecution is within the benefit of any of the statutes of amendments; from whence it follows that no amendment can be admitted in any such prosecution but such only as is allowed by the common law. And agreeably hereto I find it laid down as a principle in some books that the body of an indictment removed into the king's bench from any inferior court whatsoever, except only those of London, can in no case be amended. But it is said that the body of an indictment from London may be amended, because by the city charter a tenor of the record only can be removed from thence." He further says that: "It seems to have been anciently the common practice, where an indictment appeared to be insufficient, either for its uncertainty or the want of proper legal words, not to put the defendant to answer it; but if it were found in the same county in which the court sat, to award process against the grand jury to come into court and amend it. And

it seems to be the common practice at this day, while the grand jury who found a bill is before the court, to amend it, by their consent, in a matter of form, as the name or addition of the party." *Hawkins*, P. C. 98. See *Starkey's Cr. Pi.* 287.

1. *Com. v. Boyer*, 1 Binn. (Pa.) 201; *Spangler v. Com.*, 3 Binn. (Pa.) 533; *Randolph v. Com.*, 6 Serg. & R. (Pa.) 398; *Stewart v. Com.*, 4 Serg. & R. (Pa.) 194; *U. S. v. Cantril*, 8 U. S. (4 Cr.) 167; bk. 2, L. ed. 584; 2 Hale, P. C. 167; 4 Bl. Com. 301.

The indictment should set out the material facts charged against the accused. *State v. O'Flaherty*, 7 Nev. 153, and must be in the English language; but where a document in the foreign language is introduced it should be set out in the original tongue, and then translated. *Zenobio v. Axtel*, 6 T. R. 162. Except where such foreign document is in Chinese characters. Senator Verplank says in the case of *People v. White*, 24 Wend. (N. Y.) 520, 570: "I understand the common law rule to be, that an indictment may be good when the offence is charged in general, but intelligible terms sufficient for the description without further allegations; and that, moreover, a count may be divided by the jury, and certain allegations rejected if the rest constitute a complete offence; yet when allegations are made, if they be such as to enter substantially into the description of the crime, so that they cannot be severed from it without rendering the description applicable to another and different offence (different in fact if not in nature), then such allegations must be proved, or the indictment is not sustained. Thus, in the recent case of *Reg. v. Dean*, 4 Jur. 364, in England, where, in an indictment for a conspiracy, the overt acts were averred to have been done with intent to defraud one Gompertz, who was entitled to receive a certain sum of money, and the jury found that he

The formal requisites of an indictment are the venue,¹ the presentment,² the name and condition of the defendant,³ the names of third persons,⁴ the time of the commission of the offence,⁵ the offence must be properly described,⁶ the conclusion.⁷

III. NECESSITY AND RIGHT TO INDICTMENT—1. The Right Generally.—All criminal prosecutions must be either by indictment or information.⁸ Prosecution by information is in derogation of the common law, and a departure from the general policy of the law, and for that reason statutes providing for it which are

was not so entitled; it was *held* that the indictment could not be sustained, though a verdict of guilty was found. LORD DENMAN, Ch. J.: "Suppose I had said to the jury, it is nothing to do with the question whether the intent of the defendant was to deceive Gompertz; the jury might have found the defendant guilty of a conspiracy, but it would not have been the conspiracy laid in this indictment. We are of opinion that all the subsequent allegations are bound so up with the allegation of an intent to defraud the person named that they cannot be dissevered from it; and that, it being disproved, there is nothing for them to rest upon, and both counts are open to this objection. Verdict of not guilty to be entered."

1. **The venue** at common law should always be laid in the county where the offence has been committed, notwithstanding the fact that the charge is in its nature transitory, such as a battery. Hawk., P. C., bk. 2, ch. 25, § 35.

2. **The presentment** should be in the present tense, and is usually in the following formula: "The grand inquest of the commonwealth of Verplank enquiring for the state and county aforesaid, upon their oaths and affirmations therein." *Turns v. Com.*, 47 Mass. (6 Metc.) 225; *Hite v. State*, 9 Yerg. (Tenn.) 357.

3. **A misnomer** in an indictment is cured by the plea of the defendant thereto. See Bacon's Abr., tit. Indictment (G. 2); *Misnomer B.*; 2 Hale, P. C. 175; 1 Chit. P. R. 202; *Rex v. —*, Russ. & R. 489.

4. **Names of Third Persons.**—Where names of third persons are necessarily introduced into an indictment, they must always be stated with certainty to a common intent in order that the defendant may be informed who are his accusers; in those cases where the names of third persons cannot be ascertained, it is thought to be sufficient to state "a certain person or persons to the

jury aforesaid unknown." See Hawk. P. C., bk. 2, ch. 25, § 71; 2 East, P. C. 651, 781; 2 Hale, P. C. 181; *Blowden* 85; *Reg. v. Biss*, 8 Car. & P. 773.

5. **Averments as to Time.**—See *post*, IX., 9. See also U. S. v. Bowman, 2 Wash. C. C. 328; *Jacobs v. Com.*, 5 Serg. & R. (Pa.) 316. See *Oliver v. State*, 6 Miss. 14; *People v. Adams*, 17 Wend. (N. Y.) 475; *Com. v. Alfred*, 4 Dana (Ky.) 496; *State v. Haney*, 1 Hawks (N. C.) 460; *State v. Hendricks*, 1 Cam. & N. (N. C.) 369; *Stout v. Com.*, 11 Serg. & R. (Pa.) 177; 1 Chit. Cr. L. 217, 224; *State v. Sam* (a slave), 2 Dev. (N. C.) L. 567; *Cowley v. People*, 83 N. Y. 464; s. c., 38 Am. Rep. 464; *People v. Adams*, 17 Wend. (N. Y.) 475; *Gallagher v. State*, 26 Wis. 425.

6. **Describing the Offence.**—See *post*, IX., 6. See also U. S. v. Hess, 124 U. S. 483; U. S. v. Cruikshank, 92 U. S. 542; U. S. v. Cook, 84 U. S. (17 Wall.) 168. See U. S. v. Britton, 107 U. S. 665; U. S. v. Mann, 95 U. S. 584; U. S. v. Reese, 92 U. S. 225, 232; U. S. v. Schimer, 5 Biss. C. C. 195; U. S. v. Walsh, 5 Dill. C. C. 61.

7. **The conclusion** of an indictment must conform to the provisions of the constitution of the state where it is drawn. The constitution provides (art. 5, § 11) that "all prosecutions shall be carried on in the name and by the authority of the commonwealth of Pennsylvania and conclude against the peace and dignity of the state."

8. *Shular v. State*, 104 Ind. 541; *State v. Ross*, 14 La. An. 364; *United States v. Howard*, 17 Fed. Rep. 638; *State v. Boswell*, 104 Ind. 541.

The state has the right to choose either mode, but cannot prosecute both at the same time. *State v. Ross*, 14 La. An. 364.

The offence of embezzling a letter in postal custody is not an infamous crime, and therefore may be prosecuted by in-

in opposition to long settled policy must be strictly construed.¹

2. Constitutional Amendments.—Constitutional amendments providing that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of the grand jury," are jurisdictional, and no court of the United States has authority to try a prisoner without indictment and presentment in such case.² But this provision refers solely to proceedings before the United States tribunals.³

3. Indictable Offences—*a. GENERALLY.*—It may be said that, as a general rule, all offences and misdemeanors are indictable under the statutes of the various states.⁴

b. STATUTORY AND COMMON LAW OFFENCES—(1) *Common Law Offences.*—Criminal offences not provided for in the codes or statutes of the various States are punishable as at common law.⁵

(2) *Disobedience to Statute.*—It seems that disobedience to the statute or an act of assembly is an indictable offence at common law.⁶

formation, not necessarily by indictment. *United States v. Baugh*, 4 Hughes C. C. 501; *United States v. Wynn*, 3 McCr. C. C. 268.

In *Missouri*, under the act concerning crimes and punishments, of 1835, offences punishable by fine under \$100 are not indictable. *Williams v. State*, 4 Mo. 480.

It is said a law which prescribes that all violations of the penal laws punishable by indictment or presentment, does not create new misdemeanors, but makes existing misdemeanors which are punishable indictable. *State v. Maze*, 6 Humph. (Tenn.) 17.

1. *State v. Boswell*, 104 Ind. 545.

It is not in the power of the legislature to deprive one accused of crime of the right to demand an information of the nature of the crime with which he is charged. *State v. Boswell*, 104 Ind. 541.

An information cannot be prosecuted where defendant was arrested but was not indicted. *State v. Boswell*, 104 Ind. 541; *Shular v. State*, 105 Ind. 289.

2. *Ex parte Bain*, 121 U. S. 1.

The indictment here referred to is the presentation to the proper court, under oath, by a grand jury, duly empanelled, of a charge describing an offence against the law for which the party charged may be punished. *Ex parte Bain*, 121 U. S. 1.

3. *State v. Kaub*, 15 Mo. App. 433; *State v. Keyes*, 8 Vt. 63; s. c., 30 Am. Dec. 450.

4. See *State v. Benson*, 38 Ind. 60; *Garza v. State*, 11 Tex. App. 410.

In Indiana, all prosecutions for violations of the criminal law, whether felonies or misdemeanors, originating in the several criminal courts of the state, must be by indictment, not by information. *State v. Benson*, 38 Ind. 60. And in Texas, all offences except those in Tex. Crim. Code, art. 418, must be prosecuted by indictment or information. *Garza v. State*, 11 Tex. App. 410.

Under the Illinois statute, all offences cognizable in the county court must be prosecuted by information of the state's attorney, the attorney general, or some other person; and even when presented by such other person, the county judge shall endorse thereon that there is probable cause for filing the same. *Gallagher v. People*, 120 Ill. 179.

5. *Smith v. People*, 25 Ill. 17; s. c., 76 Am. Dec. 780; *State v. Pulle*, 12 Minn. 164.

It is a rule of the common law that where a statute prohibits an act which was before lawful, and enforces the prohibition with a penalty, and a succeeding statute, or the same statute, in subsequent substantive clause, prescribes a mode of proceeding for the penalty different from that by indictment, the prosecutor may notwithstanding proceed by indictment upon the prohibitory clause as for a misdemeanor at common law, or he may proceed in the manner pointed out in the statute, at his option. *Phillips v. State*, 19 Tex. 158.

6. *Gearhart v. Dixon*, 1 Pa. St. 224.

(3) *Statute Imposing Fine or Penalty*.—Where a statute prohibits an act to be done under a penalty certain, though no mention is made of indictment, a party offending against such statute may be indicted unless another mode of recovery be prescribed, in which case the mode prescribed must be pursued.¹

(4) *Failure to Enact Penalty*.—It seems that where a statute prohibits any matter of public convenience to the liberty and security of the people, or commands an act to be done, without enacting any penalty for disobeying its prohibitions and commands, those who violate its provisions may be prosecuted by indictment and punished by fine.²

(5) *Municipal Charter Penalties and Ordinances*.—An offence which is punished by penalties authorized and imposed by the charter and ordinances of the city may at the same time be indictable under the general law of the state, although the offence is committed within the city limits, because the power delegated to the city does not narrow the application of the general law.³

(6) *Effect of Repeal and Amendment of Statute*.—The repeal of a statute creating an offence, without any saving clause, is a repeal, of the offence, and judgment cannot be rendered upon an indictment under such statute found before the repeal, but not tried until afterwards.⁴ And it is said that judgments cannot be ren-

1. *State v. Helgen*, 1 Speer (S. C.) 310; *State v. Meyer*, 1 Speer (S. C.) 305; *State v. Maze*, 6 Humph. (Tenn.) 17. See *Hodgman v. People*, 4 Den. (N. Y.) 235; *State v. Corwin*, 4 Mo. 609.

U. S. Rev. Stat., § 2148, makes liable to a penalty of \$1,000 one who returns to the Indian country after having been removed. Section 2124 regulates suits for penalties generally. *Held*, that an information would lie for a violation of section 2148; that the provision for the recovery of a penalty was not exclusive, but cumulative. *U. S. v. Howard*, 17 Fed. Rep. 638.

2. See *Keller v. State*, 11 Md. 525; s. c., 69 Am. Dec. 226; *State v. Fletcher*, 5 N. H. 257.

3. *State v. Plunkett*, 3 Harr. (N. J.) 5. See *Levy v. State*, 6 Ind. 281; *Marshall v. Standard*, 24 Mo. App. 192. See title ORDINANCE, this series.

Charter Penalties.—Where a city charter provided a penalty for an offence, authorized the council to pass ordinances to enforce it, gave the mayor exclusive jurisdiction of such offences, and provided that he should proceed against offenders, for said penalty, by action of debt in the name of the city, it was *held* that such provisions did not suspend or conflict with the criminal

law of the state, as to such offence, within the city limits, and that a payment of said penalty, in such proceeding before the mayor, was no bar to a criminal prosecution for the same act. *Levy v. State*, 6 Ind. 281.

A violation of a city ordinance is not a criminal offence, within the provision of the Missouri bill of rights that felonies must be prosecuted by indictment only; and all other offences criminally by indictment or information. *Marshall v. Standard*, 24 Mo. App. 192.

4. *Mayers v. State*, 7 Ark. 68; *Reg. v. Inhabitants of Denton*, 21 L. J. (N. S.) M. C. 207; s. c., 14 Eng. L. & Eq. 124.

Repeal of Statute.—After a statute has been repealed it cannot be acted upon in respect of a proceeding under it commenced before its repeal, and in this respect there is no valid distinction between matters of form and substance. Where, therefore, between the finding of an indictment for non-repair of a road and plea pleaded, the statute upon which alone the indictment could be supported was repealed, and afterwards the indictment was proceeded with and a conviction obtained, the court arrested the judgment. *Reg. v. Inhabitants of Denton*, 21 L. J. (N. S.) M. C. 207; s. c., 14 Eng. L. & Eq. 124.

dered upon indictments found under an act which is amended before convictions obtained, by an act varying the forms of judgment, and repealing so much of the amended act as is inconsistent therewith, unless the act contains a saving clause as to pending indictments; nor can judgments be rendered upon indictments found subsequent to the passage of the amendatory act, upon offences committed prior thereto, said act containing no provision as to such offences.¹

It is held, however, by some courts that an offence committed against a statute while in force may be the subject of indictment and punishment after the repeal of the statute.²

c. CAPITAL AND INFAMOUS OFFENCES GENERALLY—FELONIES.—Prosecutions for offences not capital may be authorized by statute to be by indictment or information, in the discretion of the prosecuting officer,³ because a state is not forbidden by the United States constitution from prosecuting felonies by information,⁴ and an offence against the law of the United States, which is of a character not capital or infamous,⁵ may be prosecuted in the courts of the United States by an information according to the courts of the common law.⁶

d. MISDEMEANORS.—The constitutional provisions requiring indictment and trial by jury on "criminal charges" do not, it seems, apply to misdemeanors.⁷

An indictment for a misdemeanor is not necessary at common law; the prosecution may be by information;⁸ and the same is true under many of the state statutes.⁹

e. EFFECT OF KNOWLEDGE OR INTENT.—The intention to commit an injury within the statute under which the prisoner is indicted, as the means of the accomplishment of any ultimate

1. *State v. Fletcher*, 1 R. I. 193.

2. See *People v. Quinn*, 18 Cal. 122; *State v. Mathews*, 14 Mo. 133.

In the case of *Walters v. State*, 5 Iowa 507, the supreme court of Iowa held that an indictment in the district court in a case where the offence is less than felony, or in which the punishment does not exceed a fine of \$100, or imprisonment for thirty days, which charges the offence to have been committed subsequent to the taking effect of the new constitution of the state of Iowa, is void, under art. 1, § 10 of the constitution.

3. *State v. Cole*, 38 La. An. 843.

4. *Shular v. State*, 105 Ind. 289; *State v. Boswell*, 104 Ind. 541.

5. **Infamous Crimes.**—A crime punishable by imprisonment in the penitentiary for more than a year is infamous within the meaning of the fifth amendment, and the prosecution must be by indictment. *Parkinson v. U. S.*,

121 U. S. 281; *Ex parte Wilson*, 114 U. S. 417; *U. S. v. Tod*, 25 Fed. Rep. 815. See tit. INFAMOUS CRIMES, Am. & Eng. Ency. of L., vol. 10.

6. *U. S. v. Shepard*, 1 Abb. (U.S.) 431.

7. *McGinnis v. State*, 9 Humph. (Tenn.) 43; s. c., 49 Am. Dec. 697. See tit. MISDEMEANORS, Am. & Eng. Ency. of L.

It is said by the supreme court of Missouri, in the case of *State v. Cowan*, 29 Mo. 330, that the general assembly has power, under the constitutional amendment, to provide that for offences of the grade of misdemeanors persons may be proceeded against criminally, either by indictment or information.

8. *Smith v. State*, 63 Ga. 168; *Douglass v. State*, 72 Ind. 385; *Reddick v. State*, 4 Tex. App. 32; *McGinnis v. State*, 9 Humph. (Tenn.) 43; s. c., 49 Am. Dec. 697.

9. See *Douglass v. State*, 72 Ind. 385; *Smith v. State*, 63 Ga. 168.

and unlawful object, is not taken out of the operation of the statute by the existence of such ultimate design.¹

IV. NATURE, FORM, AND REQUISITES GENERALLY—1. **General Rules.**—The rules of pleading are the same in civil and criminal cases.²

2. **Form.**—The legislature may ordain any forms of indictment not unconstitutional;³ but this power of the legislature to mold and fashion the form of the indictment is plenary; its substance, however, cannot be dispensed with.⁴

3. **Requisites and Sufficiency.**—The leading requisites of an indictment at common law are required under the statutes of the various states.⁵ It may be stated, as a general proposition, that an indictment must contain the title of the prosecution, the name

1. See *People v. Edwards*, 5 Mich. 22; *People v. Carmichael*, 5 Mich. 10; s. c., 71 Am. Dec. 769. See 4 Am. & Eng. Ency. of L., pp. 673-677, 746.

But it is said in the case of *McPherson v. State*, 22 Ga. 478, that a notice to A's wife which was not communicated to him will not render an act criminal which would have been justifiable but for such notice.

2. *United States v. Brown*, 3 Mc-L. C. C. 233.

An indictment, under the Arkansas Code, should be the substitute of the common law indictment. *Clary v. State*, 33 Ark. 561.

Indictment, in California, is more than mere accusation based upon probable cause, being an accusation based upon legal testimony of a direct and positive character, and the concurring judgment of at least twelve of the grand jurors that upon the evidence presented to them the defendant is guilty. *People v. Tinder*, 19 Cal. 539; s. c., 81 Am. Dec. 77.

Georgia Code, section 4632 obliterates the distinction between presentments and indictments. *Groves v. State*, 73 Ga. 205.

In Kentucky, prosecutions commenced before September 1st, 1854, may be regulated, either according to the laws existing at the time of the adoption of the criminal code, or according to the provisions of the code itself. *Walston v. Com.*, 16 B. Mon. (Ky.) 15.

In Texas, in criminal cases, the common law system of pleading prevails. *State v. Odum*, 11 Tex. 12.

3. *Dillon v. State*, 9 Ind. 409; *State v. Comstock*, 27 Vt. 553.

The power of the legislature to mold and fashion the form of an indictment is plenary; its substance, how-

ever, cannot be dispensed with. *State v. O'Flaherty*, 7 Nev. 153.

The article of the constitution which requires prosecutions to be by indictment or information does not prevent the legislature from prescribing the forms of such instruments. *State v. Mullen*, 14 La. An. 577.

The legislature has laid down certain general rules in relation to the material facts of an indictment, and left the courts to apply those rules and mold the forms by judicial decision. *Dillon v. State*, 9 Ind. 408.

Art. 6, p. 44, of the Rev. Code of Mississippi, applies the code only to the modes and forms of procedure upon indictments for offences committed prior to its adoption, and does not affect the rights of parties prosecuted for such offences as to any substantial rights of defence which existed under the law in force when the code went into operation. *Josephine v. State*, 39 Miss. 613.

Under the constitution two modes of prosecution cannot be carried on in the same court, but different modes may be established for different courts, so long as neither is bad in itself. *Reed v. State*, 12 Ind. 641.

Courts are not disposed to relax the strictness required by the common law in the form of indictments, without legislative authority for so doing. *Cain v. State*, 18 Tex. 387.

4. *State v. O'Flaherty*, 7 Nev. 153.

5. See *Ham v. State*, 17 Ala. 188; *People v. Aro*, 6 Cal. 207; s. c., 65 Am. Dec. 503; *State v. Callendine*, 8 Iowa 288.

An indictment is sufficient in law when, if a defendant were found guilty thereunder, judgment would not be arrested, and *vice versa*. *Black v. State*, 36 Ga. 447, s. c., 91 Am. Dec. 772.

of the court in which it is presented, names of parties, a statement of ordinary, concise and generally intelligible language, of the acts constituting the offence; and must be direct and certain as to the party and offence charged, the county of its commission, and the circumstances, if they are necessary to constitute a complete offence.¹

The sufficiency of an indictment, under any statute or code of criminal procedure, must be determined by the provisions of that statute or code.²

V. CONSTRUCTION.—Except where technical expressions must be used, no different construction must be given to the words of an indictment from that which they bear in ordinary acceptation;³ and in giving a construction to an indictment, the obvious purpose of the pleader should have influence in the collation of the sentences, and a term used may be referred to that antecedent which accords to the general tenor of the preceding, whether it conforms to strict grammatical rules or not.⁴

VI. THE FINDING, CAPTION, ETC.—1. **The Prosecutor.**—It is thought that as a general rule it is not necessary that there be a public prosecutor to justify the grand jury in finding a valid presentment against an ordinary malfeasance in office,⁵ larceny⁶ or the like, because an informer is not necessary to an indictment.⁷

Certainty.—An indictment, though artificially and clumsily drawn, if it allege sufficient matter to indicate the crime and person charged, will be sustained. *Madden v. State*, 1 Kan. 340.

The requirements of an indictment, under the California statute, are said to be almost, if not quite, the same as at common law, except as to the manner of stating the matter necessary to be charged. *People v. Aro*, 6 Cal. 207; s. c., 65 Am. Dec. 503. In Iowa it is said that the statute does not dispense with the leading requisite of indictments. *State v. Callendine*, 8 Iowa 288.

Under the statutes of Minnesota, an indictment is divided into two parts: first, the accusation; and second, the specification of the crime charged. Where the crime has a name and is divided into several classes or degrees, it is sufficient if the indictment charge the defendant with having committed the offence by name, in the accusing part, and bring it within some one of the classes or degrees in the descriptive part or specification. *State v. Eno*, 8 Minn. 220.

1. *Jane v. Com.*, 3 Met. (Ky.) 18.

2. *Madden v. State*, 1 Kan. 340; *Com. v. Patterson*, 2 Met. (Ky.) 374.

3. *State v. Pratt*, 14 N. H. 456. See

People v. Littlefield, 5 Cal. 355; *Smith v. State*, 1 Kan. 365.

Under the criminal code of California, words used in an indictment are to be construed according to their common acceptation, except words or phrases specifically defined by law. *People v. Littlefield*, 5 Cal. 355.

The Kansas Criminal Code, sections 87 and 89, divests indictments of all artificial and technical construction and gives to their language its natural and ordinary meaning. *Smith v. State*, 1 Kan. 365.

4. *State v. Beason*, 40 N. H. 367.

5. See *Groves v. State*, 73 Ga. 205.

6. *U. S. v. Flanakin*, 1 Hempst. C. C. 30.

7. *Molett v. State*, 33 Ala. 408.

A prosecutor is one who prefers an accusation against a party whom he suspects to be guilty. A party who appears in response to a subpoena is not a prosecutor, but only a witness. *State v. Millain*, 3 Nev. 409.

A person by appearing voluntarily before the grand jury as a witness in support of a complaint, is not therefore to be deemed the complainant, but it must appear of record. *State v. Bailey*, 21 Me. 62.

A husband cannot prosecute his wife; and his name appearing on the indictment.

However, there must be a prosecuting officer in bringing an indictment before the court, who must conduct the proceedings in person, but the actual trial before the court and jury may be conducted by other counsel.¹

2. Time of Finding.—An indictment may be returned for an offence committed at any time previous to the finding thereto, provided it is not barred by the statute of limitations,² even though the crime was committed after the commencement of the term of court at which the indictment was found.³ In such case it should appear in the caption of the indictment that it was found at a term begun and holden and continued by adjournment to a day named, being after the time of the alleged offence.⁴ But where an information is presented and filed on the day the offence is alleged to have been committed, it is fatally defective, notwithstanding the complaint shows that it was filed subsequent to the commission of the offence.⁵ It is no objection to an indictment that it was found while an investigation of the charge was pending before the committing magistrate or before an examination before a coroner has been completed.⁶

3. At What Term of Court May be Found—*a. GENERALLY; REGULAR TERM.*—An indictment may be found by any general term

ment as prosecutor, the effect is the same as if there was no prosecutor. *State v. Tankersly*, 6 Lea (Tenn.) 582.

Death of Prosecutor.—The accident of the death of the prosecutor marked on an indictment, pending the prosecution, does not operate as a discharge of the accused. The prosecution continues as if no death had occurred. *State v. Loftis*, 3 Head. (Tenn.) 500.

1. *Byrd v. State*, 2 Miss. (1 How.) 247.

In Tennessee an indictment must be preferred by the attorney general for a district, or, in his absence, by the attorney pro tem. appointed by the court, and the indictment must appear in some part of it to be signed by him, otherwise it is defective and a conviction founded on the indictment will be set aside. *Hite v. State*, 9 Yerg. (Tenn.) 198.

2. *Kennedy v. State*, 22 Tex. App. 689.

3. *Allen v. State*, 5 Wis. 329.

The grand jury, before whom a perjury is committed, may indict the witness for the crime. *State v. Terry*, 30 Mo. 368.

4. *Com. v. Gee*, 60 Mass. (6 Cush.) 174.

In Massachusetts there is no limitation short of six years upon indictment found under Gen. Stat., ch. 160, § 34, against common carriers of passengers. *Com. v. East Boston Ferry Co.*, 95 Mass. (13 Allen) 589.

In *State v. Strong*, 39 La. An. 1181, an information was presented and filed within one year after the offence charged had become known to the officer authorized to prosecute and the court held that it presented the question of prescription as an issue for the jury.

In *State v. Miller*, 11 Humph. (Tenn.) 505, it was held that a statute providing that "all prosecutions by presentment or indictment for misdemeanors shall be commenced within twelve months after such offence shall have been committed," is to be construed as referring to the commencement of the prosecution, as by apprehension upon a warrant, and requiring bail for appearance, and not merely to the finding of the indictment.

Previous Examination.—The statutes regulating the arrest and commitment of persons accused of crimes and misdemeanors do not require the previous examination of a prisoner before a committing magistrate in order to authorize the grand jury to enquire into the matter and find a bill of indictment. *State v. Bunger*, 14 La. An. 465.

5. *Kennedy v. State*, 22 Tex. App. 689.

6. *People v. Hyler*, 2 Park. Cr. Cas. (N. Y.) 566; *People v. Horton*, 4 Park. Cr. Cas. (N. Y.) 222.

of the court legally holden after the commission of such crime or where the crime is committed while the grand jury is in session;¹ but an indictment found by a grand jury at a term of court held at a time unauthorized by law will be a nullity, and the proceedings thereon invalid.²

Where a person has been held for a crime to answer at a designated term of court, if the witnesses for said person have not been prevented from attending court and no indictment has been found against him at the term to which he is held to answer, he should be discharged.³ However, it is held by some authorities that a prisoner is not entitled to a discharge because a term of the court has passed, and an indictment was to be found against him, unless the record shows that the grand jury heard evidence against him.⁴

b. SPECIAL, EXTRA AND ADJOURNED TERMS; RECESS.—A valid indictment may be found at any duly called special,⁵ ex-

1. *State v. Terry*, 30 Mo. 368; *State v. Jarvis*, 63 N. C. 556; *Allen v. State*, 5 Wis. 329. See *supra* 2, "Time of Finding."

In Massachusetts under the statute of 1804, ch. 105, § 6, an indictment for a capital offence might be found, returned into court, and filed of record, at any term of the supreme court, though holden by one judge only. *Com. v. Hardy*, 2 Mass. 303. But under the same statute, one indicted for a capital offence could not be arraigned unless three justices of the court at least were present. *Com. v. Braley*, 1 Mass. 103.

2. Such an indictment should be quashed and after conviction thereon judgment should be arrested on motion. *Davis v. State*, 46 Ala. 80.

Change of Time of Holding Court.—After a grand jury had been drawn for the year, the law was changed so as to require court to be held a week later. *Held*, that this did not make the grand jury illegal, and that an objection to the panel, after verdict but before sentence, came too late. *State v. Jeffcoat*, 26 S. C. 114.

3. *Ex parte* Two Calf, 11 Neb. 221.

Discharge on Failure to Indict.—It is said in *Ex parte* Fennessy, 54 Cal. 101, that a prisoner's application for a discharge under the California Penal Code, section 1382, on the ground that an indictment was not found against him at the next term of court, at which he was held to answer, must be made, in the first place, to the court, where the prosecution against him is pending.

It is said by the Virginia Court of

Appeals, in *Waller v. Com.* (Va. App.), 5 S. E. Rep. 364, that it is sufficient reason for refusing to discharge a prisoner under the criminal code of Virginia, which provides that a person shall be discharged if not indicted before the end of the second term after his arrest, that the prisoner has been indicted every term of court, though for a different crime from that for which he was finally tried.

4. *People v. Hessing*, 28 Ill. 410.

5. *People v. Carabin*, 14 Cal. 438; *Wilson v. State*, 1 Blackf. (Ind.) 428; *State v. Nash*, 7 Iowa 347; *State v. Smith*, 7 Iowa 244; *State v. Moran*, 7 Iowa 236; *Young v. State*, 2 How. (Miss.) 865; *Bell's Case*, 8 Gratt. (Va.) 600.

Special Term—Power to Empanel Grand Jury and Return Indictment.—In *State v. Nash*, 7 Iowa 347, it is held that, under the power to hold a term of court for the trial of criminal cases, the court has power to empanel a grand jury and have an indictment found and transact all business relating to criminal trials; it would seem, however, that a statute authorizing special sessions of the circuit court, does not warrant the finding of an indictment at the special term against any other person than the one for whose trial the court was convened. *Wilson v. State*, 1 Blackf. (Ind.) 428.

Where in January the legislature passed an act repealing a former provision, which required a term of court to be held in February, providing that all indictments, etc., returnable at the February term, should be returnable at

tra¹ or adjourned term of the court duly constituted.² And it has recently been held that an indictment found by the grand jury after they had passed upon the charge and voted, any bill upon a reconsideration by them of such charge, and without any direction from the court, is not void by reason of its having been found during the recess of the court.³

4. Qualifications and Competency of Grand Jurors—*a. EFFECT OF INCOMPETENCY.*—To be valid, an indictment for a crime or misdemeanor must have been found by persons competent to serve on such jury, and where one of the jurors is incompetent, the indictment will be void,⁴ if exception thereto is taken by the defendant.⁵

b. CITIZENSHIP.—It is not a valid objection to an indictment that one of the jurors who found it was an alien,⁶ where it was not also alleged that the juror had not declared his intention of becoming a citizen.⁷

c. PERSONAL INTEREST OR PREJUDICE.—An indictment otherwise valid will not be objectionable because it was found by a grand jury, one of the members of which was an interested tax-payer,⁸

the September term, in March it was enacted that a special term should be held in April or May, for the trial of criminal cases only; *held*, that an indictment which was made before January, and returnable at the February term, was not, by the statute of January, continued until September, but that the party might be tried at the special term in May. *State v. Moran*, 7 Iowa 236; *State v. Smith*, 7 Iowa 244.

A prisoner being sent on for further trial by an examining court, which sat during the session of the circuit court to which he is sent for further trial, that term of the circuit court is not one of the two at which the statute directs that he shall be indicted or discharged from imprisonment. *Bell v. Com.*, 8 Gratt. (Va.) 600.

1. An extra term of the court of general sessions was convened, but no petit jury summoned. *Held*, that the court was legally constituted, and the grand jurors in attendance could find an indictment. *State v. Cardoza*, 11 S. C. 195.

2. Ulmer v. State, 14 Ind. 52; *State v. Davis*, 22 Minn. 423.

It is no valid objection to an indictment that it was found and presented by the grand jury at an adjourned regular term of the court, and after the petit jury had been finally discharged. *State v. Davis*, 22 Minn. 423.

3. People v. Sheriff, 11 N. Y. Civ. Proc. Rep. 172.

4. See Levy v. Wilson, 69 Cal. 105; *Kitrol v. State*, 9 Fla. 9; *Beason v. State*, 34 Miss. 602; *State v. Duncan*, 7 Yerg. (Tenn.) 271.

5. Kitrol v. State, 9 Fla. 9.

An accusatory paper found by a body of men styled a grand jury, but not in fact or in law a valid and constitutional grand jury, is worthless and void as an indictment, and the court has no jurisdiction to try a defendant under it. *Levy v. Wilson*, 69 Cal. 105.

The issue being whether one of the grand jurors was competent, an instruction that "the indictment must be found by a grand jury, above all exceptions, of the prisoner's own county," and that this was a constitutional right of which every man had a right to avail himself, was held useless and inapplicable, and therefore properly refused. *Beason v. State*, 34 Miss. 602.

6. State v. Taylor, 8 Blackf. (Ind.) 178.

7. Mon. Rev. Stat. 780, p. 571, only requires citizenship or declaration of intention as a qualification for service on the grand jury. Territory v. Harding, 6 Mont. 323.

8. It is no defence to an indictment for an offence punishable with a fine to be paid to the use of a town, that the foreman of the grand jury who found.

a strong political partisan,¹ an officer of the law,² a former prosecutor of the defendant.³

d. QUAKERS AND WOMEN.—Quakers⁴ and women⁵ are not competent to serve as jurors, either grand or petit, in some jurisdictions, and indictments found by jurors of which they are a member are for that reason invalid if objected to.

e. FREEHOLDERS, HOUSEHOLDERS.—It is generally required that the members of the grand jury which returns an indictment shall be freeholders or householders. Where this is the case an indictment found is void if one of the grand jurors was neither a freeholder nor a householder; and such disqualification of said juror may be pleaded in abatement before the general issue.⁶

f. FORMER SERVICE ON REGULAR JURY.—Where the statute exempts a person from serving on a regular jury within two years, an indictment found by a grand jury of which those who have served on a regular jury within the period for which they were exempt from jury duty, is not invalid because of disqualifications of such juror.⁷

5. Organization of Grand Jury.—To be valid, an indictment must be found by a grand jury constituted and convoked by the requisite number of competent grand jurors; is void if an unauthorized person participates in the proceedings.⁸

the bill was a taxable inhabitant of that town. *Com. v. Ryan*, 5 Mass. 90.

1. The fact that a man is a member of a political party, and a strong partisan, does not affect his qualifications as a grand juror. *U. S. v. Eagan*, 30 Fed. Rep. 608.

2. The fact that one grand juror was a justice of the peace and two were deputy sheriffs does not disqualify them from serving, although, under Rev. Stat. Tex., art. 3014, such officers are exempt from jury service when they claim such exemption. *Owens v. State*, 8 S. W. Rep. 658.

3. The court will not exclude from the grand jury a person who has been the prosecutor of one accused of a capital crime, whose case may probably be brought before the grand jury. *Tucker's Case*, 8 Mass. 286. But where two of the grand jury afterwards sat as traverse jurors upon the trial of an indictment of their own finding, the court granted a new trial upon conviction. *Com. v. Hussy*, 13 Mass. 221.

4. Com. v. Smith, 9 Mass. 107.

5. Women are not competent to serve as jurors, grand or petit, under code Wash. Ter., section 2078, providing that "all qualified electors shall be competent to serve as petit jurors, and all

qualified electors and householders shall be competent to serve as grand jurors," notwithstanding an act passed subsequently to the enactment of the code making women qualified electors. *Harland v. Territory*, 3 Wash. Ter. 131.

6. State v. Duncan, 7 Yerg. (Tenn.) 271; *Harland v. Territory*, 3 Wash. Ter. 131. Compare *State v. Henderson*, 29 W. Va. 147.

Although one of the grand jurors who found an indictment was not a freeholder, as required by act W. Va. 1882, ch. 138, §§ 2-4, the indictment will be sufficient, under section 12 of that act, which provides that an indictment shall not be quashed on account of the incompetency or disqualification of any one or more of the grand jurors who found it. *State v. Henderson*, 29 W. Va. 147.

A married woman, under the laws of Washington Territory, living with her husband, is not a householder, and is, therefore, not qualified to sit as a grand juror, the statute prescribing the qualifications to grand jurors requiring them to be householders. *Harland v. Territory*, 3 Wash. Ter. 131.

7. See State v. Elson, 45 Ohio St. 648.

8. State v. Clough, 49 Me. 573. Filling deficiency with petit jurors.

a. NUMBER OF JURORS.—The indictment must be found by a grand jury composed of the number designated by statute;¹ and if composed of a greater number the indictment will be bad, and all proceedings based thereon.²

Where there was not a sufficient number of competent grand jurors and alternates present and not excused, the court ordered the deficiency to be made up from the petit jurors who had been summoned, though not empanelled and sworn. *Held*, that though irregular for the court to designate, by name, persons to fill the panel, yet such irregularity would not invalidate all the proceedings of the grand jury. *Runnels v. State*, 28 Ark. 121.

1. See *People v. Butler*, 8 Cal. 435; *Norris' House v. State*, 3 G. Greene (Iowa) 513; *Low's Case*, 4 Me. (4 Greenl.) 439; s. c., 16 Am. Dec. 271; *Doyle v. State*, 17 Ohio 222; *Turk v. State*, 7 Ohio, pt. 2, 240; *Jackson v. State*, (Tex. App.); 7 S. W. Rep. 872; *Drake v. State*, (Tex. App.); 7 S. W. Rep. 868; *Harrell v. State*, 22 Tex. App. 692; *Wells v. State*, 21 Tex. App. 594; *Watts v. State*, 22 Tex. App. 572; *U. S. v. Eagan*, 30 Fed. Rep. 608.

In **California**, though nine of twenty-three grand jurors be challenged for cause and set aside, the indictment found by the fourteen, the statute requiring twelve, is good. *People v. Butler*, 8 Cal. 435.

In **Iowa**, an indictment found by a grand jury consisting of less than fifteen persons is not legal, although twelve concur in it. *Norris' House v. State*, 3 Greene (Iowa) 513.

In **Maine**, an indictment not found by twelve of the grand jury is void and erroneous, and the fact that the indictment was found by twelve of the grand jury, the party accused may show by solemn suggestion before pleading. *Low's Case*, 4 Me. (4 Greenl.) 439; s. c., 16 Am. Dec. 271.

In **Ohio**, an indictment, found by a grand jury composed of less than fifteen persons, having the qualifications required by the statute, is not sufficient to put the accused upon trial; and a plea to the indictment that one of the grand jurors had not the requisite statutory qualifications is a good plea in bar. *Doyle v. State*, 17 Ohio 222.

An indictment is valid if found by twelve grand jurors, though one of the panel may have misbehaved. *Turk v. State*, 7 Ohio, pt. 2, 240.

In **Texas**, under Const., § 13, art. 5, providing that "grand juries shall be composed of twelve men, but nine members of a grand jury shall be a quorum to transact business and present bills," a bill presented by eleven members, when one of the panel of twelve has been excused by the court, has gone beyond its jurisdiction, and has become a resident of another state, is sufficient. *Drake v. State* (Tex. App.), 7 S. W. Rep. 868; *Jackson v. State* (Tex. App.), 7 S. W. Rep. 872.

In Texas, an indictment presented by a body of fourteen persons assuming to act as a grand jury is void, and a judgment upon the forfeited recognizance of the person indicted is a nullity. *Harrell v. State*, 22 Tex. App. 692; 3 S. W. Rep. 479.

In *Watts v. State*, 22 Tex. App. 572, the grand jury which presented an indictment had, before such presentment, excused one of its members for the term, leaving only eleven members. *Held* not to affect the validity of the indictment.

Completing Grand Jury in Federal Court.—Under Rev. Stat., U. S. 808, providing that "If, of the persons summoned, less than sixteen attend, they shall be placed on the grand jury, and the court shall order the marshal to summon . . . from the body of the district, and not from the bystanders, a sufficient number of persons to complete the grand jury," the court has the right to determine of how many persons, up to twenty-three, the grand jury shall consist; but if more than sixteen and less than the number ordered attend under the first venire, and the court sees fit to require an additional number to make up the full panel, as first ordered, the deficiency must be supplied by ordering additional names to be drawn from the wheel, and not by directing the marshal to select the additional jurors from the body of the district, or from the particular localities of the district. *United States v. Eagan*, 30 Fed. Rep. 608.

2. See *Harding v. State*, 22 Ark. 210; *People v. Thurston*, 5 Cal. 69; *Wells v. State*, 21 Tex. App. 594.

An indictment found by a grand jury composed of a greater number of per-

b. DRAWING, SELECTION, IMPANELLING—(1) The Validity in General.—To be valid, an indictment must be found by a grand jury legally drawn, selected and empanelled.¹ It seems that it is not necessary that the drawing and selection of the grand jury be made before the commencement of the term of court at which the indictment was found;² and where the method of drawing grand jurors has been changed by an amendment of the organic law of the State, an indictment found by the grand jury drawn

sons than specified by law shall be quashed on a plea in abatement. *Harding v. State*, 22 Ark. 210.

In Texas, the grand jury is required to be composed of twelve persons. *Drake v. State* (Tex. App.); 7 S. W. Rep. 868; *Jackson v. State*, (Tex. App.); 7 S. W. Rep. 872; Tex. Const., § 13, art. 5.

In the case of *Wells v. State*, 21 Tex. App. 594.

The purported indictment being a presentation of a grand jury composed of thirteen persons, it was *held* that it was in fact no indictment at all, and conferred no jurisdiction upon the trial court or its officers to require a bail bond or recognizance of the defendant; and hence the recognizance and all other proceedings based upon the purported indictment were void. The rule that a surety upon a bail bond or recognizance will not be heard to question the sufficiency of an indictment after judgment *nisi* cannot be held to apply to a case in which there was in fact no indictment, and over which the trial court has not acquired jurisdiction.

1. *State v. Clough*, 49 Me. 573; *State v. McNamara*, 3 Nev. 70; *Com. v. Thompson*, 4 Leigh (Va.) 667; s. c., 26 Am. Dec. 339.

The provisions of Cal. Penal Code, § 995, cl. 1, that an indictment must be set aside "when not found as prescribed in this code," means simply that it must be concurred in by twelve grand jurors according to section 940; it does not refer to the selection, summoning or empanelling. *People v. Colby*, 54 Cal. 37; *People v. Hunter*, 54 Cal. 65.

Organizing the Grand Jury.—The act of congress of June 30th, 1879, with reference to drawing jurors for the courts of the United States, did not repeal Rev. Stat., §§ 800, 802, 804 or 808. U. S. v. Eagan, 30 Fed. Rep. 608.

Fraud on part of grand juror in securing his nomination, or conspiracy with the sheriff to get upon the grand jury, will render void an indictment found by

the grand jury of which he is a member. *Com. v. Thompson*, 4 Leigh (Va.) 667; s. c., 26 Am. Dec. 339. The court say: "It is not necessary, for the upright administration of justice, that the whole jury system should be preserved free and uncontaminated. The law demands that each grand juror shall make no presentment through malice, hatred or ill-will, and that he should not be prevented from making presentments by motives equally vicious. It also requires that the sheriff, whose duty it is to summon the grand jury, should discharge that duty with the sole view to the public good. It does not seem to be compatible with either of these requisitions of law, that a corrupt nomination of himself to the sheriff, by a citizen of the commonwealth, to serve on the grand jury, should be permitted; or that a false conspiracy or corrupt agreement, between the sheriff and himself, for that purpose, should be tolerated. in *Scarlet's Case*, 3 Inst. 33, 12 Rep. 98, it was charged that he, well knowing that he was not returned of the grand inquest, procured himself by false conspiracy to be sworn on the same, and it was decided that such procurement was an indictable offence, as well at common law as under the statute. 11 Hen. IV, ch. 9. And whensoever such corrupt nomination shall be procured, we have the authority of this court, in *Com. v. Cherry's Case*, 2 Va. Cas. 20, for saying that an indictment or presentment, found by a grand jury so constituted, may be avoided by plea."

2. See *Holman v. State* (Ga.), 4 S. E. Rep. 8; *Kelley v. State*, 53 Ind. 311.

Where the grand jury serving at the regular term of the superior court having been discharged before the court adjourned over, the judge in vacation, five days before the adjourned term convened, drew a grand jury and caused it to be summoned, *held*, that under Ga. Code, section 3942, providing that when from any cause the court is about to convene, and no juries have been

under the provisions of the previously existing law will be valid.¹

(2) *Who May Draw; Selection of Foreman.*—See tit. GRAND JURIES, vol. 9, pp. 2-7.²

(3) *Lists.*—The list of names from which the grand jury is to be selected must be furnished as provided by statute,³ and where such lists have been destroyed by accident or calamity, the record of the lists returned being duly authenticated as exact copies of the original may be substituted for the original destroyed lists.⁴

(4) *Return; Venire.*—The court cannot permit the sheriff to amend his return showing the execution of the venire for grand jurors.⁵

6. Proceedings By and Before Grand Jury—*a.* PRESENCE AND CONSENT OF COURT.—To be valid, an indictment must be found by the grand jury while the court is in session and presented thereto.⁶

b. ADVICE AND DIRECTIONS BY COURT AND COUNSEL.—The grand jury, in their deliberations and report for the court, may be directed and assisted by court and counsel.⁷

drawn for the same, it shall be lawful for the judge to draw so many as is necessary, the jury was legally drawn, though no petit jury was drawn at the same time. *Holman v. State* (Ga.), 4 S. E. Rep. 8.

1. *Anderson v. State*, 42 Ga. 9.

2. See also *State v. Duggan*, 15 R. I. 412; *Blackmore v. State* (Ark.), 8 S. W. Rep. 940.

3. The names in the box from which the grand jurors are drawn, having been duly selected and placed therein, any irregularity in preparing and certifying the lists or the book which the Georgia statute requires the clerk to make out and keep in his office is not cause for quashing or abating a special presentment or bill of indictment found and returned by the grand jury composed of persons whose names were drawn from the box, and who were organized as a grand jury according to law. *Crawford v. State* (Ga.), S. E. Rep. 445.

4. See *Hudspeth v. State*, 50 Ark. 534.

5. *Rampey v. State*, 83 Ala. 31. Compare *Com. v. Parker*, 19 Mass. (2 Pick.) 550.

Amending Return.—The constable who served the venire for one of the grand jurors, and who was still in office, was allowed to amend his return so far as to sign it, even after a verdict of guilty, in a capital case. *Com. v. Parker*, 19 Mass. (2 Pick.) 550.

The omission of a middle name, or the insertion of a wrong initial, in the venire of grand jurors, is immaterial, in the absence of evidence that there is another person bearing the name, of which the onus is on defendant. *Rampey v. State*, 83 Ala. 31.

6. See *Cook v. State*, 7 Blackf. (Ind.) 165; *Foute v. State*, 3 Hayw. (Tenn.) 98; *Jackson v. Com.*, 13 Gratt. (Va.) 795.

Under the act 22 & 23 Vict., ch. 17, which requires in certain cases the consent of a judge before an indictment can be found, no previous summons or notice to the party prosecuted, or even affidavit of the facts, is required; and where the necessary written consent was given by the judge who tried the cause, a fortnight after the trial, the judge having received no application nor given any direction for the prosecution at the time of the trial, a newspaper being laid before the judge containing a report of the proceedings, in order to refresh his memory, such written consent was held sufficient without summons or affidavit. *Reg. v. Bray*, 3 B. & S. 255.

7. See *Stewart v. State*, 24 Ind. 142; *State v. Harris*, 39 La. An. 228; *People v. Bradner*, 44 Hun (N. Y.) 233; *People v. Sheriff*, 11 N. Y. Civ. Proc. Rep. 172; *Johnson v. State*, 22 Tex. App. 206.

The omission of the court to instruct the grand jury does not affect the

c. NECESSITY AND SUFFICIENCY OF EVIDENCE.—An indictment can only be found upon the presentment of evidence regarding the guilt or innocence of the accused;¹ no indictment should be found when there is wanting an essential link in the proof of the charge,² and unless the testimony unexplained would swear a conviction.³

d. WITNESSES; EXAMINATION.—Witnesses examined before a grand jury upon a bill of indictment must be sworn in open court;⁴ and if not so sworn the indictment will be quashed;⁵ but an indictment founded upon the testimony of witnesses duly sworn will not be invalidated by the omission of the court to certify to the administration of the oath as required by statute.⁶

validity of their presentments or indictments. *Stewart v. State*, 24 Ind. 142.

After passing upon a charge and voting no bill, the grand jury reconsidered the charge and, without any direction from the court, found an indictment. *Held*, that such indictment was not void. *People v. Sheriff*, 11 N. Y. Civ. Proc. 172.

Instructing as to Degree of Murder.—

An indictment for murder in the first degree will not be set aside on the ground that the grand jury, being unanimous to draw it for murder in the second degree, were told by the district attorney and the judge, through their foreman, that it could only be drawn in the first degree, which was accordingly done against their wishes and finding. *Johnson v. State*, 22 Tex. App. 206.

Advice by District Attorney's Assistant.—

Upon a motion to dismiss an indictment for grand larceny, on the ground that the counsel assisting the district attorney in the prosecution of the case appeared before the grand jury and gave advice in reference to indicting defendant, the affidavits of such counsel and the district attorney stated that the former appeared before the grand jury as a witness only, and that he was sworn as such, and gave no advice other than that which was given to the district attorney outside the grand jury room. *Held*, that the conduct of the counsel was satisfactorily explained, and that the motion was properly denied. *People v. Bradner*, 44 Hun 233; 7 N. Y. St. Rep. 846.

Report Drawn by an Attorney.—An indictment is not invalidated by the fact that the final report of the grand jury was drawn by an attorney at law instead of a member of the jury or the district attorney, unless such attorney was present at their deliberations, or

otherwise assisted them in their proceedings and findings. *State v. Harris*, 39 La. An. 228.

1. See *Stewart v. State*, 24 Ind. 142; *McIntire v. Com. (Ky.)*, 4 S. W. Rep. 1; *State v. Grady*, 84 Mo. 220; *People v. Price*, 2 N. Y. 414.

2. *People v. Price*, 2 N. Y. 414.

Thus an indictment which alleges a prior conviction will be set aside if there was no testimony before the grand jury identifying the accused as the prior convict. *People v. Price*, 2 N. Y. St. Rep. 414.

3. *People v. Hyler*, 2 Park. Cr. Cas. (N. Y.) 570.

Inquiry Into Evidence.—It is not competent to inquire into the amount of evidence which grand jurors acted upon in finding an indictment. *Stewart v. State*, 24 Ind. 142.

When an indictment, with the indorsement, "a true bill" thereon, signed by the foreman, as required by Crim. Code Ky., section 119, and the names of all the witnesses purporting to have been examined written thereon, as required by section 120, is presented by the foreman, in the presence of the grand jury, to the court, and filed with the clerk, as required by section 121, it must be taken as found and returned in due form of law. And the court has no authority to inquire whether the grand jury heard the evidence before finding it, or whether the evidence as required by section 111 was such as, in their judgment, if unexplained, would warrant a conviction by the trial jury. *McIntire v. Com. (Ky.)* 4 S. W. Rep. 1.

4. *Duke v. State*, 20 Ohio St. 225; *State v. Kilcrease*, 6 Rich. (S. C.) 444; *Jetton v. State*, 1 Meigs (Tenn.) 192.

5. *State v. Kilcrease*, 6 Rich. (S. C.) 444.

6. *Duke v. State*, 20 Ohio St. 225.

Swearing in open court, though not

7. Return; Presentment—*a.* NECESSITY AND SUFFICIENCY.—Every indictment should be returned and presented to the court by the grand jury, otherwise it will be invalid, and such return and presentment must appear on the record.¹ The grand jury as a body should return their indictments; they should not be carried into court by the foreman alone.²

A presentment signed by the foreman of the grand jury only is said to be sufficient;³ but an information presented at the request of the grand jury, and indorsed a true bill by the foreman does not thereby become an indictment.⁴

b. RECORD; MINUTES.—While it is true that the record must show that the indictment was properly presented by the court to the grand jury, and received by the court and filed,⁵ yet the cir-

in the immediate presence of the judge, or even in his temporary absence from the bench, is good. *Jetton v. State*, 1 Meigs (Tenn.) 192.

Appearing Before Grand Jury.—It is not allowable for individuals, with their witnesses, to go before the grand jury and prefer charges. Such a course deprives the accused of a responsible prosecutor, who can be made liable in costs, and also to respond in damages for false and malicious prosecution. *McCullough v. Com.*, 67 Pa. St. 30.

An accomplice is a competent witness to prove the crime charged before the grand jury or the petit jury. *State v. Wolcott*, 21 Conn. 272.

The testimony of an accomplice, without corroboration, the law considers as credible, in some degree, and it may be sufficiently so to produce conviction, which is a matter exclusively for the jury to determine. *State v. Wolcott*, 21 Conn. 272.

Directions Regarding Witnesses.—It is not usual for the court, without special reasons suggested, on application, to give directions regarding witnesses to be called before the grand jury. *State v. Wolcott*, 21 Conn. 272.

Therefore, where A, an accomplice in the crime charged, went before the grand jury, and testified as a witness, without the direction or permission of the court, it was *held* that the indictment was not thereby invalidated. *State v. Wolcott*, 21 Conn. 272.

Where A, an accomplice, having testified, on the trial before the petit jury, witnesses were called to prove circumstances tending to corroborate the testimony of A; it was *held* that the evidence of such witnesses was admissible. *State v. Wolcott*, 21 Conn. 272.

1. See *State v. Glover*, 3 G. Greene

(Iowa) 249; *Fitzcox v. State*, 52 Miss. 923; *Cachute v. State*, 50 Miss. 165; *Pond v. State*, 47 Miss. 39; *Jenkins v. State*, 30 Miss. 408.

2. *State v. Bordeaux*, 93 N. C. 560.

Bringing Indictment Into Court.—An indictment is not bad because brought into court by the bailiff of the grand jury and entered on the minutes when none of the grand jurors are present, it not appearing that the bailiff was not the duly qualified officer of the grand jury. *Danforth v. State*, 75 Ga. 614.

3. *State v. Cox*, 6 Ired. (N. C.) L. 440.

4. *Texas & St. L. R. Co. v. State*, 41 Ark. 488.

5. *Fitzcox v. State*, 52 Miss. 925; *Cachute v. State*, 50 Miss. 165; *Pond v. State*, 47 Miss. 39. Compare *Cornwell v. State*, 53 Miss. 385; *Speed v. State*, 52 Miss. 176.

An indictment must be brought into court by the grand jury as a body, or through their foreman, accompanied by the requisite number, and by Miss. code 1871, section 2794, the record must show this affirmatively. Section 2795 postpones such entry upon the minutes until the accused has been arrested, and is either in custody or at large on bail. Under these sections, a record must be made upon the minutes of the fact, either at the term at which the indictment is found, or at some time after the appearance of the accused. *Cachute v. State*, 50 Miss. 165.

Record of Presentment to Court.—Unless the record of a conviction on a criminal charge preferred by indictment shows that the indictment was presented to the court by the grand jury, and received by the court and filed, it is as though there was no indictment found, and such conviction

circumstances of this presentation need not be indorsed on the indictment.¹

c. EFFECT; SUBSEQUENT PROCEEDINGS THEREON.—An indictment founded on a presentment of the grand jury is effectual, and need not be signed again before them for their action upon it.² In some jurisdictions an individual may be put upon his trial upon the presentment of a grand jury instead of an indictment³ but when such presentment is by the prosecution made the ground of further proceedings, it is regarded as the beginning of the whole prosecution, and not as a separate proceeding.⁴

d. ADMISSIBILITY AND COMPETENCY AS EVIDENCE.—The special presentment of the grand jury is said to be admissible in evidence, although it is marked "indictment" at the trial of the case.⁵ But the reading of the special presentment upon which an indictment is founded is not an indispensable part of the proof in the case.⁶

8. Discharge and Recalling of Grand Jury.—A grand jury which has been discharged may be recalled to consider and pass upon offences committed, and after their discharge and before the adjournment of the term.⁷

cannot stand. *Pond v. State*, 47 Miss. 39.

Where the record shows that an indictment was presented by the grand jury in open court, and filed, though the law requires it to be presented by the foreman, it will make no difference if handed in by some other member of the body in their presence. The defect, if it be one, is technical, and will not be regarded. *Laurent v. State*, 1 Kan. 313.

In *Kentucky* it is not requisite for the validity of an indictment that it should appear upon its face to have been presented on oath by a grand jury. *Jane v. Com.*, 3 Met. (Ky.) 18.

Texas Code Crim. Proc., art. 415, requires an entry on the minutes of the court only of the style of the action and file number of the indictment; and this being done, where the charge in an indictment is murder, the entry upon the minutes of the court of the presentation by the grand jury, naming the charge therein as "an assault with intent to kill," does not vitiate it. *Rowlett v. State*, 23 Tex. App. 197.

Presumption of Presentment.—Proof that an indictment was endorsed "a true bill" and was signed by the foreman, and that the court ordered the finding to be recorded, *held* to raise a presumption that the indictment was duly presented in open court. *Omnia rite*

acta applies. *State v. Mason*, 32 La. An. 1018.

It will be presumed that an indictment was presented by the foreman of the grand jury and in their presence, where the record shows nothing to the contrary, though the fact is not endorsed on the indictment. *People v. Blackwell*, 27 Cal. 65.

1. *Fitzcox v. State*, 52 Miss. 923. Compare *Cornwell v. State*, 53 Miss. 385; *Speed v. State*, 52 Miss. 176.

2. *Nunn v. State*, 1 Kelley (Ga.) 243. Where other offences than that specifically set out upon the return of the grand jury are apparent from the return, the district attorney may frame different bills. *Com. v. Morton*, 12 Phila. (Pa.) 595.

3. *Smith v. State*, 1 Humph. (Tenn.) 396; *Com. v. Christian*, 7 Gratt. (Va.) 631.

4. *Com. v. Christian*, 7 Gratt. (Va.) 631.

5. See *Ivey v. State*, 23 Ga. 576; *Hatcher v. State*, 23 Ga. 307.

Where the presentment of a grand jury is sought to be made the ground of a rule to show cause, it must contain enough to show that an offence has been committed. *Bishop v. Com.*, 13 Gratt. (Va.) 785.

6. *Hatcher v. State*, 23 Ga. 307.

7. *Clem v. State*, 33 Ind. 418; *State v. Reid*, 20 Iowa 413.

9. Service on Defendant of Copies, Lists, etc.—*a.* COPIES OF INDICTMENT AND VENIRE.—A copy of the indictment and the list of the jury should be served upon the accused before the trial.¹

b. COPIES OF TESTIMONY; LISTS OF WITNESSES.—It is thought that in a capital case the defendant is entitled as of right to be furnished with a list of the witnesses examined before the

The fact that a grand jury was discharged until a certain future day, and did not appear on that day, but upon the day after, and without being re-empanelled, returned an indictment, does not vitiate the indictment. A grand jury cannot dissolve itself by disregarding an order of the court. *Clem v. State*, 33 Ind. 418.

Where, on the third day of the term, the grand jury came into court and asked to be discharged, there being no one present with them acting as attorney for the state, and saying that they could not present any bill of indictment, not having a district attorney, and they were accordingly discharged without returning any bill of indictment, it was held that a person previously committed to the custody of the sheriff upon the charge of murder must be discharged on his motion, no indictment or information having been presented against him. *Bennett v. State*, 27 Tex. 701.

1. See *Aaron v. State*, 39 Ala. 75; *Chaney v. State*, 31 Ala. 342; *Bill v. State*, 29 Ala. 34; *Friar v. State*, 4 Miss. (3 How.) 422; *Woodall v. State*, 25 Tex. App. 617; *U. S. v. Curtis*, 4 Mason C. C. 232.

Service of Copy, etc.—Under the Alabama code, section 3576, when a person indicted for a capital offence is in actual confinement, he is entitled to a list of the jurors summoned for his trial, at least two days before the day appointed for trial; but if he is not in actual custody, and have counsel, whose names are so entered on the docket, the right to such list does not arise, either in favor of the defendant or his counsel, except on application by the latter. *Bill v. State*, 29 Ala. 34.

Under Code Crim. Proc. Texas, arts. 504, 505, providing that, where the accused is in custody, as soon as the indictment is presented a certified copy shall be made out and served upon him; and under art. 532, providing that in cases where defendant is entitled to be served with a copy of the indictment he shall be allowed two days'

time after service to plead, where a defendant, when his case is called for trial, answers that he is not ready, because he has been in custody, and has never been served with a copy of the indictment, and thereupon demands such copy and a postponement for two days, it is error to refuse such demand. *Woodall v. State*, 25 Tex. App. 617.

Same—In Federal Courts.—A prisoner is not entitled, under the United States constitution, art. 6 of the amendments, to have a copy of an indictment against him furnished at the expense of the government. *United States v. Bickford*, 4 Blatchf. C. C. 337.

Under the statute of 1790, ch. 90, § 28, which requires that in capital cases a copy of the indictment, etc., should be delivered to the prisoner two entire days before the trial, the word "trial" means the trying of the case by the jury, and not the arraignment and pleading preparatory to such trial by the jury. *U. S. v. Curtis*, 4 Mason, C. C. 232.

Same—Copy Furnished by Sheriff.—It is not error that the copy of the venue and indictment are furnished to the prisoner by the sheriff. *Friar v. State*, 4 Miss. (3 How.) 422.

Same—Change of Law.—In a criminal case which was pending when the code went into effect, the prisoner's right to a copy of the *venire* must be determined by the former law. *Chaney v. State*, 31 Ala. 342.

Change of Indictment—Service of Copy.—Where on the trial of an indictment for shooting with intent to murder "while lying in wait," the aggravating circumstances alleged were stricken from the indictment, there was no necessity of a new service of the indictment. *State v. Evans*, 39 La. An. 912.

Objection for Failure to Serve—Copy and Lists.—An objection that a copy of the indictment on a list of the jurors was not furnished as required must be taken at the trial. *State v. Cook*, 20 La. An. 145.

grand jury, upon whose testimony the indictment was found;¹ otherwise as to those witnesses whom the prosecuting officer proposes to call upon the trial.² And it seems that the defendant is entitled as of right to be furnished with or permitted to take a copy of the testimony before the grand jury upon which he was indicted.³

10. Loss or Destruction; Replacing.—*a.* EFFECT OF LOSS GENERALLY.—Where an indictment is lost it cannot be replaced by affidavit of the clerk or the order of the court, and the defendant cannot be tried thereon, even when lost after the defendant has been arraigned and pleaded.⁴

Service Personally—Reading, etc.—Where a prisoner in actual confinement is served with copies of the indictment and *venire* personally, it is not necessary that they be read to him, nor that copies should be served on his counsel. *Aaron v. State*, 39 Ala. 75.

That certain words endorsed on the original indictment were not contained on the copy served is immaterial. *State v. Valere*, 39 La. An. 1060.

Where a justice of the peace was indicted for malpractice in office, in wilfully and knowingly demanding and receiving more costs than he was entitled to under the law, a service on him of a copy of the indictment, except that it did not contain the names of the grand jurors, was a substantial compliance with the law; and a special plea alleging that this service was insufficient was properly stricken out on demurrer. *Ridenhour v. State*, 75 Ga. 382.

1. *Com. v. Locke*, 31 Mass. (14 Pick.) 485. See *Com. v. Knapp*, 26 Mass. (9 Pick.) 496; s. c., 20 Am. Dec. 491. See *post*, VII, 13, h, (4).

Abode of Witness.—If, following the name of a witness in the list, which the statute requires to be furnished to a defendant in certain criminal actions, there is a designation of a town and state, it is a sufficient designation of abode, although the preposition "of" is omitted. *Lord v. State*, 18 N. H. 173.

2. See *Keener v. State*, 18 Ga. 194; *Com. v. Walton*, 34 Mass. (17 Pick.) 403.

Cases Not Capital.—A defendant in a criminal case, not capital, who has been furnished by the district attorney with a list of the witnesses sworn before the grand jury in his case, is not entitled, of right, to inspect the record of the list of all the witnesses sworn before

the grand jury during the same term. *Com. v. Edwards*, 70 Mass. (4 Gray) 1.

3. *Hofler v. State*, 16 Ark. 534; *People v. Richmond*, 5 N. Y. Cr. Cas. 97; except possibly to enable the defendant to move to set aside the indictment for the reasons pointed out by statute authorizing the granting of such relief. *People v. Richmond*, 5 N. Y. Cr. Cas. 97.

4. *Ganaway v. State*, 22 Ala. 772; *Boyd v. State*, 6 Coldw. (Tenn.) 1; *Bradshaw v. Com.*, 16 Gratt. (Va.) 507; s. c., 86 Am. Dec. 722. See *State v. Harrison*, 10 Yerg. (Tenn.) 542. Compare *Smith v. State*, 4 G. Greene (Iowa) 189; *Com. v. Roland*, 97 Mass. 598.

Lost Indictment.—In *Bradford v. State*, 54 Ala. 230, it was decided that where an indictment is lost after the defendant has been arraigned and his plea has been entered, the court has inherent power, without the consent of the prisoner or his counsel, to order the substitution of an indictment lost after that stage of the proceedings.

Nunc Pro Tunc Entry or Return of Indictment.—The defendant in a criminal prosecution cannot be put upon trial on a *nunc pro tunc* entry, made by the order of the court, showing the return into the court by the grand jury on an indictment against the defendant, and that it has been destroyed. *Buckner v. State*, 56 Ind. 208.

It is said in *People v. Burdock*, 3 Cai. (N. Y.) 104; s. c., Col. & Cai. 458, that if the record of an indictment be lost the court will grant leave to file one *nunc pro tunc*. But this case is criticised in *Bradshaw v. Com.*, 16 Gratt. (Va.) 507; s. c., 86 Am. Dec. 722.

In *Com. v. Keger*, 1 Duv. (Ky.) 240, the court say: "That while the power in the court to replace a lost indictment, that it cannot be replaced by a

b. RIGHT AND POWER OF COURT TO ORDER NEW INDICTMENT.—The general power which courts have over pleadings does not extend to indictments, because an indictment proceeds from a grand jury, and the court has no creative or amendatory power over it; if it is defective, another grand jury must supply the defects by effecting another indictment; if it be lost or destroyed the only remedy of the prosecution is to have the accused reindicted.¹

different indictment found by a grand jury. That the only effect of such proceedings would be the institution of a new prosecution in which the limitation would run up to the new indictment into court.

Restoring Mutilated Indictment.—It has been *held* in Massachusetts that an indictment torn into three pieces, which may be so enacted as to restore it substantially in the form in which it was presented in court for the grand jury, is sufficient as a basis for further legal proceedings. *Com. v. Roland*, 97 Mass. 598.

After an indictment was returned by the grand jury, it was accidentally cut into three pieces, but without destroying any material words. *Held*, that it was not thereby rendered insufficient as a basis for further proceedings. *Com. v. Roland*, 97 Mass. 598.

Indictment Must be Among Records at Time of Sentence.—The Supreme Court of Ohio *held*, in the case of *Mounts v. State*, 14 Ohio 295, 306, that it is not essential that the indictment should be among the records at the time the sentence was passed.

The Supreme Court of Iowa say, in *Smith v. State*, 4 G. Greene (Iowa) 189, that the mere fact that the indictment was stolen or missing after the trial and could not be sent by file to each of them will not justify an appellate court in reversing the judgment.

Statutory Enactments.—In several of the states statutes have been enacted providing for the replacement of lost or destroyed indictments. In such states the fact of the loss is to be entered upon the minutes of the court, which puts a stop to the running of the statute of limitations, and a new indictment is prepared. This second indictment is to be found in the same manner as the first, upon the testimony of witnesses sworn to give evidence to the grand jury. *State v. Adams*, 17 Tex. 322; *State v. Elliott*, 14 Tex. 423.

The Texas statute has been recently changed, so that now when an indict-

ment is lost the district attorney may suggest the fact to the court and the suggestion will be entered upon the minutes of the court, and then a new indictment may be substituted upon the written statement of the district attorney that does substantially the same as that which has been lost or mislaid. See *Graham v. State*, 43 Tex. 550; *Withers v. State*, 21 Tex. App. 210; *Beardall v. State*, 4 Tex. App. 631; *Clampitt v. State*, 3 Tex. App. 638.

In Tennessee it is provided by statute that indictments in cases of felony shall be entered in full on the minutes of the court, and that a copy of the minutes shall be as good and valid as the originals, if at any time the latter are lost or destroyed. See *Boyd v. State*, 6 Coldw. (Tenn.) 1, 3.

In Mississippi the statute provides that where an indictment has been lost, destroyed or quashed, the further time of six months shall be allowed for the finding of a new indictment. *Thompson v. State*, 54 Miss. 740, 745.

Whenever there is a period of limitation prescribed and an indictment has been lost, destroyed or quashed, six months additional is given within which to find a new one; but if the offence committed is one of that class for the prosecution of which no bar is established, the destruction of the indictment cannot have the effect of creating the summary bar of six months from the date of the destruction. *Thompson v. State*, 54 Miss. 740.

In Indiana the statute provides that indictments must be recorded, and that in case of their loss the defendant may be tried upon a copy taken from the record and certified by the state. *Buckner v. State*, 56 Ind. 208.

In Kansas the statute authorizes the replacement of lost indictments by copies. *Millar v. State*, 2 Kan. 174, 181.

In Georgia there is a statutory provision authorizing the replacement of indictments by copies. *Reinhart v. State*, 29 Ga. 522.

1. *Bradford v. State*, 54 Ala. 230;

c. SUFFICIENCY OF AND MODE OF FINDING NEW INDICTMENT.—A grand jury may, without examining witnesses, find a new indictment as a substitute for another indictment found by them upon an investigation of the facts at a previous term.¹

d. EFFECT OF NEW INDICTMENT; SUBSEQUENT TRIAL AND CONVICTION.—Where an indictment has been returned against a party, and has been lost or not accounted for, and another is passed against him for the same offence, the first is not substituted by the second, and the proceedings under it will not impair the first, so that it is immaterial upon which one the accused is tried.²

e. COPIES; PROOF OF CONTENTS.—Where an indictment or information has been lost, it is held in some jurisdictions that a

Ganaway *v.* State, 22 Ala. 772; State *v.* Neiderer, 94 Mo. 79; State *v.* Harrison, 10 Yerg. (Tenn.) 542; Bradshaw *v.* Com., 16 Gratt. (Va.) 507; s. c., 86 Am. Dec. 729.

Where an indictment is lost, a special judge elected to try the case can order the summoning of the grand jury, so that an indictment may be returned on which the defendant may be tried. State *v.* Neiderer, 94 Mo. 79; s. c., 13 West. 123, 6 S. W. Rep. 708.

In an Alabama case it was decided that where the indictment is lost after the defendant has been arraigned and his plea has been entered, the court has inherent power, without the consent of the prisoner or his counsel, to order the substitution of an indictment lost after that stage of the proceedings. Bradford *v.* State, 54 Ala. 230; distinguishing 22 Ala. 772. The court in this case recognized the force of the reasoning of Ganaway *v.* State, 22 Ala. 772, that where the indictment is lost before the arraignment it cannot be replaced.

Where Indictment Purloined.—Where the papers have been purloined from the clerk's office, the district attorney may enter a *nolle prosequi* and present a new indictment. State *v.* Pierre, 38 La. An. 91.

Finding Second Indictment.—Rev. St. Mo., § 1879, enacts that a special judge shall, during the hearing of the particular cause, possess all the powers of the regular judge. Under acts Mo. 1874, p. 99, § 7, courts may summon another, the indictment being lost, pending a trial before a special judge. Held, that he might summon a grand jury to find an indictment. State *v.* Neiderer, 94 Mo. 79.

Substitution of Affidavit.—Where affidavit upon which defendant had been

tried before a justice of the peace could not be found when case was called in the circuit court, there was no error in permitting prosecuting attorney to file a substituted affidavit; in absence of proof to the contrary it will be presumed that substituted affidavit did not differ from the original. Small *v.* State, 106 Ind. 94.

1. Com. *v.* Keger, 1 Duv. (Ky.) 240; Com. *v.* Woods, 76 Mass. (10 Gray) 477. See State *v.* Elliott, 14 Tex. 423.

The course to be pursued in the case of a lost indictment is plainly indicated in the statute. The fact of the loss is to be entered on the minutes of the court, which avoids the statute of limitations, and a new indictment is to be preferred. The second is to be found in the same manner as the first, on the testimony of witnesses, sworn to give evidence before the grand jury, touching the truth of the accusation; and the prosecution is to be conducted on the second indictment in the same manner as it would have been on the first. State *v.* Elliott, 14 Tex. 423.

Where an indictment has been abstracted from the clerk's office, a subsequent indictment found by a different grand jury cannot be substituted for it. But the destruction of the indictment would not abate the prosecution. By a dismissal of the pending prosecution, and with the consent of the court, the case could be again submitted to a grand jury for a new indictment, which would, in effect, be a new prosecution, and as such the time within which the offence must have been committed should be estimated from the date of its return into court. Com. *v.* Keger, 1 Duv. (Ky.) 240.

2. Reddan *v.* State, 4 G. Greene (Iowa) 137; Rosenberger *v.* Com., 118 Pa. St. 77.

certified copy thereof, taken from the record book, may be substituted therefor, upon which copy the trial may proceed.¹ But a different rule prevails in other jurisdictions.²

Where an indictment or presentment has been lost or destroyed, parol evidence of its contents is admissible, the same as with any other document where the case does not from its character disclose the existence of other or better evidence.³

II. Second Indictment; Same Offence; Jeopardy ⁴—*a*. PENDENCY; BAR; SEPARATE INDICTMENTS.—The mere pendency of an indictment is no bar to the filing of an information or another indictment for the same offence.⁵ The accused cannot be tried on

Thus where an indictment was found, but, when the case came on for trial, was said to be lost, and another was found, but was quashed as being defective, when the first one was found, *held* that the second did not supersede the first, nor the proceedings under it impair the first. *Reddan v. State*, 4 G. Greene (Iowa) 137.

1. *Buckner v. State*, 56 Ind. 208; *Millar v. State*, 2 Kan. 174; *State v. Thomas*, 39 La. An. 318; *State v. Simpson*, 67 Mo. 647; *Magee v. State*, 14 Tex. App. 366.

Replacing Lost Indictment.—The defendant in a criminal prosecution cannot be put upon trial on an indictment against him which has been destroyed, and of which there is no record. If a record of the indictment exists, the defendant may be arraigned on a certified copy; but the copy must appear by the transcript of the record on error. *Buckner v. State*, 56 Ind. 208.

An indictment being lost, the district attorney, by written statement, suggested the fact, and asked that an instrument, which he then presented and claimed to be a substantial copy, be received and filed as a substitution. The motion was granted, and a substitution filed the same day. *Held*, a compliance with Tex. Code, art. 434. *Magee v. State*, 14 Tex. App. 366.

Where the appellant was tried upon a copy of the indictment as found on record, and not upon the original bill signed by the foreman, it was *held* that, as it would have been proper to show by affidavit that the original bill had been lost or destroyed, the omission to file such affidavit, or to place it upon record if filed, would be merely a "technical error or defect" within the meaning of section 276 of the Criminal Code, and must be disregarded. *Millar v. State*, 2 Kan. 174.

2. See *Ganaway v. State*, 22 Ala. 772; *Reinhart v. State*, 29 Ga. 522;

Bradshaw v. Com., 16 Gratt. (Va.) 507; s. c., 86 Am. Dec. 722.

Showing Loss of Indictment.—Where the presentment on the record appeared to be the original, the party was not allowed to show in arrest of judgment that the original had been lost, and that the one produced was in fact but a copy, the record not showing that the original had not been found. *Reinhart v. State*, 29 Ga. 522. The party should have, moved for a new trial, on the ground that the paper providing to be original was in fact a copy. *Reinhart v. State*, 29 Ga. 522.

3. *People v. Dennis*, 4 Mich. 609; s. c., 69 Am. Dec. 338. See also *Derrett v. Alexander*, 25 Ala. 265; *Davies v. Pettit*, 11 Ark. 349; *Jackson v. Cullum*, 2 Blackf. (Ind.) 228; s. c., 51 Am. Dec. 158; *Donaldson v. Winter*, 1 La. 137; *Simpson v. Norton*, 45 Me. 281; *Gore v. Elwell*, 22 Me. 442; *Tillotson v. Warner*, 69 Mass. (3 Gray) 574, 577; *Com. v. Roark*, 62 Mass. (8 Cush.) 210, 212; *Stockbridge v. West Stockbridge*, 12 Mass. 400; *Eakin v. Vance*, 18 Miss. (10 Smed. & M.) 549; s. c., 48 Am. Dec. 770; *Hall v. Manchester*, 40 N. H. 410; *Harris v. McRea*, 4 Ired. (N. C.) L. 81; *Cutbush v. Gilbert*, 4 Serg. & R. (Pa.) 555; *Adams v. Betz*, 1 Watts (Pa.) 425, 428; s. c., 26 Am. Dec. 79; *Hill v. Parker*, 5 Rich. (S. C.) L. 87; *Newcomb v. Drummond*, 4 Leigh (Va.) 57; *Burton v. Driggs*, 87 U. S. (20 Wall.) 125; *Anonymous*, 1 Salk. 284; *U. S. v. Gilbert*, 2 Sumn. (C. C.) 19, 80, 81; *Knight v. Danler*, *Hardres* (Eng. Exch.) 323.

In the case of *Bradshaw v. Com.*, 16 Gratt. (Va.) 507; s. c., 86 Am. Dec. 722, a judgment was reversed where a man was tried and convicted upon parol proof of the contents of a lost indictment against him.

4. See also 6, d, and tit. JEOPARDY, this series.

5. *Perkins v. State*, 66 Ala. 457; *Hudspeth v. State*, 50 Ark. 534; *State v. Mc-*

both indictments;¹ the first will be regarded as suspended by the second, and should be quashed.²

b. AFTER CONVICTION OR ACQUITTAL.—A conviction or acquittal of one of several counts, an indictment for an entire discharge of the defendant therefrom, and he cannot be put a second time upon his trial upon that count.³ However, where

Kinney, 31 Kan. 570; Com. v. Berry, 71 Mass. (5 Gray) 93; State v. Vincent, 91 Mo. 662; Blatchley v. Moser, 15 Wend. (N. Y.) 215; State v. Johnson, 5 Jones (N. C.) L. 221; Bailey v. State, 11 Tex. App. 149; Stuart v. Com., 28 Gratt. (Va.) 950; U. S. v. Hill, 1 Brock. C. C. 156.

Thus it has been held that an indictment for selling liquor without licence is no bar to an action for the penalty given by statute in such cases. Blatchley v. Moser, 15 Wend. (N. Y.) 215.

The finding of a new bill of indictment for the same felony, varying the terms in which the offence is charged, is simply adding a new count, and the whole constitutes but one proceeding; an order therefore for the removal of a cause applies to the several bills that have been found against the defendant. State v. Johnson, 5 Jones, (N. C.) L. 221.

An individual is presented by the grand jury for a particular offence, and a bill of indictment for the same offence is sent to the grand jury by the attorney of the United States, which they find "a true bill." At a subsequent term of the court the attorney enters a *nolle prosequi*. It seems that the indictment was but an amendment of the presentment, that the presentment was embodied with the indictment and perished with it. U. S. v. Hill, 1 Brock. C. C. 156.

Where an indictment was found by a grand jury against a husband for violent treatment of and separation from his wife, and there was a suit pending on the other side of the court against him, for alimony, a presentment of the same person, by the same grand jury, for the same cause was quashed. *Ex parte Chauvin*, T. U. P. Charlt. (Ga.) 14.

Compelling State to Elect.—One against whom several indictments for the same charge are pending cannot compel the state to elect on which it will proceed; such mere pendency is not jeopardy. Bailey v. State, 11 Tex. App. 140.

Indictments for Different Degrees for Same Offence.—In New York the prac-

tice of finding two or more indictments for different degrees of the same offence or for different offences, founded on the same matter, is disapproved of, as a general rule. People v. Van Horne, 8 Barb. (N. Y.) 158.

1. Stuart v. Com., 28 Gratt. (Va.) 950.

2. See Hudspeth v. State, 50 Ark. 534; State v. Vincent, 91 Mo. 662; s. c., 4 S. W. Rep. 430.

Finding Second Indictment.—Under a statute providing that the State, pending an indictment, may file a new indictment for the same offence, and that the first indictment shall be deemed to be suspended and shall be quashed, a motion to dismiss the second indictment on the ground that the first indictment is pending is properly denied, whether or not the first indictment has been quashed. State v. Vincent, 91 Mo. 662.

When an indictment is ignored, a new indictment charging the same offence may be sent to the grand jury, with the names of other witnesses endorsed thereon. State v. Harris, 91 N. C. 656.

When a second indictment is preferred on account of fatal defects in the first or in the organization of the grand jury by which it was found, the better and more usual practice is that the second indictment shall be found before the first is quashed. Perkins v. State, 66 Ala. 457.

3. Campbell v. State, 9 Yerg. (Tenn.) 333; See State v. Collis, 73 Iowa 542; Richards v. State, 22 Neb. 145; Phillips v. State, 85 Tenn. 551.

Thus where a defendant who has been acquitted on some counts, and convicted upon others, moves for a new trial generally, it is only applicable to the count upon which he was convicted, and if the court sets aside the whole verdict, it is erroneous. Campbell v. State, 9 Yerg. (Tenn.) 333.

Under a statute providing that the dismissal of a charge against a person by a grand jury "does not prevent the same from being again submitted to a grand jury as often as the court may direct, it cannot again be submitted" does not

prevent the grand jury from finding an indictment upon their own motion on a charge that has since been dismissed but which has not been resubmitted by the court. *State v. Collis*, 73 Iowa 542.

As to requisites of the record of a discharge under the "two term rule" prescribed by the Pa. Stat. of 1860, in order to bar a second indictment. *Hester v. Com.*, 85 Pa. St. 139.

Power of Prosecutor to File Information.—Where a party is bound over to await the action of a grand jury, and the grand jury investigates the charge and makes report to the court "No cause of action," and the accused is thereupon discharged, the prosecuting attorney cannot thereupon treat such finding as void and file an information against the accused for the same offence upon the same evidence; the jury being the judges of the credibility of the witnesses. *Richards v. State*, 22 Neb. 145.

Effect of Former Conviction.—Where wearing apparel hanging on one side of a room and belonging to a woman, and wearing apparel hanging on the opposite side of the same room belonging to her daughter, and at such a distance away that both could not be taken into possession by the same person at the same moment, were stolen at the same occasion and two indictments were returned against the defendant, one charging him with the larceny of the mother's property, and the other with that of the daughter's, it was *held* that, as there were two distinct purchases and two distinct properties, there were two distinct larcenies; and a previous trial and acquittal of the larcenies of the mother's property was not a bar to a trial for the larceny of the daughter's property. *Phillips v. State*, 85 Tenn. 551. See *State v. Blahut*, 48 Ark. 34; *State v. Mikesell*, 70 Iowa 176; *Com. v. Andrews*, 2 Mass. 409; *Hilands v. Com.*, 114 Pa. St. 372; *State v. Thurston*, 2 McMull. (S.C.) L. 382; *Morton v. State*, 1 Lea (Tenn.) 498.

Larceny of Money—Bar.—Where a defendant who is tried on an indictment for larceny of money, and acquitted on the ground that the taking of the money under the circumstances was not larceny, it was *held* that the acquittal was not a bar to a subsequent indictment for embezzling the same money. *People v. Burch*, 5 N. Y. Cr. L. Rep. 29.

Trial for Murder Bar to Indictment for Involuntary Manslaughter.—In the case of *Hilands v. Com.*, 114 Pa. St. 372, A was convicted and indicted for involuntary manslaughter. When called upon to plead to the indictment he filed a special plea setting forth that he had been indicted and tried in the same court upon the charge of murder; that upon such previous trial he had been convicted of murder in the first degree; that this had been reversed by the supreme court, and that he had been discharged from said indictment; that the indictment for involuntary manslaughter involves the same facts and circumstances as were involved in the charge of murder; and that this last charge was for the same offence for which he had been discharged. To this plea the commonwealth demurred and the court below sustained the demurrer. *Held*, that this was correct, and that the trial for murder did not place A in jeopardy of a conviction for involuntary manslaughter.

Acquittal of Robbery Bars a Prosecution for Larceny.—In the case of *State v. Mikesell*, 70 Iowa 176, it was *held* that a previous acquittal, on trial of an indictment for robbery, under code Iowa, section 3903, fixing the penalty for larceny from a dwelling house, in the night time, of property exceeding \$20, is a good defence to an indictment, under code, section 3858, which enacts that "if any person, with force or violence, or by putting in fear, shall steal and take from the person of another any property which is the subject of larceny, he is guilty of robbery," for a robbery of the same property described in the first indictment, as it is also to an indictment for any other offence in which such larceny is an essential element.

In the case of *State v. Hennessey*, 23 Ohio St. 339; s. c., 13 Am. Rep. 253, it was *held* that where several articles of property were stolen at the same time, the transaction being the same, the whole, although they belong to different owners, may be embraced in one count of the indictment, and the taking thereof charged as one offence. See *Com. v. Andrews*, 2 Mass. 409.

To sustain a plea of former conviction, the defendant must not only produce the record of conviction, but show that he has been tried for the same offence for which he is being prosecuted. *State v. Blahut*, 48 Ark. 34.

the information fails through variance, a verdict of acquittal does not prevent the filing of a new information avoiding the variance.¹

c. AFTER QUASHING INDICTMENT; REVERSAL OR ARREST OF JUDGMENT.—Where an indictment has been demurred to, the demurrer sustained, and the indictment quashed, the matter should be resubmitted to the grand jury.² In such a case it is not necessary, before finding the second indictment, for the grand jury to have recalled and re-examined all the witnesses who were before them when the first indictment was found.³ And where the judgment is restated because of a defect in the indictment, a new indictment should be procured for the same offence.⁴ But a new indictment need not be preferred against a prisoner where a former judgment of conviction is reversed and the cause remanded for, unless the indictment was adjudged to be insufficient.⁵

Where an indictment is quashed, it may still remain as a sworn accusation, and which the court is warranted in remanding the prisoner to answer a new indictment.⁶

12. **Caption, Indorsement, Signing, etc.**⁷—*a.* DEFINITION AND OFFICE OF CAPTION.—The caption of an indictment has been said to be that entry of record showing when and where the court is held, who presided as judge, the venire and who were summoned and sworn as grand jurors.⁸ The office of the caption is

1. **Amendment.**—It is customary for our courts to allow the prosecutor to amend and go on with the trial without a re-examination of the witnesses, unless such re-examination is claimed by the prisoner. *State v. Stebbins*, 29 Conn. 463; s. c., 79 Am. Dec. 223.

2. *State v. Withrow*, 47 Ark. 551. See *McIntire v. Com.* (Ky.) 4 S. W. Rep. 1.

The court say in *State v. Withrow*, 47 Ark. 551, that "there is no public end to be subserved in the prosecution of an appeal by the state in any criminal case, unless it is important to the correct and uniform administration of the criminal law that this court should settle the question involved in the case. Mansf. Dig., section 2452. Or unless the correction of the error complained of will prevent a particular individual deemed guilty by the prosecuting officers from escaping from the meshes of the law."

3. *McIntire v. Com.* (Ky.) 4 S. W. Rep. 1.

4. *State v. Holley*, 1 Brev. (S. C.) 35.

5. *State v. Hughes*, 2 Ala. 102; s. c., 36 Am. Dec. 411.

6. *In re Smith*, 4 Colo. 532. See *Kalloch v. San Francisco Superior*

Court, 56 Cal. 229; *Calvin v. State*, 25 Tex. 789.

When the supreme court reverses the judgment of the district court, based on a verdict rendered on a fatally defective indictment, it will command the district court to hold the defendant committed until the grand jury can present a new indictment. *Calvin v. State*, 25 Tex. 789.

Information—Dismissal.—The Supreme Court of California held, in the case of *Kalloch v. San Francisco Superior Court*, 56 Cal. 229, that Cal. Penal Code, section 809, where the prisoner has been proceeded against by information, and was committed without the oral testimony of the witnesses having been reduced to reading, and the information against him dismissed, that this fact will not constitute a bar to another information.

7. See also XI.

8. *Reeves v. State*, 20 Ala. 33. See tit. CAPTION, vol. 2, Am. & Eng. Ency. of Law 729.

It is said in *Reeves v. State*, 20 Ala. 33, that the caption is a part of every indictment, and need not be repeated in any part of it. See to the same effect *State v. Hopkins*, 7 Blackf. (Ind.) 494;

to state the style of the court, at which and the time and place, when and where the indictment was found with reasonable certainty.¹

b. NECESSITY, AND WHEN DISPENSED WITH.—Where an indictment is found by a court having general jurisdiction, no caption is necessary while the indictment remains in the court in which it was found.² But when it is removed to another court,

State *v.* Paine, 1 Ind. 163; s. c., Smith (Ind.) 73. The weight of authority seems to be that the caption is no part of the indictment, but only a part of the record. See *Noles v. State*, 24 Ala. 672; *Territory v. McFarlane*, 1 Mart. (La.) 216; *State v. Conley*, 39 Me. 78; *Com. v. Stone*, 69 Mass. (3 Gray) 453; *Com. v. Gee*, 60 Mass. (6 Cush.) 174; *State v. Freeman*, 21 Mo. 481; *Kirk v. State*, 6 Mo. 469; *State v. Wentworth*, 37 N. H. 196; *State v. Gary*, 36 N. H. 359; *People v. Bennett*, 37 N. Y. 117; *McGarry v. People*, 2 Lans. (N. Y.) 227; *State v. Brickell*, 1 Hawks. (N. C.) 354; *State v. Wasden*, N. C., Term R. 163; *State v. Creight*, 1 Brev. (S. C.) 169, 171, 172; s. c., 2 Am. Dec. 656; *State v. Williams*, 2 McC. (S. C.) 301; *Mitchel v. State*, 8 Yerg. (Tenn.) 514; *Barnes v. State*, 5 Yerg. (Tenn.) 186; *English v. State*, 4 Tex. 125; *State v. Thibau*, 30 Vt. 100; *State v. Brady*, 14 Vt. 353; *State v. Gilbert*, 13 Vt. 647; *Allen v. State*, 5 Wis. 329; *State v. McCarty*, 2 Pinney (Wis.) 513; s. c., 2 Chand. (Wis.) 199; 54 Am. Dec. 150, 151; *U. S. v. Thompson*, 6 McL. C. C. 56.

Amendment of Caption—In Court Where Indictment Found.—The caption being a part of the record, may be amended in the court where it was found to the same extent as any other part of the record. See *Noles v. State*, 24 Ala. 672, 694; *Reeves v. State*, 20 Ala. 33; *Farnum v. U. S.*, 1 Colo. 309; *State v. Paine*, 1 Ind. 163; s. c., Smith (Ind.) 73; *State v. Hopkins*, 7 Blackf. (Ind.) 494; *Territory v. McFarlane*, 1 Mart. (La.) 216; *Com. v. Hines*, 101 Mass. 33; *State v. Gary*, 36 N. H. 359; *State v. Brickell*, 1 Hawks. (N. C.) 354; *Brown v. Com.*, 78 Pa. St. 122; *English v. State*, 4 Tex. 125; *State v. Creight*, 1 Brev. (S. C.) 169; s. c., 2 Am. Dec. 656; *State v. Emmett*, 23 Wis. 632; *Allen v. State*, 5 Wis. 329; *State v. McCarty*, 2 Chand. (Wis.) 199; s. c., 54 Am. Dec. 150; *U. S. v. Thompson*, 6 McL. C. C. 56; *Rex v. Davis*, 1 Car. & P. 470; *Rex v. Brandon*,

Comb. 70; *Faulkner's Case*, 1 Saun. 249.

Same—In Appellate Court.—The caption of an indictment may be amended in the appellate court. *State v. Jones*, 2 N. J. L. (4 Halst.) 357; *State v. Williams*, 2 McC. S. Car. 301.

Same—How Made.—The amendment to the caption of an indictment should be made not by mutilating the record, but by subl. of marginal entries, new papers, or substituting new papers according to the circumstances of the particular case. *Norwood v. State*, 45 Md. 68, 76; *Walsh v. Smyth*, 3 Bland Ch. (Md.) 9; *Sewall v. Sullivan*, 108 Mass. 355; *Cook v. Berth*, 108 Mass. 73; *Com. v. Cheney*, 108 Mass. 33; *Luce v. Graham*, 4 Johns. Ch. (N. Y.) 170.

As to amendment of record see the matter fully discussed, *post*, this series, tit. RECORD.

It is said by the Supreme Judicial Court of Massachusetts in the case of *Com. v. Cheney*, 108 Mass. 33, 38, that "an amendment so made is not a new record, and does not give rise to a new cause of action. It is made *nunc pro tunc*, and has the same operation as if the record had been originally extended in the amended form. This has frequently been held in similar and analogous cases, even where the effect is to cut off intervening rights." *McCormick v. Carroll*, 103 Mass. 151; *Com. v. Field*, 93 Mass. (11 Allen) 488; *Hitchings v. Ellis*, 83 Mass. (1 Allen) 475; *Pratt v. Wheeler*, 72 Mass. (6 Gray) 520; *Balch v. Shaw*, 61 Mass. (7 Cush.) 282; *Baxter v. Rice*, 38 Mass. (21 Pick.) 197; *Johnson v. Day*, 34 Mass. (17 Pick.) 106; *Haven v. Snow*, 31 Mass. (14 Pick.) 28; *Atkins v. Sawyer*, 18 Mass. (1 Pick.) 351; s. c., 11 Am. Dec. 188; *Close v. Gillespey*, 3 Johns. (N. Y.) 526.

1. *State v. Gary*, 36 N. H. 359.

2. See *State v. Marion*, 15 La. An. 495; *Winn v. State*, 5 Tex. App. 621; *People v. Jewett*, 3 Wend. (N. Y.) 314; *State v. Nibb*, 18 Vt. 70; *Wagner v. People*, 4 Abb. App. Dec. (N. Y.) 509;

a caption must be affixed, and it is the clerk's duty to affix it; and this whether an entry of the finding be entered in the minutes or not.¹ In those cases where the court acts under a special commission, a caption is necessary.²

c. FORM AND CONTENTS GENERALLY.—The caption of an indictment should state with sufficient certainty its history, the name of the court, the judge presiding, the names of the grand jurors,³ and the time and place where found.⁴ The caption of

s. c., 2 Keyes (N. Y.), 684; affirming s. c., 54 Barb. (N. Y.) 367.

In the indictment itself the caption may be wholly omitted. State v. Nixon, 18 Vt. 70.

The caption to indictments is uniformly dispensed with. State v. Marion, 15 La. An. 495.

1. Tipton v. State, Peck (Tenn.) 308; People v. Jewett, 3 Wend. (N. Y.) 314.

A caption should accompany every indictment removed into a superior court; and it should exhibit the day and year, and that the indictment was taken on the oath of jurors of the county in which the crime was committed. Tipton v. State, Peck (Tenn.) 308.

2. State v. Wasden, 2 Tayl. (N. C.) 163.

Where the court sits by authority of a public law, everybody must take notice of it. State v. Wasden, 2 Tayl. (N. C.) 163.

3. Thomas v. State, 6 Miss. (5 How.) 20; People v. Bennett, 37 N. Y. 117; s. c., 93 Am. Dec. 551. While it is usually the custom to put the names of grand jurors in the caption, yet it has been decided that such insertion is not necessary.

What Should Show.—However it should distinctly appear that the jury was composed of twelve persons and were sworn; but it need not appear that they were charged. Reg. v. Watton, 6 Mod. 95. It has been said that it is necessary to describe the jurors as *probi et legales homines*, for this is a necessary indentment of law. See State v. Coleman, 27 La. An. 601; McGarry v. People, 2 Lans. (N. Y.) 227; State v. Cook, Riley (S. C.) 234; Rex v. Marsh, 6 Ad. & E. 236, note; s. c., 1 Nev. & P. 187; Aylett v. Rex, 3 Bro. P. C. 529; s. c., 6 Ad. & E. 247 note; Rex v. Davis, 1 Car. & P. 470; Rex v. Roysted, 1 Keny. 255; Rex v. Fearnley, 1 Leach (4th ed.) 425; s. c., 1 T. R. 316; Rex v. Waite, 4 Mod. 248; Rex v. Vaws, 1

Mod. 24; Reg. v. Butterfield, 2 Moo. & R. 522; Dakin's Case, 2 Saund. 290 a.

4. Thomas v. State, 6 Miss. (5 How.) 20; People v. Bennett, 37 N. Y. 117; s. c., 93 Am. Dec. 551.

It has been held that it is not necessary for an indictment to show that the grand jury was legally called before the court, or where the session of the court or grand jury was held, or that the indictment was returned into court. Harrington v. State, 36 Ala. 236.

And it is also said that indictments need not describe the court before which they are found, nor the jurors by whom they are found, nor need they aver that the court has jurisdiction of the offence. State v. Marion, 15 La. An. 495.

Stating Time and Place.—It is said that where, in the caption of an indictment, time and place are set forth with sufficient certainty to common intent, legal niceties will be regarded. State v. Brisbane, 2 Bay (S. C.) 451. It is said in Tenorio v. Territory, 1 New Mex. 279, that where in the caption of an indictment the time and place where it was found are set forth with certainty to a common intent, the character of the court designated, and the grand jury appeared to have been sworn from the body of the county, it is sufficient.

Defects in caption to an indictment may be heard and determined in a higher grade, only when removed there on writ of error or *certiorari*, and cannot be heard on a commission in arrest of judgment. State v. Thibreau, 30 Vt. 100; State v. Nixon, 18 Vt. 70; s. c., 46 Am. Dec. 135. See State v. Jones, 9 N. J. L. (4 Halst.) 357; s. c., 17 Am. Dec. 483.

Same—Amendment After Verdict.—It is said in the case of State v. Creight, 1 Brev. (S. C.) 169; s. c., 2 Am. Dec. 656, that the statement in an indictment that the presentment of the jury, is "upon their oaths" a part of the caption, and that if it has been omitted may be inserted even after conviction.

What the Caption of an Indictment

an indictment is not affected by striking out the count,¹ and a defect in the caption, for which an indictment will be quashed, must be of a clear and decisive character.²

d. DATES, FIGURES, ETC.—Indictments are required to be in the English language, yet this does not render objectionable an indictment which has the term at which it was found stated in the caption in figures,³ or in Arabic characters instead of words;⁴ and it has been held that it is no objection to an information or bill of indictment that the terms "anno domini" are used instead of the words "year of our Lord."⁵

e. OMISSIONS; USE OF IMPROPER WORDS.—The omission or unimportant connecting of formal words and phrases from the caption of an indictment will not vitiate it;⁶ neither will the

Should Show.—The caption of an indictment should show the time (*State v. Beckwith*, 1 Stew. (Ala.) 318; s. c., 18 Am. Dec. 46; *State v. Sexton*, 3 Hawks. (N. C.) 184; s. c., 14 Am. Dec. 584; *State v. Roach*, 2 Hayw. (N. C.) 352; s. c., 2 Am. Dec. 626, and place where the court was holden (*Carpenter v. State*, 5 Miss. (4 How.) 163; s. c., 34 Am. Dec. 116), and the indictment found (*Carpenter v. State*, 5 Miss. (4 How.) 163; s. c., 34 Am. Dec. 116); and must show that the grand jury were empanelled for the county in which the indictment was found, and the offence committed. *Mau-zau-mau-ne-kah v. U. S.*, 1 Pinney (Wis.) 124; s. c., 39 Am. Dec. 279; but need not state that the members of the grand jury and summoned and returned as such (*State v. Jones*, 9 N. J. L. (4 Halst.) 357; s. c., 17 Am. Dec. 483.)

1. *Duncan v. People*, 2 Ill. (1 Scam.) 456.

2. *State v. Hickman*, 8 N. J. L. (3 Halst.) 299.

3. *Johnson v. State*, 29 N. J. L. (5 Dutch) 453; see *Barnes v. State*, 5 Yerg. (Tenn.) 186.

It has been held by the supreme court of Tennessee that the caption of an indictment, "Circuit Court, November Term, 1829," in figures, is good, if it appear from the record that an indictment was found at that term. *Barnes v. State*, 5 Yerg. (Tenn.) 186.

Figures English.—It is held in some cases, and the American doctrine seems to favor that opinion, that figures are English; in any event they are adequate. See *State v. Tuller*, 34 Conn. 280; *Rawson v. State*, 19 Conn. 292; *State v. Voshall*, 4 Ind. 589; *Finch v. State*, 6 Blackf. (Ind.) 533; *Winfield v. State*, 3 G. Greene (Iowa) 339; *State v.*

Seamons, 1 G. Greene (Iowa) 418; *State v. Reed*, 35 Me. 489; s. c., 58 Am. Dec. 727; *Kelly v. State*, 11 Miss. (3 Smed. & M.) 518; *Covenhoven v. State*, 1 N. J. L. (Coxe) 258; *Berrian v. State*, 22 N. J. L. (2 Zab.) 9; *State v. Raiford*, 7 Port. (Ala.) 101; *State v. Smith, Peck* (Tenn.) 165; *State v. Hodgden*, 3 Vt. 481.

Some of the state legislatures have declared figures valid. See *Lazier v. Com.*, 10 Gratt. (Va.) 708; *Cady v. Com.*, 10 Gratt. (Va.) 776. While others have determined the other way. See *Hizer v. State*, 12 Ind. 330; *Hampton v. State*, 8 Ind. 336; *Johnson v. State*, 26 N. J. L. (2 Dutch) 313.

It is thought to be practically best in all instances for the pleader to write out the date in preference to inserting them in figures or roman characters. See *U. S. v. Prescott*, 2 Abb. U. S. 169, 172.

4. *State v. Smith, Peck* (Tenn.) 165.

5. *State v. Gilbert*, 13 Vt. 647.

6. See *Beauchamp v. State*, 6 Blackf. (Ind.) 299; *Com. v. Mullen*, 95 Mass. (13 Allen) 551; *State v. Moses*, 2 Dev. (N. C.) 452; *State v. Brady*, 14 Vt. 353; *Fizell v. State*, 25 Wis. 364.

"**And,**" "**For,**" "**Use.**"—An indictment commenced thus: "The grand jury within and the body of the county," etc. Held, that the omission of the word "for" after the word "and" did not vitiate the indictment. *State v. Brady*, 14 Vt. 353.

In North Carolina, an indictment concluding, "and the jurors," omitting the word "so," is sufficient. *State v. Moses*, 2 Dev. (N. C.) L. 452.

"**Court.**"—The omission of the word "court" after "superior" in the caption of an indictment is immaterial, when the record of the superior court shows that

use of any improper word.¹

f. TITLE OF ACTION; NAMING DEFENDANT.—An indictment may be good, although the title to the action is not set forth, the statute requiring that it be set forth being merely directory;² while the defendant must be charged by his name,³ where such name is known.⁴ The object in requiring the name of the person indicted to be set out is to enable the court to

the indictment was returned by the grand jury into that court, and that the clerk certified upon the back of the indictment that it had been so returned. *Com. v. Mullen*, 95 Mass. (13 Allen) 551.

"Then and There."—It is said that the omissions of the words "then and there," the words "duly summoned, empanelled, tried, sworn and charged enquiring in and for the county," in an indictment, is immaterial. *Fizell v. State*, 25 Wis. 364.

The caption of an indictment from the circuit court of Indiana showed that at, etc., on, etc., the jurors (naming them) appeared in court, and being duly sworn and charged, etc. *Held*, that the omission of the words "then and there," before the words "sworn and charged," was not material.

Beauchamp v. State, 6 Blackf. (Ind.) 299.

"Body of the County."—The omission of the words "body of the county," in an indictment, the caption of which recites that the grand jury were sworn and charged "inquiring in and for the county of," etc., is not an informality which prejudices the defendant or vitiates the indictment. *Fizell v. State*, 25 Wis. 364.

1. **"Impounded" for "Impanelled";** "by" for "to."—Thus it has been said that the substitution of the word "impounded" for "impanelled," in the caption of an indictment, does not require a reversal. *Williams v. State*, 3 Heisk. (Tenn.) 376.

And the substitution of "by" for "to" in the form in the text of an indictment does not spoil it. *Com. v. Griffin*, 105 Mass. 175.

2. *People v. Walters*, 1 Idaho, 271.

3. 1 Chit. Cr. L. 202.

4. **Where the name of the defendant is not known** and cannot be ascertained, its insertion will be excused on the ground of impossibility. The pleader is not required to do more than to set forth the charge with such distinctness, and only such, as the circumstances permit. 1 Bish. Crim. Proc., section 319, 493, 546. But where the name of the defendant is unknown to the grand

jury, it should be so stated in the indictment. *Brooster v. State*, 15 Ind. 190; *Com. v. Thornton*, 80 Mass. (14 Gray) 41; *Rushton's Case*, 2 Lea (Tenn.) 121; *State v. Snow*, 41 Tex. 596; *Morgenstern v. Com.*, 27 Gratt. (Va.) 1018; *Reg. v. Campbell*, 1 Car. & K. 82; *Rex v. Smith*, 6 Car. & P. 151; *Partridge v. Strange*, 1 Plow. 77, 85; *Buckley v. Thomas*, 1 Plow. 118, 129; *Rex v. Clark, Russ. & Ry.* 358; 1 Stark, Cr. Pl. (2nd ed.) 1888; 1 Chit. Cr. L. 212; because the want of knowledge will not avail to make the indictment good, unless such want of knowledge is properly averred in the instrument itself. See cases above cited and also *State v. Burgess*, 4 Ind. 606; *State v. Stucky*, 2 Blackf. (Ind.) 289; *Robertson v. Lambertville*, 38 N. J. L. (9 Vr.) 69; *Reg. v. Hicks*, 2 Moo. & R. 302.

Refusal to Disclose Name.—Where a defendant refuses to disclose his name, and his name cannot be discovered, his name may be designated as "to the grand jury unknown;" or he may be indicted under a fictitious name, with the statement that his real name is unknown. See *Geiger v. State*, 5 Iowa 484.

Name Partially Known.—Where the name of the defendant is known in part, so much of it as is known should be given, supplemented with the proper statement that a balance is not known, and cannot be ascertained by the grand jury. *Morning Star v. State*, 52 Ala. 405. See *Kelley v. State*, 25 Ark. 392; *Stone v. State*, 30 Ind. 115; *Kriel v. Com.*, 5 Bush. (Ky.) 362; *State v. Bayonne*, 23 La. An. 78.

Thus an indictment will not be held bad for the mere omission of the Christian name of the defendant, where it contains an allegation that his christian name is unknown of the jury, the indictment being in all other respects unobjectionable. See *Skinner v. State*, 30 Ala. 524, 525.

Where the initials only of a man's name are known to the grand jurors, an indictment which uses them only,

giving the reason for such use, will be sufficient. See *Jones v. State*, 11 Ind. 357; *Gardner v. State*, 4 Ind. 632.

But it is thought that there is no reason why a man should not be known by a single letter, though his name has many letters, and that for this reason if one is commonly designated by his initials, if his christian and middle name and their use in indictments indicates plainly who is meant that such initials are direct to the indictment. *Franklin v. State*, 52 Ala. 414; *State v. Seely*, 30 Ark. 162; *Mitchum v. State*, 11 Ga. 615; *Thompson v. State*, 48 Ala. 165; *Vandermark v. People*, 47 Ill. 122; *State v. Wall*, 39 Mo. 532; *State v. Brite*, 73 N. C. 26; *State v. Anderson*, 3 Rich. (S. C.) 176; *State v. Black*, 31 Tex. 560. See *Aikin v. State*, 35 Ala. 399; *Tweedy v. Jarvis*, 27 Conn. 42; *Stone v. State*, 30 Ind. 115; *Anderson v. State*, 26 Ind. 89; *Wassels v. State*, 26 Ind. 30; *State v. Pierce*, 8 Iowa 231; *Rice v. People*, 15 Mich. 9; *Easterling v. State*, 35 Miss. 210; *State v. Kean*, 10 N. H. 347, 351; s. c., 34 Am. Dec. 162; *U. S. v. Winter*, 13 Blatchf. C. C. 276. But in order to render such an indictment true, it is necessary that the individual is known by those initials. See *Franklin v. State*, 52 Ala. 415; *Diggs v. State*, 49 Ala. 311; *Graham v. State*, 40 Ala. 659; *Mitchum v. State*, 11 Ga. 615; *Vandermark v. People*, 47 Ill. 122; *U. S. v. Winter*, 13 Blatchf. C. C. 276; *Tardy v. State*, 4 Blackf. (Ind.) 152; *State v. Taylor*, 15 Kan. 420; *State v. McMillan*, 68 N. C. 440; *State v. Henderson*, 68 N. C. 348; *City Council v. King*, 4 McC. (S. C.) 487; *Hardin v. State*, 26 Tex. 113.

Same—Exception to Indictment.—

Where a man is indicted by the initials of his name simply, exception to the indictment must be opened by a plea in abatement before pleading the general merits; after verdict the indictment is good. *Smith v. State*, 8 Ohio 294. See *Gerrish v. State*, 53 Ala. 476; *State v. Webster*, 30 Ark. 166; *Com. v. Hamilton*, 81 Mass. (15 Gray) 480; *Com. v. Melling*, 80 Mass. (14 Gray) 388; *State v. McMillan*, 68 N. C. 440.

Indictment in Fictitious Name.—It has been said that when a person's name is unknown, the grand jury may charge him with the crime by a mere fictitious name, the same as though such name is known to be his real one, and that if he elects not to be tried by it he must plead such misnomer in abatement, giving his true name, which may

be substituted for the old one in a new indictment. See 1 Chit. Cr. L. 203. By statute in some states that on the tender of the plea the true name may be substituted for the fictitious one, and the trial proceeded with. *State v. Burns*, 8 Nev. 251; *Lasure v. State*, 19 Ohio St. 43. See also *People v. Kelly*, 6 Cal. 210; *Dukes v. State*, 11 Ind. 557; s. c., 71 Am. Dec. 370; *Com. v. Holley*, 69 Mass. (3 Gray) 458; *Haywood v. State*, 47 Miss. 1; *State v. Schricker*, 29 Mo. 265; *Turpin v. State*, 19 Ohio St. 540; *Rough v. Com.*, 78 Pa. St. 495.

Remedy—Where Defendant Indicted

by Wrong Name.—Where a defendant is indicted by a wrong or fictitious name, he can take advantage of such error only by a plea in abatement, in which plea he must set out his true name; where this is not done before pleading to the merits of the indictment, it will be conclusively presumed that the name by which he is designated in the indictment is his true name, whatever the real fact may be. See *Lynes v. State*, 5 Port. (Ala.) 236; s. c., 30 Am. Dec. 557; *Salisbury v. Gillett*, 3 Ill. (2 Scam.) 290; *State v. White*, 32 Iowa, 17; *Christian Soc. v. Macomber*, 44 Mass. (3 Metc.) 235; *Com. v. Lewis*, 42 Mass. (1 Metc.) 151; *Com. v. Dedham*, 16 Mass. 141, 146; *Carpenter v. State*, 8 Mo. 291; *Thompson v. Elliott*, 5 Mo. 188; *State v. Burns*, 8 Nev. 251; *State v. Duestoe*, 1 Bay (S. C.) 377; *Wilcox v. State*, 31 Tex. 586; *State v. Brunell*, 29 Wis. 435; 1 Chit. Cr. L. 202; *Hale P. C.* 238.

Addition to Name.—Under the early common law, where the party indicted was of "the degree of a knight or some higher dignity," it was required to set out in the indictment the name of the dignity (11 Hen. 4, 40; *Com. Dig.*, tit. Indictment (G. 1), 2 Co. Inst. 665, 666, 10 e, 4, 16). And if a person were indicted in respect to his office an addition of his office is necessary. *Com. Dig.*, tit. Indictment (G. 1).

The "Statute of Additions" (1 Hen. 5, ch. 5) passed in 1413 has never been applicable in this country (see *State v. McDowell*, 6 Blackf. (Ind.) 49), except in those states in which such statute has been accepted as common law, and where the crime of outlawry has heretofore existed, as in Virginia and Alabama. See *Dale Co. v. Gunter*, 46 Ala. 118, 137; *Com. v. Pearce*, 6 Gratt. (Va.) 669; *Com. v. Anderson*, 2 Va. Cas. 245; *Com. v. Hagerman*, 2 Va. Cas. 244; *Com. v. Hale*, 2 Va. Cas. 241;

identify the person on trial with the perpetrator of the offence;¹ this being the purpose in setting out the name of the defendant, the omission to insert his name in the title of an indictment where he is named in the body does not tend to prejudice his rights upon the merits, and for that reason is not fatal.² An indictment is not bad because the caption contains the middle initial of a defendant's name, and the body omits it.³

g. COMMENCEMENT—(1) *General Matters*.—The commencement of an indictment is the beginning of the body of that instrument.⁴ This initial clause of an indictment drawn in the

Republica v. Steele, 2 Dill. C. C. 92. The statute has been said to have been deemed of force, or some colonial or state statute of the same kind enacted, in Alabama (*Morgan v. State*, 19 Ala. 556), Georgia (*Studstill v. State*, 7 Ga. 2), Kentucky (*Com. v. Rucker*, 14 B. Mon. 228), Maryland (*State v. Hughes*, Kelly, Rep. Stats. 226; s. c., *State v. Hughes*, 2 Har. & McH. (Md.) 479), New Hampshire (*State v. Moore*, 14 N. H. 45), North Carolina (*State v. Newmans*, 2 Car. L. Repos. (N. C.) 171), Pennsylvania (Report of Judges, 3 Binn. (Pa.) 599; 615; *Com. v. France*, 2 Brewst. (Pa.) 568; *Com. v. Jackson*, 1 Grant (Pa.) 262), Virginia (*Com. v. Clark*, 2 Va. Cas. 401); but was rejected in Indiana (*State v. McDowell*, 6 Blackf. (Ind.) 49); as to Maine see *State v. Nelson*, 29 Me. 329; *State v. Bishop*, 15 Me. 122.

1. See *State v. Angel*, 7 Ired. (N. C.) L. 27.

Identification.—Stark says in his work on criminal pleading that "certainty seems to consist in the special description of the persons, places and things mentioned in the indictment with their respective NAMES, situation, nature, quantity, number, value and ownership." 1 Starke, Cr. Pl. (2nd ed.) 182.

2. *Dukes v. State*, 11 Ind. 557; s. c., 71 Am. Dec. 370.

3. *O'Connor v. State*, 97 Ind. 104.

Middle Names.—The law recognizes but one christian name, notwithstanding the number of middle names the party may have. (See *Rex v. Newman*, 1 Ld. Raym. 562; Co. Litt. 3 a, 1 Stra. Cr. Pl. (2nd ed.) 46. Consequently if a person is described in the indictment or in the proof on the trial as having one or more middle names or initials, such middle names or initials will be disregarded as forming no part of the christian surname. See *Edmundson v. State*, 17 Ala. 179; s. c., 52 Am. Dec.

169; *State v. Smith*, 12 Ark. (7 Eng.) 622; s. c., 56 Am. Dec. 287; *Miller v. People*, 39 Ill. 457; *Erschine v. Davis*, 25 Ill. 251; *Choen v. State*, 52 Ind. 347; *West v. State*, 48 Ind. 483; *Girous v. State*, 29 Ind. 93; *State v. Williams*, 20 Iowa 98; *Hart v. Lindsey*, 17 N. H. 235; s. c., 43 Am. Dec. 597; *People v. Cook*, 14 Barb. (N. Y.) 259; *State v. Manning*, 14 Tex. 402; *Dodd v. State*, 2 Tex. App. 58.

In some states, however, it is held that while the middle name or initial is not necessary to the validity of the indictment, yet if it is inserted, and as inserted is wrong, the defect will be fatal. See *Price v. State*, 19 Ohio 423; *State v. Hughes*, 1 Swan (Tenn.) 261.

4. *People v. Bennett*, 37 N. Y. 117; s. c., 93 Am. Dec. 551.

Distinction Between Commencement and Caption.—The commencement of an indictment is to be distinguished from the caption, which constitutes no part of an indictment. The commencement is as follows: "The jurors of the people of the state of —, in and for the body of the county of —, upon their oath present," etc. *People v. Bennett*, 37 N. Y. 117; s. c., 93 Am. Dec. 551.

In this case the courts say that: "A great deal of confusion, however, exists in the books, because the distinction between the commencement and the caption of an indictment, which has always existed in England, has not uniformly been maintained here. 'The whole question as to what a caption should contain,' says Bishop, in his treatise on Criminal Procedure (section 154), 'appears, when approached through the American books, draped in mist and girded about with darkness. Observing the proper distinction between the caption and the commencement of an indictment, no valid objection will be found to the one in this case. The caption is no part of the indictment. It consists wholly of the history of the

statutory form, which first charges that defendant has committed a crime, is merely formal; and if the body of the indictment sufficiently specifies the offence charged, and avers the facts constituting such offence, the indictment will be held good notwithstanding any defect in the commencement.¹

proceedings, when an indictment is removed from an inferior to a superior court."

Omission of Word "Present."—It has been held that the omission of the word "present," in the commencement of an indictment, is no valid objection to the indictment. See *State v. Freeman*, 21 Mo. 481.

1. *State v. Anderson*, 3 Nev. 254.

Thus it has been held that:

The fact that the prosecuting attorney elects to abandon the first count does not render the other counts bad for want of the formal introductory allegations which were in the first count only; the other counts beginning "the grand jurors aforesaid, upon their oaths aforesaid, do further present," etc. *State v. Dufour*, 63 Ind. 567.

Form of Commencement.—It is said in the case of *People v. Bennett*, 37 N. Y. 117, 122; s. c., 93 Am. Dec. 551, that the form of an indictment in many of our States, and which form is derived from England, is thus: The jurors of the people of the state of —, in and for the body of the county of —, upon their oath present, etc. It is held in *Vermont*, in the case of the *State v. Nixon*, 18 Vt. 70; s. c., 46 Am. Dec. 135, that the proper commencement for an indictment is: "The grand jurors for the people of the state of Vermont." The given form of commencement in Pennsylvania is said to be as follows: "The grand inquest of the Commonwealth of Pennsylvania inquiring in and for the county of —, upon their oaths and solemn affirmations respectfully do present." See *Brandt v. Com.*, 94 Pa. St. 290; *Turner v. Com.*, 86 Pa. St. 54; s. c., 27 Am. Rep. 683; *Campbell v. Com.*, 84 Pa. St. 187; *Hackett v. Com.*, 15 Pa. St. 95; *Com. v. Jackson*, 1 Grant (Pa.) 262; *Com. v. Sharpless*, 2 Serg. & R. (Pa.) 91; s. c., 7 Am. Dec. 632; *Sherban v. Com.*, 8 Watts (Pa.) 212; s. c., 34 Am. Dec. 460; *Comfort v. Com.*, 5 Whart. (Pa.) 437.

The legislatures of the various states, particularly in those states where codes of procedure have been adopted, have prescribed forms either directly or indirectly, which are to be followed in the

commencement of an indictment; in others there are variations from the forms given, either in that which is required or that which is customary, for illustrations in the various states. See the following cases: *Glenn v. State*, 60 Ala. 104; *Sanders v. State*, 55 Ala. 183; *Perkins v. State*, 50 Ala. 154; *Caldwell v. State*, 49 Ala. 34; *Diggs v. State*, 49 Ala. 311; *Schuster v. State*, 48 Ala. 199; *Anderson v. State*, 48 Ala. 665; s. c., 17 Am. Rep. 36; *McGuire v. State*, 37 Ala. 161; *Harrington v. State*, 36 Ala. 236; *Lowenthal v. State*, 32 Ala. 589; *Noles v. State*, 24 Ala. 672, 688; *Reeves v. State*, 20 Ala. 33, 35; *Morgan v. State*, 19 Ala. 556; *State v. Murphy*, 9 Port. (Ala.) 487; *State v. Bell*, 5 Port. (Ala.) 365; *Bridges v. State*, 37 Ark. 224; *McClure v. State*, 37 Ark. 426; *Walker v. State*, 35 Ark. 386; *Howard v. State*, 34 Ark. 433; *State v. Hinson*, 31 Ark. 638; *Bradley v. State*, 32 Ark. 704; *Dixon v. State*, 29 Ark. 165; *State v. Willis*, 4 Eng. (Ark.) 196; *People v. War*, 20 Cal. 117; *People v. Mills*, 17 Cal. 276; *People v. Saviers*, 14 Cal. 29; *Long v. State*, 12 Ga. 293; *McCutcheon v. People*, 69 Ill. 601; *Fairlee v. People*, 11 Ill. 1; *Nixon v. People*, 3 Ill. (2 Scam.) 267; *Manheim v. State*, 66 Ind. 65; *State v. Stewart*, 66 Ind. 555; *Howard v. State*, 64 Ind. 516; *Shepherd v. State*, 64 Ind. 43; *Mitchell v. State*, 63 Ind. 276; *State v. Howard*, 63 Ind. 502; *Batterson v. State*, 63 Ind. 531; *State v. Stephens*, 63 Ind. 542; *Edwards v. State*, 62 Ind. 34; *Snyder v. State*, 59 Ind. 105; *Mills v. State*, 52 Ind. 187; *Lovell v. State*, 45 Ind. 550; *Mains v. State*, 42 Ind. 327; s. c., 13 Am. Rep. 364; *Dukes v. State*, 11 Ind. 557; s. c., 71 Am. Dec. 370; *State v. Mohr*, 53 Iowa 261; *State v. Bauman*, 52 Iowa 68; *State v. Book*, 41 Iowa 550; s. c., 20 Am. Rep. 609; *State v. Jordan*, 39 Iowa 387; *State v. Close*, 35 Iowa 570; *State v. Reid*, 20 Iowa 413; *Rice v. State*, 3 Kan. 141, 146; *Com. v. Stephenson*, 3 Met. (Ky.) 226; *State v. Hurley*, 71 Me. 354; *State v. Goddard*, 69 Me. 181; *State v. Smith*, 65 Me. 257; *State v. Smith*, 67 Me. 328; *State v. Corson*, 59 Me. 137; *State v. Bartlett*, 55 Me. 200; *State v. Stevens*, 40 Me. 559; *State v. Conley*, 39 Me. 78; *Com-*

(2) *Naming State*.—It is thought that it is not necessary, either in the caption or in the body of the indictment, to allege that it is found or presented under the authority of the State, provided it be alleged in it that the crime charged to have been committed is "against the peace and dignity of the State of——," and that the grand jury making the presentment were impanelled and sworn to enquire for the body of the county wherein the indictment is found, that county being within the State.¹

v. Howe, 132 Mass. 250; *Com. v. Cohen*, 120 Mass. 198; *State v. Armington*, 25 Minn. 29; *State v. Davis*, 22 Minn. 423; *State v. Hatfield*, 72 Mo. 518; *State v. Osborne*, 69 Mo. 143; *State v. Cutter*, 65 Mo. 503; *State v. Freeman*, 21 Mo. 481; *State v. Ragan*, 22 Mo. 459; *State v. England*, 19 Mo. 386; *State v. Malim*, 14 Nev. 288; *Territory v. Seavilles*, 1 New Mex. 119; *Keefe v. People*, 40 N. Y. 348; *People v. Bennett*, 37 N. Y. 117, 122; s. c., 93 Am. Dec. 551; *Quinlan v. People*, 6 Park. C. C. (N. Y.) 9; *People v. Cooke*, 6 Park. C. C. (N. Y.) 31; *Cantor v. People*, 5 Park. C. C. (N. Y.) 217; *Hayes v. People*, 5 Park. C. C. 325; *Cohen v. People*, 5 Park. C. C. (N. Y.) 330; *Didieu v. People*, 4 Park. C. C. (N. Y.) 593; *People v. Thoms*, 3 Park. C. C. (N. Y.) 256; *People v. Sweetman*, 3 Park. C. C. (N. Y.) 358; *Goodrich v. People*, 3 Park. C. C. 622; *People v. Smith*, 1 Park. C. C. (N. Y.) 329; *Woodford v. People*, 5 T. & C. (N. Y.) 539; *State v. Walker*, 87 N. C. 541; *State v. Whitehurst*, 70 N. C. 85; *State v. Jasper*, 4 Dev. (N. C.) 323; *State v. Cobb*, 1 Dev. & B. (N. C.) 115; *State v. Smith*, 3 Hawks (N. C.) 378; *State v. Clark*, 8 Ired. (N. C.) 226; *State v. Tolever*, 5 Ired. (N. C.) 452; *State v. Farmer*, 4 Ired. (N. C.) 224; *State v. Huntley*, 3 Ired. (N. C.) 418; s. c., 40 Am. Dec. 416; *State v. Davis*, 2 Ired. (N. C.) 153; *State v. Williams*, 7 Jones (N. C.) 446; s. c., 78 Am. Dec. 248; *Egner v. State*, 25 Ohio St. 464; *Davis v. State*, 19 Ohio St. 270; *Fouts v. State*, 8 Ohio St. 98; *Robbins v. State*, 8 Ohio St. 131; *Clarke v. State*, 8 Ohio St. 630; *Mackey v. State*, 3 Ohio St. 362; *Brandt v. Com.*, 94 Pa. St. 290; *Turner v. Com.*, 86 Pa. St. 54; s. c., 27 Am. Rep. 683; *Campbell v. Com.*, 84 Pa. St. 187; *Hackett v. Com.*, 15 Pa. St. 95; *Com. v. Jackson*, 1 Grant (Pa.) 262; *Com. v. Sharpless*, 2 Serg. & R. (Pa.) 91; s. c., 7 Am. Dec. 632; *Sherban v. Com.*, 8 Watts. (Pa.) 212; s. c., 34 Am. Dec. 460; *Comfort v. Com.*, 5 Whart. (Pa.) 437; *State*

v. Saylor, 6 Lea (Tenn.) 586; *Conner v. State*, 6 Tex. App. 455; *Ferguson v. State*, 6 Tex. App. 504; *Garling v. State*, 2 Tex. App. 44; *Johnson v. Com.*, 29 Gratt. (Va.) 796; *State v. Lusk*, 16 W. Va. 767; *State v. Baltimore & Ohio R. Co.*, 15 W. Va. 362; s. c., 36 Am. Rep. 803; *U. S. v. Paul*, 31 U. S. (6 Pet.) 141; *U. S. v. Wilson*, Bald. C. C. 78; *U. S. v. Dawson*, Hemp. C. C. 643.

1. *Holt v. State*, 47 Ark. 196; *State v. Blakely*, 83 Mo. 359; *State v. Foster*, 61 Mo. 549; *State v. Delue*, 1 Chand. (Wis.) 166.

Thus it is said not to be necessary that an indictment should state that it was presented by the grand jury "in the name and by the authority of the state." *Holt v. State*, 47 Ark. 196; *Savage v. State*, 18 Fla. 909; *Allen v. Com.*, 2 Bibb (Ky.) 210; *State v. Johnson*, 1 Walk. (Miss.) 392; *State v. England*, 19 Mo. 386; *Alderman v. State*, (Neb.) 38 N. W. Rep. 36; *Davis v. State*, 19 Ohio St. 270; *Re Oliver*, 21 S. C. 318. *Compare Horne v. State*, 37 Ga. 80; s. c., 92 Am. Dec. 49; *Whitesides v. People*, Breese (Ill.) 4; *State v. Cutter*, 65 Mo. 503; *Saine v. State*, 14 Tex. App. 144.

It is necessary that all criminal prosecutions shall be conducted "in the name and by the authority of the State," but it is not essential that an indictment shall recite those or equivalent words. It is enough that the record shows that the prosecution is "so conducted." *Savage v. State*, 18 Fla. 909.

An indictment in the name of the commonwealth and concluding against its peace and dignity, although it does not express that it is found by the authority of the commonwealth, is sufficient. *Allen v. Com.*, 2 Bibb (Ky.) 210.

Under Const. Neb., art. 6, § 24, requiring that all process shall run in the name of the State of Nebraska, and the prosecution shall be conducted in the name of the State of Nebraska, and information filed in the district court

And an indictment which states that the grand jury were summoned from the body of the county is not defective because the name of the State is given only in the caption.¹

(3) *Time, Place, Venue.*²—*a. General Averments as to Time and Place.*—While it is necessary that the caption of an indictment should set forth with sufficient certainty the court in which, the jurors³ by whom, and the time and place at which, the indict-

with a caption of "The State of Nebraska," and prosecuted in the name of "The State of Nebraska," is sufficient. *Alderman v. State* (Neb.), 38 N. W. Rep. 36.

An indictment commencing with the words "the State of Mississippi," and concluding "against the peace and dignity of the same," is sufficient. *State v. Johnson*, 1 Miss. (Walk.) 292.

An indictment commenced thus: "State of Missouri, county of Hickory. In the Hickory circuit court, September term, A. D. 1852. The grand jurors for the State of ——— empanelled, charged, and sworn to enquire," etc., etc. *Held*, sufficiently good. *State v. England*, 19 Mo. 386.

Doing Business Without Licence.—

Where, in a prosecution for doing business without a municipal licence, it substantially appears that the proceeding is in the name of the State, it is sufficient. *Re Oliver*, 21 S. C. 318.

Abbreviating Name of State.—An indictment is not fatally defective under Mo. Const. 1865, art. 6, § 26, because headed "State of Mo." instead of "State of Missouri." The injunction therein contained that all prosecutions shall be conducted in the name of the "State of Missouri" is directory merely, and a failure to comply with that requirement is simply an irregularity cured by the statute. (Wagn. Stat. 420, § 15. See also Wagn. Stat. 1090, § 27.) *State v. Foster*, 61 Mo. 549.

An indictment alleging the presentment to be made "in behalf of said State of Iowa," the caption being "State of Iowa, M. county," shows that the prosecution is conducted "in the name and by the authority of the State" according to the constitution, art. 5, § 6. *Wrocklege v. State*, 1 Iowa 167; *Baurse v. State*, 1 Iowa 374.

"In the Name of the State."—The constitution of Iowa requires criminal proceedings to be conducted in the name of "the State of Iowa." *Held*, that a prosecution in the name of "State

of Iowa" was valid. *Harriman v. State*, 2 G. Greene (Iowa) 270.

Whether it is necessary that the caption of an indictment should state that the jurors were sworn "for the people of the State of New York and the body of the county of" instead of "for the body of the county of" merely, *quære*. *People v. Fish*, 4 Park. Cr. Cas. (N. Y.) 206.

Texas Penal Code, art. 905, provides that offences against the State shall be prosecuted in the name of the State, does not preclude a municipal corporation from prosecuting in its own name an offence against its penal ordinances; art. 916 providing that a defendant shall not be discharged for any informality, etc. *Ex parte Boland*, 11 Tex. App. 159.

However, in Georgia, indictment should charge defendant "in the name and behalf of the citizens of Georgia," but an exception on the ground of failure to so charge must be taken before the trial, and if not so taken will not be good in arrest of judgment. *Horne v. State*, 37 Ga. 80; s. c., 92 Am. Dec. 49. And in Illinois, if an indictment does not contain the words "in the name and by the authority of the people of the State of Illinois," it is bad. *Whitesides v. People*, 1 Breese (Ill.) 4.

An indictment purporting to be found "by the grand jurors of the county of Wayne in the State of Missouri" is bad; the constitution requires all prosecution to be conducted in the name of the State. *State v. Cutter*, 65 Mo. 503.

An information is fatally defective in omitting the words "of Texas" after the commencement, "In the name and by the authority of the State." The requirement is a constitutional one. *Saine v. State*, 14 Tex. App. 144.

1. *State v. Brooks*, 94 Mo. 121. See *State v. Delue*, 1 Chand. (Wis.) 166.

2. See also IX., § 9 & 10.

3. In New York it is not necessary that the caption should set out the names of the grand jurors by whom

ment was found,¹ yet it need not state when and where the court was held, at which it was found, or the name of the judge who held the court.²

b. Time of Finding.—An omission in the caption of an indictment to state the time of the finding is not fatal³ where the certificate of the clerk, endorsed thereon, gives the date of return and presentment.⁴

c. Designating or Describing Court—*c.1 Necessity and Sufficiency of Description.*—The caption to an indictment should set forth the name of the court in which the indictment is found.⁵ And if the name of the court is in the caption, the body of the indictment need not show before what court it was found.⁶ Where

the indictment was found. *People v. Willson*, 109 N. Y. 345.

1. *State v. Williams*, 2 McC. (S. C.) 301.

2. *People v. Willson*, 109 N. Y. 345.

3. See *Com. v. Hines*, 101 Mass. 33; *Burgess v. Com.*, 2 Va. Cas. 483; *Haught v. Com.*, 2 Va. Cas. 3.

4. *Com. v. Hines*, 101 Mass. 33. In this case the court say that "in our practice, a caption is indeed affixed to every indictment and returned with it by the grand jury; and is so far a part of the indictment that it may be referred to in order to ascertain the county and state in and for which the indictment is found. *Com. v. Edwards*, 70 Mass. (4 Gray) 1; *Com. v. Fisher*, 73 Mass. (7 Gray) 492. But defects in the title of the court as stated in the caption may be supplied by reference to the certificate endorsed by the clerk upon the indictment at the time of its return into court. *Com. v. Mullen*, 95 Mass. (13 Allen) 551. In the matter of time, especially, the caption is not the sole evidence; for the caption is usually entitled as of the first day of the term; and yet an indictment with such a caption may be presented to a grand jury empanelled, and for an offence committed since that day, and may be proved by referring to the clerk's certificate thereon to have been returned after the day on which it alleges the offence to have been committed. *Com. v. Stone*, 69 Mass. (3 Gray) 453; *Com. v. Colton*, 77 Mass. (11 Gray) 1.

5. See *U. S. v. Upham*, 2 Montana 170; *Mau-zau-mau-ne-kah v. U. S.*, 1 Pinney (Wis.) 124; s. c., 39 Am. Dec. 279.

It has been questioned whether the stated commencement of the name of

the court and the term at which the indictment was found is not surplusage, and, if not surplusage, if it is not useless. See *Bell v. Com.*, 8 Gratt. (Va.) 600.

Naming Court Not in Existence.—An indictment preferred as if in court which has no existence, is fatally defective. Thus, an indictment "in the circuit court of said territory," a court which does not exist, whereas it should have been "in the district court," etc., is bad. *Mau-zau-mau-ne-kah v. U. S.*, 1 Pinney (Wis.) 124; s. c., 39 Am. Dec. 279.

A caption describing the indictment as found in the United States district court of the territory of Montana is irregular, for that is not the proper title of any court; but the error does not necessarily vitiate the indictment. 1874. *U. S. v. Upham*, 2 Montana 170.

A caption "in the district court . . . having and exercising the same jurisdiction in all such cases as is vested in the circuit and district courts of the United States," held sufficient. *U. S. v. Spaulding*, 3 Dakota 85.

6. *Dean v. State*, Mart. & Yerg. (Tenn.) 127.

A caption stating that, "at a court of oyer and terminer and general gaol delivery, held, etc., before the honorable G. H. F., one of the justices, etc., and J. G. etc., their fellows, it is presented," sufficiently indicates the court to whom the grand jury made their presentment. *State v. Price*, 11 N. J. L. (6 Halst.) 203.

Where an indictment had this caption: "State of North Carolina, Franklin county, March sessions," it was held to be a sufficient designation of the court before which it was taken. *State v. Jeffreys*, C. & N. (N. C.) 364.

the caption of an indictment sets forth the quantity without entitling it of the court, it is sufficient.¹

c.² Naming Justices.—The caption of an indictment ought to show distinctly the names and style of office of the judges composing the court to which it is presented; if it does not, the indictment will be quashed on motion.²

c.³ Place of Holding Court Generally.—The caption of an indictment should show the place where the court was held and the indictment found, and that the grand jury were drawn from the county where the offence was committed.³ But an indictment will not be defective because the caption only shows that it was found at a term of the "city court," without saying at what place, if the record names the city.⁴

c.⁴ County or District.—The caption of an indictment should show within which county the court was held;⁵ but where the

1. *Taylor v. Com.*, 2 Va. Cas. 94; *Burgess v. Com.*, 2 Va. Cas. 483.

2. *State v. Zule*, 10 N. J. L. (5 Halst.) 348.

It is said in the case of *Tenorio v. Territory*, 1 New Mex. 279, that the caption need not mention the name of the judge holding the court.

3. See *Lusk v. State*, 64 Miss. 845; *Carpenter v. State*, 5 Miss. (4 How.) 163; s. c., 34 Am. Dec. 116.

It has been said that an indictment with this caption: "Commonwealth of Massachusetts, Essex, to wit: At the court of common pleas, begun and holden at Salem within and for the county of Essex," on a certain day, sufficiently shows that it was found at a court held in this commonwealth. *Com. v. Fisher*, 73 Mass. (7 Gray) 472.

An indictment with the following caption: "City of B., to wit: At the municipal court for the town of B., now by an act, etc., incorporated into a city, etc., begun, etc., for said city and county of S., on, etc. The jurors, etc., present that N. J. at B. aforesaid," etc., sufficiently expresses the jurisdiction, name and place of session of the court. *Com. v. James*, 18 Mass. (1 Pick.) 375.

4. See *Bonner v. State*, 55 Ala. 242; *Harrison v. State*, 55 Ala. 239; *People v. Connor*, 17 Cal. 354.

The styling of the court, in an indictment, "court of sessions of the city and county of San Francisco," was held a proper entitling of the court. *People v. Connor*, 17 Cal. 354.

5. *Overton v. State*, 60 Ala. 73; *Anderson v. State*, 104 Ind. 467; *State v. Mathis*, 21 Ind. 277; *State v. Crittenden*, 38 La. An. 448; *State v. Conley*, 39 Me. 78; *State v. Moore*, 24 S. C. 150; s. c., 58 Am. Rep. 241; *State v. Hunter*, Peck (Tenn.) 166; *State v. Fields*, Peck (Tenn.) 140.

Where an indictment commenced: "State of Maine, Cumberland, ss. At the supreme court begun and holden at Portland, within the county of Cumberland," it was held that this was sufficient to show that the court at which the indictment was found was holden for that county in the State of Maine. *State v. Conley*, 39 Me. 78.

The caption of the indictment setting forth the state, parish and district, an averment that the crime was committed in the state, parish and district aforesaid is sufficient. *State v. Crittenden*, 38 La. An. 448.

Upper Marginal Title.—The criminal code makes the caption and upper marginal title for many purposes a preliminary part of the indictment; and when the name of the state there appears, it sufficiently indicates that the county is within the state. *Anderson v. State*, 104 Ind. 467.

Same.—In an Information.—In an information, the statement in the caption of the title of the court to which the information is presented is sufficient, without naming the county. *State v. Mathis*, 21 Ind. 277.

Name of County in German.—The rule that the court will take judicial notice of the counties of the state,—applied, where the caption of an indictment had the name of the county printed in German letters, and the word "Wadison," recognized to indicate "Madison." *Overton v. State*, 60 Ala. 73.

county was omitted from the caption of an indictment, the defect is not fatal because the caption may be omitted.¹

c. *Term or Session of Court.*—The caption of an indictment should set forth the term or session of the court at which the indictment was found;² this is sufficiently done where the day on which the indictment was found is given.³ The caption is sufficiently explicit where it states that the indictment was found at the term of the court by certain men duly empanelled, sworn and charged as grand jurors in and for the county at the term;⁴ and the indictment will not be vitiated by the fact that the wrong term of court is stated in the caption, the record showing where it was found.⁵

Naming Wrong District.—It is no objection to an indictment entitled in the district court, that the first district is named instead of the second; for the number of the district is no part of the title of the court. *State v. Munch*, 22 Minn. 67.

Illegally Marrying a Woman.—It is not necessary to state in the caption of an indictment for illegally marrying a woman, knowing her to be the wife of another man, that the defendant was apprehended in the county where he is indicted, when the offence is alleged to have been committed in another county. *Houser v. People*, 46 Barb. (N. Y.) 33.

1. *State v. Moore*, 24 S. C. 150; s. c., 58 Am. Rep. 241.

2. It has been said that the defendant cannot object that the caption does not find in what court nor at what term the indictment was found. *Kirk v. State*, 6 Mo. 469.

3. *People v. Beatty*, 14 Cal. 566. See *Com. v. Hamilton*, 81 Mass. (15 Gray) 480; *Com. v. Stone*, 69 Mass. (3 Gray) 453; *State v. Wentworth*, 37 N. H. 196; *State v. Gary*, 36 N. H. 359; *Smith v. State*, 9 Humph. (Tenn.) 9.

A caption of an indictment as follows: "At a term of the circuit court for the county of Portage, in the state of Wisconsin, begun and held at the court house, in the village of Clover, in the county of Portage aforesaid (stating the time when and the judge by whom said term was held), the jurors for the grand jury of the state of Wisconsin aforesaid, good and lawful men, duly summoned, empanelled, tried and sworn, enquiring in and for the body of the county of Portage aforesaid, on their oaths aforesaid, do present," sufficiently shows before which court the prisoner was charged. *Benedict v. State*, 12 Wis. 313.

Where the caption to an indictment

shows that the court was opened on the first day of the term, by the clerk, at the time and place prescribed by law, and adjourned by him from day to day, until the appearance of the judge, it will be presumed that the court was held on each day at the same place. *Smith v. State*, 9 Humph. (Tenn.) 9.

An indictment, which purports in its caption to have been found on the first day of the term, but charges an offence of a later date, may be shown, by reference to the clerk's certificate endorsed thereon, to have been actually returned into court after this date. *Com. v. Stone*, 3 Gray (Mass.) 453.

An indictment purporting in the caption to have been found at the superior court holden on a certain day, which is the first day of the term, is good, although in fact found on a subsequent day of the same term. *Com. v. Hamilton*, 15 Gray (Mass.) 480.

The caption of an indictment, alleging that it was found at a specified term of the supreme judicial court, is not defective or imperfect, inasmuch as the terms of that court are fixed by public law; and when the term is stated, with the time and place of holding it, it is sufficiently stated and sufficiently appears, with reasonable certainty, whether it was found at a trial or law term of that court. *State v. Gary*, 36 N. H. 359; *State v. Wentworth*, 37 N. H. 196.

The sessions court of the county of San Francisco is well described in an indictment as the court of the city and county of that name, the two being contemporaneous. *People v. Beatty*, 14 Cal. 566.

4. *Engleman v. State*, 2 Ind. 91; s. c., 52 Am. Dec. 494.

5. *Firby v. State*, 59 Tenn. (3 Bax.) 358.

Defective Description in Caption.—An

(4) *The Grand Jury*¹—(a) *Stating Name and Number*.—The names of the grand jurors by whom an indictment is found need not be stated therein;² the proper place to state the names of the grand jury is in the caption of the indictment;³ and where

indictment is not invalidated by a defective description in its caption of the term of court at which it was found, if the clerk's certificate gives the true date. *Com. v. Smith*, 108 Mass. 486.

1. As to the return and selection and the bringing in of the grand jury under the various statutory provisions, see tit. GRAND JURY, vol. 9, 1.

2. *People v. Haynes*, 55 (Barb.) N. Y. 452; s. c., 38 How. (N. Y.) Pr. 371; *People v. Bennett*, 37 N. Y. 117; s. c., 93 Am. Dec. 551; 4 Abb. Pr. N. S. 89. See *State v. Dayton*, 23 N. J. L. (3 Zab.) 49; s. c., 53 Am. Dec. 270.

Number of Grand Jurors.—For a full description of the number of grand jurors required in the various states to return a valid indictment, see this series, tit. GRAND JURY.

3. See *State v. Murphy*, 9 Port. (Ala.) 487; *State v. Vincent*, 91 Mo. 662; *People v. Bennett*, 37 N. Y. 117; 4 Abb. Pr. N. S. 89; s. c., 93 Am. Dec. 551.

The venire of the grand jury and the names of the grand jurors are a part of the caption, and need not be introduced in an indictment. *State v. Murphy*, 9 Port. (Ala.) 487.

Where the record shows that the grand jurors were sworn, received their charge, and retired to consider, etc., and, under a subsequent date, returned to the bar, and through their foreman delivered the indictment, it was not necessary that the names of the jurors should be repeated. *State v. Vincent*, 91 Mo. 662.

When Caption Sufficient.—It is thought that the caption of an indictment is sufficiently explicit where it states that the indictment was found at a term of the court by certain men, duly empanelled, sworn and charged as grand jurors, in and for the county at that term. *Engleman v. State*, 2 Ind. 91; s. c., 52 Am. Dec. 494; because it is sufficient if the indictment shows upon its face that the grand jury were of the number and qualification required by law. *McGarry v. People*, 2 Lans. (N. Y.) 231.

Stating Names of Grand Jurors in Indictment—History of Doctrine.—The supreme court of New York say in the

case of *People v. Bennett*, 37 N. Y. 117; s. c., 93 Am. Dec. 551; 4 Abb. Pr. N. S. 89; that "we have inherited, from England, many technical rules relating to criminal practice, which have long since become obsolete. They had their origin in that period of English history when the most trivial offence was punishable with death, and when it was almost a foregone conclusion, if the sword of justice was drawn, that it must be returned bathed in blood. It is not to be wondered at that humane judges should have been found, in such an age, willing to save life by attaching importance to objections, purely technical, to the form of the indictment which places the accused on trial. An advanced civilization, and a more humane administration of the law, have removed the causes which gave rise to these technical rules, and there is, therefore, no good reason for retaining them: *cessante ratione, cessat ipsa lex*. So thought our legislature, when it passed the statute of jeofails, and enacted that 'no indictment should be deemed invalid by reason of the omission of the defendant's title or occupation, or by a misstatement of them, or of the town or county of his residence, where the defendant shall not be prejudiced thereby,' or by an omission of the words 'with force of arms,' or words of similar import, or by an omission to charge any offence to have been committed contrary to statute, or by reason of any other defect or imperfection in matters of form, which shall not tend to the prejudice of the defendant. This statute swept away many of the objections to the forms of indictments, which at times seriously interfered with an effective administration of criminal justice.

"A more liberal practice began to prevail, at an early day, in England. Bacon says: 'Some indictments have been quashed for an omission of the names of jurors, others, for the want of the words good and lawful men, and others, for want of the words and then and there sworn and charged, and others, for want of the words to inquire for the king and for the body of the country; yet, of late years, excep-

the names of the grand jurors are stated in the caption, and the names as there stated do not correspond with the names in the panel, the objection will not be fatal.¹

(b) *Showing Qualifications*—*b.*¹ *Generally*.—It is not necessary that the caption to an indictment should state at length the qualifications of the grand jurors, nor recite all the facts which give the court jurisdiction, when the court in which the indictment is found is one of general criminal jurisdiction,² it being sufficiently explicit to state in the indictment that it was found at a term of the court by certain men duly empanelled, sworn and charged as grand jurors in and for the county at that term,³ where it shows upon its face that the grand jury were of the number and qualification required by law.⁴

*b.*² *Good and Lawful Men*.—Accuracy in the caption of an indictment showing that the grand jurors who return the same are good and lawful men of the county, etc., is not important where every facility is offered to the defendant to ascertain the qualifications of the jurors.⁵ It is not necessary to set forth the specific qualifications of each grand juror, it being sufficient to describe them simply as "good and lawful men."⁶

tions of this kind have not been much favored, especially if the indictment were in a superior court, and that which is omitted be, in common understanding, implied in what is expressed. (Bac. Abr.; Indictment, I.) This is a sound rule, and one that it is safe to follow. It does not deprive an accused party of a fair trial on the merits, nor does it, on the other hand, open an easy door for an escape on technical grounds."

1. State v. Dayton, 23 N. J. L. (3 Zab.) 49; s. c., 53 Am. Dec. 270. See State v. Norton, 23 N. J. L. (3 Zab.) 33.

Some of the cases go so far as to hold that it is unnecessary, either in the caption or in the body of an indictment, to state the name or number of the grand jury, it being sufficient if the indictment shows upon its face that the grand jury were of the number and qualification required by law. Young v. State, 6 Ohio 435; McGarry v. People, 2 Lans. (N. Y.) 231, citing People v. Bennett, 37 N. Y. 117; s. c., 93 Am. Dec. 551.

The caption of an indictment declaring that it was found by "the grand jurors of the state of Wisconsin, to-wit, twelve good and lawful men," the statute of the state requiring that there shall be not more than twenty-three nor less than sixteen persons sworn on any grand jury, is bad, and the indictment, of which it is part, will not support a conviction. Fitzgerald v. State, 4 Wis. 395.

2. State v. Pearce, 14 Fla. 153; Wein-zorpfin v. State, 7 Blackf. (Ind.) 186; State v. McCarthy, 2 Pinn. (Wis.) 513; s. c., 2 Chand. (Wis.) 199; 54 Am. Dec. 150.

A caption of an indictment which shows the indictment to have been found by a grand jury at a circuit court, held at, etc., on, etc., is sufficient. It need not specify the qualifications of the jurors, nor allege them to be good and lawful men. Wein-zorpfin v. State, 7 Blackf. (Ind.) 186.

Caption, Venue, etc.—It is not essential that an indictment should commence with the words "the grand jurors of the State of Florida." It is sufficient if it commence with the words "the jurors" of the State of Florida, where the other entries in the record show that it was found by a grand jury. State v. Pearce, 14 Fla. 153.

3. Engleman v. State, 2 Ind. 91; s. c., 52 Am. Dec. 494; Mau-zau-mau-nekah v. U. S., 1 Pinn. (Wis.) 124; s. c., 39 Am. Dec. 559.

4. State v. Dayton, 23 N. J. L. (3 Zab.) 49; s. c., 53 Am. Dec. 270; People v. Bennett, 37 N. Y. 117; s. c., 93 Am. Dec. 551; People v. Haynes, 55 Barb. (N. Y.) 452; s. c., 38 How. (N. Y.) Pr. 371; McGarry v. People, 2 Lans. (N. Y.) 231.

5. Cornelius v. State, 7 Eng. (Ark.) 782.

6. State v. Price, 11 N. J. L. (6 Halst.)

(c) *Showing Organization, etc.*—It is thought that it is not necessary to set out in the caption to an indictment that the members of the grand jury were properly summoned and returned as such, and that they were duly organized.¹

(d) *Showing County from Which Empanelled.*—d.¹ *Necessity.*—An indictment must appear by direct averment to have been pre-

203. See *Beauchamp v. State*, 6 Blackf. (Ind.) 299; *Jerry v. State*, 1 Blackf. (Ind.) 395; *Benedict v. State*, 12 Wis. 313.

"Good and Lawful Men."—It is sufficient to describe the grand jurors, in the indictment, as "good and lawful men," those words including every qualification required by law. *Jerry v. State*, 1 Blackf. (Ind.) 395.

The caption of an indictment from the circuit court of Indiana represented the grand jurors that found the bill to be "good and lawful men." *Held*, that this was a sufficient description of the qualifications of the jurors. *Beauchamp v. State*, 6 Blackf. (Ind.) 299.

A caption of an indictment as follows: "At a term of the circuit court for the county of Portage, in the State of Wisconsin, begun and held at the court house, in the village of Clover, in the county of Portage aforesaid (stating the time when and the judge by whom said term was held), the jurors for the grand jury for the state of Wisconsin aforesaid, good and lawful men, duly summoned, empanelled, tried and sworn, enquiring in and for the body of the county of Portage aforesaid, on their oaths aforesaid, do present," sufficiently shows that the indictment was prosecuted by a jury of good and lawful men who were duly summoned, empanelled, tried and sworn. *Benedict v. State*, 12 Wis. 313.

Same—Need Not be Set Out in Indictment.—It is unnecessary to set out the words "good and lawful men," in an indictment for murder, in *South Carolina*. *State v. Yancy*, 1 Const. Rep. Tread., (S. C.) 237.

Meaning of "Good and Lawful Men."—The words "good and lawful men" in the caption of an indictment, inquest or the like, mean "freeholders." See *State v. Glasgow*, Conf. Rep. (N. C.) 38; s. c., 2 Am. Dec. 629. In this case the court say: "With respect to all those reasons which proceed upon the ground that the expressions 'good and lawful men' are inserted in the caption and commission, instead of the word 'freeholders,' the answer is that these words are to be understood according to the subject-matter relative to which

they are applied. In this instance, the words are used 'as forming an inquest; and an inquest formed of good and lawful men must be of freeholders. *Liberos et legales homines* are the terms which have always been used in the *venire facias*, and their legal import and signification is freeholders, without just exception. 3 Bl. Com. 351; 4 Bl. Com. 350. But even an objection to the caption of an indictment, founded in the omission of such words, ought not to prevail, especially if the indictment be in a superior court, and that which is omitted be in common understanding implied in what is expressed. 2 Hawk. ch. 25, § 126."

1. *Mackin v. People*, 115 Ill. 313; *Ford v. State*, 112 Ind. 373; *State v. Brooks*, 94 Mo. 121; 7 S. W. Rep. 24; *State v. Jones*, 9 N. J. L. (4 Halst.) 357; s. c., 17 Am. Dec. 483; *Beman v. State*, 2 N. J. L. (Penn.) 9; *McBean v. State*, 3 Heisk. (Tenn.) 20; *Turner v. State*, 9 Humph. (Tenn.) 119; *DeOlles v. State*, 20 Tex. App. 145.

The facts necessary to a proper organization of the grand jury, may appear either on the face of the indictment or in the caption of the record. The averment that they "do present and say," etc., need not contain the words "upon their oaths aforesaid." *McBean v. State*, 3 Heisk. (Tenn.) 20.

Where an indictment recites that it was presented by the grand jurors, duly elected, etc., the legal presumption is that the grand jury was a legal one. *De Olles v. State*, 20 Tex. App. 145.

The record showing nothing to the contrary it will be presumed that the necessity existed for calling the special grand jury finding an indictment. *Mackin v. People*, 115 Ill. 312. So it will be presumed that the indictment was found on proper testimony. *Mackin v. People*, 115 Ill. 312.

The caption to an indictment stated that the grand jurors were "balloted for, elected, tried and sworn." *Held*, that this was a satisfactory statement that the jury was composed of qualified men. *Turner v. The State*, 9 Humph. 119.

sented by a grand jury of the proper county;¹ and the indictment must show that the grand jurors were empanelled for the county in which it was found.²

d.³ Sufficiency of Averments.—Where the caption states that the grand jury “were empanelled and sworn and charged to enquire within and for the body of” a particular county, it is sufficient to show that they were legally selected from that county without a distinctive averment of that fact.³ Where an indictment contains the allegation that “the jurors of and for the county of——, aforesaid, on their oaths presents,” this being after the caption, will be sufficient, the county having been named

The mere omission to follow the usual form, which reads, “the grand jury for the State of Missouri, summoned from the body of the county of T, duly empanelled,” etc., is not fatal if it appear from the record that the indictment was preferred by a lawful grand jury in and to a court of competent jurisdiction. *State v. Brooks*, 94 Mo. 121.

Where an indictment states: “Grand jury legally empanelled and sworn to enquire into all felonies,” etc., it sufficiently appears that it was found and returned by a legal and duly qualified grand jury. *Ford v. State*, 112 Ind. 373.

It is not usual to set forth in the captions of indictments that the grand jurors were summoned, nor by whom, nor even that they were empanelled. *Berrian v. State*, 22 N. J. L. (2 Zab.) 9.

1. *State v. Hilton*, 41 Tex. 565.

It is said, however, in the case of *Williams v. State*, 30 Tex. 404, that it is not necessary that the indictment itself should show by what grand jury it was found, that the records of the court are sufficient to evince that fact. So *held*, where the statute required that the indictment must appear to be the act of the grand jury of the proper county; and the grand jurors were denominated in the caption as grand jurors for the state.

2. *Engleman v. State*, 2 Ind. 91; s. c., 52 Am. Dec. 494; *Mau-zau-mau-nekah v. U. S.*, 1 Pinney (Wis.) 124; s. c., 39 Am. Dec. 279.

It seems, that the omission in the indictment to set forth that the grand jury were of a certain county, when the name of the county is correctly laid in the margin, is not a defect. *Guy v. State*, 1 Kan. 448.

An indictment describing the grand

jurors as “the grand jurors of the Territory of New Mexico, enquiring for the county of San Miguel,” etc., without showing that they were chosen, empanelled, and sworn for the county is insufficient. *Territory v. Sevailles*, 1 New Mex. 119.

When it is alleged, in the commencement of an indictment, that “the grand jurors for the State of Alabama upon their oaths present,” etc., and the name of the proper county is stated in the caption, the proceedings are sufficiently certain, although it is not averred in the indictment that such grand jurors were selected, empanelled, sworn and charged to enquire for the body of the county. *Morgan v. State*, 19 Ala. 556.

3. *Leonardo v. Territory*, 1 N. Mex. 291. See *Wise v. State*, 2 Kan. 419; s. c., 85 Am. Dec. 595; *Jeffries v. Com.*, 94 Mass. (12 Allen) 145; *Com. v. Edwards*, 70 Mass. (4 Gray) 1; *Byrd v. State*, 2 Miss. (1 How.) 163; *Vanvickle v. State*, 22 Tex. App. 625.

Captions.—An indictment commencing as follows: “In the name and by the authority of the State of Texas, the grand jurors of the State of Texas, empanelled, charged, and sworn to diligently enquire into and true presentment make of all crimes and offences against the law committed within the body of the county of Rains and State of Texas,” sets out allegations sufficient under Tex. Code Crim. Proc., art. 420, subd. 3, to show that the indictment was the act of the grand jury of the county of Rains, but the proper practice is to allege this directly. *Vanvickle v. State*, 22 Tex. App. 625.

An indictment for murder commencing: “State of Kansas, Chase county, ss.: In the district court of the fifth judicial district, sitting in Chase county, April term, A. D. 1863,

in the heading.¹ Where the county is named in which the indictment is found, it is immaterial that the court house is not.²

(e) *Allegations as to Oath of Grand Jury—e.¹ Necessity.*—In order to institute a legal organization of the grand jury, it must be sworn,³ and the caption should show that the grand jurors

the jurors of the grand jury of the State of Kansas, duly drawn, empanelled, charged and sworn to enquire of offences committed within the body of the county of Chase, and within the county of Marion attached to said county of Chase for judicial purposes," etc., was held to sufficiently show that it was found by a grand jury of the county of Chase, under section 95 of the criminal code. *Wise v. State*, 2 Kan. 419; s. c., 85 Am. Dec. 595.

Where the caption of an indictment was "Commonwealth of Massachusetts, Suffolk, to wit," and named the court to be holden at Boston on a stated day, and the indictment then set out that "the jurors of the commonwealth of Massachusetts on their oath present," it was held that it sufficiently appeared that the indictment was found by the jurors for Suffolk county. *Jeffries v. Com.*, 94 Mass. (12 Allen) 145.

In this commonwealth an indictment which purports by its caption to have been found at a court of common pleas for the county of Hampshire, and in the body of which "the jurors for said commonwealth on their oath present," sufficiently shows that it was returned by the grand jury for the county of Hampshire. *Com. v. Edwards*, 70 Mass. (4 Gray) 1.

The caption of an indictment in the words, "The grand jurors of the State of Mississippi, empanelled and sworn in and for the county of Warren," etc., states with sufficient certainty that such jurors were of the county of Warren. *Byrd v. State*, 2 Miss. (1 How.) 163.

Caption—Venue, etc.—An indictment which, on its face, purports to have been found by the "grand jury of said court" instead of "said county," is not demurrable on that account, when the caption shows that the grand jury was properly organized. *Perkins v. State*, 50 Ala. 154.

1. *State v. Moore*, 24 S. C. 150; s. c., 58 Am. Rep. 241. See *Lovell v. State*, 45 Ind. 550; *State v. Vincent*, 91 Mo. 662.

The caption of an indictment showed the empanelling of the grand jury in

the county of Sullivan, State of Indiana, and the indictment was entitled "State of Indiana, Sullivan county," etc., and commenced, "The grand jurors of the State of Indiana, being duly empanelled, sworn, and charged to enquire of crimes and offences committed within the body of the county of Sullivan, in the State of Indiana, in the name and by the authority and in behalf of said State of Indiana, upon their oaths present," etc. Held, that the county in and for which the grand jury was empanelled was sufficiently shown. *Lovell v. State*, 45 Ind. 550.

Where the first count of an indictment states that "The grand jurors of the State of Missouri within and for the body of the city of St. Louis, now here in court, duly empanelled, sworn, and charged, upon their oaths present," etc., and the third count recites "and the grand jurors aforesaid upon their oaths aforesaid," etc., the latter sufficiently refers to the first count, and shows on its face that the jurors were empanelled and sworn to enquire of offences within and for the city of St. Louis, although, if the indictment had failed to allege these facts, the indictment would have been valid under *Rev. Stat. Mo.*, § 1821. *State v. Vincent*, 91 Mo. 662.

2. *State v. Moore*, 24 S. C. 150; s. c., 58 Am. Rep. 241.

3. *Ridling v. State*, 56 Ga. 601; *Bird v. State*, 53 Ga. 602. See *Jerry v. State*, 1 Blackf. (Ind.) 395; *Com. v. Sholes*, 95 Mass. (13 Allen) 554; *Com. v. Johnson*, 1 Thatch. Cr. Cas. (Mass.) 284; *State v. Morris*, Canal Co., etc., 22 N. J. L. (2 Zab.) 537.

It must appear in each count of an indictment that it was found by the jurors on their oaths; and a want of such allegation will not be aided by such allegation in a former count, where there is no reference to such former count for the finding of that fact. *State v. McAllister*, 26 Me. 374.

It is not a fatal objection against an indictment that it is stated as found on the oaths instead of the oath of the inquest. *State v. Dayton*, 23 N. J. L. (3 Zab.) 49; s. c., 53 Am. Dec. 270.

were properly sworn;¹ a mere statement in the bill of indictment that the grand jury were sworn to enquire for the body of the county without any averment in the record they were so sworn, is not sufficient.²

*e.*³ *Effect of Omission.*—It is held in some cases that where the indictment omits the words “on their oath present,” or equivalent words, is insufficient to show an accusation of the defendant by the grand jury.³ Other cases hold that if an indictment fails to allege that the grand jurors were sworn or charged, that such omission will not render the indictment invalid.⁴

*e.*³ *An Affirmation.*—An indictment which purports to be found by jurors, or upon their oath or affirmation, where some of the jury affirmed, is good.⁵

h. *INDORSEMENT; SIGNATURE*—(1) *General Matters Relating to Indorsements.*—The different legislatures of the various States have destroyed all uniformity in relation to indorsements re-

An indictment which purports to be found by the grand jury “upon their oaths,” instead of “upon their oath,” is sufficient. *Com. v. Sholes*, 95 Mass. (13 Allen) 554; *Jerry v. State*, 1 Blackf. (Ind.) 395; *State v. Morris Canal etc. Co.*, 22 N. J. L. (2 Zab.) 537.

It appeared upon the face of an indictment that it was found by “the grand jurors of the commonwealth, upon their oath,” and the county in which it was found and the names of the jurors appeared on the record. *Held*, that this was sufficient. *Com. v. Johnson*, *Thatch. Crim. Cas. (Mass.)* 284.

In such case the words “on their oath” are equivalent to the words “on their several oaths,” and are sufficient. *Com. v. Johnson*, *Thatch. Crim. Cas. (Mass.)* 284.

1. *State v. Hunter*, *Peck (Tenn.)* 66; *State v. Fields*, *Peck (Tenn.)* 140.

2. *Foster v. State*, 31 Miss. 421.

Under Tex. code, an indictment need not state that the grand jurors were sworn, or that the presentment was made on their oaths or affirmations. *Chevarrio v. State*, 17 Tex. App. 390.

However it has recently been *held* that if an indictment should fail to allege that the grand jurors were sworn or charged, the omission would not render the indictment invalid. *State v. Vincent*, 91 Mo. 662.

3. See *Vanvickle v. State*, 22 Tex. App. 625.

4. *State v. Vincent*, 91 Mo. 662; see *State v. Creight*, 1 Brev. (S. C.) 169; 2 Am. Dec. 656; *Huffman v. Com.*,

6 Rand. (Va.) 685; *Byam v. State*, 17 Wis. 145.

An indictment which declares that the jurors, being “duly summoned and then and there empanelled, sworn, etc., . . . do present,” etc., without adding the words “upon their oaths,” sufficiently avers that the presentation is upon oath. *Byam v. State*, 17 Wis. 145.

The statement, in an indictment, that the presentment of the jury is “upon their oaths” is a part of the caption; and, if it has been omitted, may be inserted even after conviction. *State v. Creight*, 1 Brev. (S. C.) 169; s. c., 2 Am. Dec. 656.

In an indictment with three counts, if, in the third count, it is omitted to be stated that the grand jury, “on their oaths present” (the first two counts being regular in that respect), the objection is obviated by the fact that the record states that the grand jury were sworn in open court. *Huffman v. Com.*, 6 Rand. (Va.) 685.

5. *State v. Adams*, 78 Me. 486; see *Horne v. Haverhill*, 113 Mass. 344; *Lincoln v. Taunton Copper Mfg. Co.*, 65 Mass. (11 Cush.) 440.

Some of the courts hold that in order to make such an indictment valid, it must appear that the grand jurors were legally entitled to serve on their mere affirmation, or the indictment will be fatally defective. See *State v. Fox*, 9 N. J. L. (4 Halst.) 244; *State v. Harris*, 7 N. J. L. (2 Halst.) 361. Other courts holding, however, that the indictment need not state the reasons why any of the jurors affirmed instead of being

quired to be put upon the indictment;¹ in all they are required to be endorsed in some manner.² In all those States the direction for indorsement is mandatory,³ and if not so endorsed is quashed.⁴

(2) *Name and Nature of Offence*.—The indorsement of the name and nature of the offence on the indictment is no part of the finding of the grand jury,⁵ is not essential,⁶ and the indorsement of a different offence from the one set forth in the body of the indictment will not vitiate it.⁷

(3) *Name of Prosecutor*—(a) *Necessity of Indorsement*.—In some of the States the statute requires the prosecutor's name to be indorsed on the indictment.⁸ Where the statute requires

sworn. *Com. v. Fisher*, 73 Mass. (7 Gray) 492.

1. See 1 Bish. Cr. Proc. (3rd ed.) 690, 704.

2. *State v. Jolly*, 7 Iowa 15; *State v. Axt*, 6 Iowa 511; see *Dixon v. State*, 4 G. Greene (Iowa) 381.

3. See *State v. Hughes*, 1 Ala. 655; *Com. v. Dever*, 10 Leigh (Va.) 685.

4. See *Towle v. State*, 3 Fla. 202; *Com. v. Gore*, 3 Dana (Ky.) 474; *Moore v. State*, 21 Miss. (13 Smed. & M.) 259; *Peter v. State*, 4 Miss. (3 How.) 433; *State v. Joiner*, 19 Mo. 224.

In some of the states the objection to this defect may be taken at any time. See *Allen v. Com.*, 2 Bibb (Ky.) 210; *Kirk v. State*, 21 Miss. (13 Smed. & M.) 406; *Moore v. State*, 21 Miss. (13 Smed. & M.) 259; *Moyers v. State*, 11 Humph. (Tenn.) 40; while in others no advantage can be taken of such a defect after verdict. See *Hayden v. Com.*, 10 B. Mon. (Ky.) 125; *Vezain v. People*, 40 Ill. 397.

It is not necessary to endorse a verdict upon the indictment at all; and if endorsed upon a wrong indictment judgment may nevertheless be entered upon the one on which the trial was had. *O'Bryan v. State*, 48 Ark. 42.

5. *State v. Rohfrisch*, 12 La. An. 382.

In an indictment for being interested in the sale of liquor without licence, it is not necessary that the offence be stated in the caption. It is sufficient to charge it in the body of the indictment. *Williams v. State*, 47 Ark. 230.

An indorsement on an indictment, by the clerk of the court, stating that it is an indictment for "sheep stealing," is sufficient to identify an indictment for "a felony committed by stealing sheep." *Com. v. English*, 6 Bush (Ky.) 431.

6. The indorsement of the grand

jury on an indictment of the nature of the offence, in addition to that of "a true bill," is not essential to the validity of the indictment. *Cherry v. State*, 6 Fla. 679; *State v. Fitzpatrick*, 8 W. Va. 707.

7. *Collins v. People*, 39 Ill. 233.

If such indorsement state only a portion of the offence charged in the body of the indictment, unless it can reasonably be inferred from the collocation of the words that some qualification or limitation was intended to be made, the finding will be taken to be general, and as referring to the entire offence as charged in the indictment. *Cherry v. State*, 6 Fla. 679.

8. In most of these cases the indorsement need only be on certain indictments, not on all. See *Molett v. State*, 33 Ala. 408; *State v. Scott*, 25 Ark. 107; *State v. Stanford*, 20 Ark. 145; *State v. Harrison*, 19 Ark. 565; *State v. Brown*, 10 Ark. (5 Eng.) 104; *Gabe v. State*, 6 Ark. (1 Eng.) 540; *U. S. v. Mundel*, 6 Call (Va.) 245; *Com. v. Bybee*, 5 Dana (Ky.) 219; *Com. v. Gore*, 3 Dana (Ky.) 474; *Com. v. Patterson*, 2 Met. (Ky.) 374; *State v. Rogers*, 37 Mo. 367; *McWaters v. State*, 10 Mo. 167; *State v. Moles*, 9 Mo. 685; *Lúcy v. State*, 8 Mo. 134; *State v. Hurt*, 7 Mo. 321; *State v. McCourtney*, 6 Mo. 649; *State v. Robinson*, 29 N. H. (9 Fost.) 274; *White v. State*, 13 Ohio St. 569; *Baker v. State*, 12 Ohio St. 214; *State v. McCann*, Meigs (Tenn.) 91; *State v. Gossage*, 2 Swan (Tenn.) 263; *Bedford v. State*, 2 Swan (Tenn.) 72; *Wortham v. Com.*, 5 Rand. (Va.) 669; *U. S. v. Flanakin*, 1 Hemp. C. C. 30.

The reason for requiring the prosecutor's name to be endorsed on the indictment seems to arise out of the fact that formerly indictments were, and

the grand jury, when an indictment is found at the instance of a private prosecutor, to endorse that fact on the indictment, such requirement, it seems, is directory merely, and such indorsement is not essential to the validity of the indictment.¹

No person is to be required as a prosecutor, unless he is so marked on the bill of indictment, and whether or not a person is such must be decided affirmatively before the court has power to render judgment against him for costs.²

(b) *Effect of Omission.*—It is a general rule that an omission to endorse the name of the prosecutor on the indictment does not render such indictment void.³ However, in some States the want of the indorsement of the prosecutor is fatal to the indictment, and may be taken advantage of at any time.⁴

now are sometimes, found at the instigation of a private prosecutor. See *State v. Millian*, 3 Nev. 409; *State v. Gossage*, 2 Swan (Tenn.) 263; *Bedford v. State*, 2 Swan (Tenn.) 72, who was and still is liable to be proceeded against for malicious prosecution, in those cases where the indictment was maliciously procured to be found without probable cause. See *Burns v. State*, 5 Ala. 227; *Gault v. Wallis*, 53 Ga. 675; *State v. Holliday*, 22 Iowa 397; *State v. Donnell*, 11 Iowa 452; *Margrave v. U. S.*, Morris (Iowa) 452; *In re Ebenhack*, 17 Kan. 618; *State v. Menhart*, 9 Kan. 98; *Ex parte Cain*, 9 Mo. 760; *In re Kelly*, 62 N. Y. 198; *State v. Darr*, 63 N. C. 516; *Office v. Gray*, 2 Car. L. Repos. (N. C.) 424; *State v. Cockerham*, 1 Ired. (N. C.) 381; *State v. Forsyth*, Taylor (N. C.) 21; *Com. v. McCuen*, 75 Pa. St. 215; *York Co. v. Jacobs*, 3 Pen. & W. (Pa.) 365; *Com. v. Hargesheimer*, 1 Ashm. (Pa.) 413; *Guffy v. Com.*, 2 Grant (Pa.) 66; *Com. v. Philadelphia*, 4 Serg. & R. (Pa.) 541; *State v. McCarty*, 4 R. I. 82; *State v. Green*, 2 Head (Tenn.) 356; *Frazer v. State*, 2 Swan (Tenn.) 535; *Com. v. St. Clair*, 1 Gratt. (Va.) 556; *Com. v. Hill*, 9 Leigh (Va.) 601; *Reg. v. Steel*, L. R., 1 Q. B. Div. 482; *Rex v. Salwick*, 2 Barn. & Ad. 136; *Rex v. Righton*, 3 Burr 1694; *Rex v. Watton*, 4 Car. & P. 229; *Rex v. Chadderton*, 5 T. R. 272; *Rex v. Firewood*, 2 T. R. 145.

The name of a prosecuting witness need not be endorsed on the indictment. *State v. Rogers*, 37 Mo. 367; *Tenorio v. Territory*, 1 New Mex. 279.

It is not necessary that the name of the prosecutor in the courts of the United States should be written at the foot of the indictment. *U. S. v. Mundel*, 6 Call (Va.) 245.

In Tennessee, if an indictment is founded on a presentment, it is not necessary that the prosecutor should be marked on the indictment. *State v. McCann*, 1 Meigs (Tenn.) 91.

1. See *State v. Hughes*, 1 Ala. 655; *State v. Briggs*, 68 Iowa 416; *State v. Willis*, 78 Me. 70; *Com. v. Dever*, 10 Leigh (Va.) 685.

Thus it has been held that an indictment for being concerned in a lottery, under a statute which apportions the penalty between the prosecutor and the town where the offence was committed, is not objectionable because the name of the prosecutor is neither stated in nor endorsed upon it. *State v. Willis*, 78 Me. 70.

2. *State v. Lupton*, 63 N. C. 483.

In an indictment found after the period limited for commencing prosecutions for the benefit in part or wholly of the prosecutor, it is not necessary that any prosecutor should be named. *State v. Robinson*, 29 N. H. (9 Fost.) 274.

3. See *Hubbard v. State*, 72 Ala. 164; *State v. Hughes*, 1 Ala. 655; *State v. Rogers*, 37 Mo. 367; *Tenorio v. Territory*, 1 N. Mex. 279; *State v. McCann*, 1 Meigs (Tenn.) 91; *U. S. v. Mundel*, 6 Call (Va.) 245; *Com. v. Dever*, 10 Leigh (Va.) 685.

The Pennsylvania act of assembly does not intend that a prosecutor shall be endorsed on all indictments, but only where a prosecutor really exists. *King v. Lukens*, 1 Dall. (U.S.) 5. The defendant himself is not a competent witness to prove the person prosecuting where no prosecutor is so endorsed. It must be proved by indifferent witnesses. *Wortham v. Com.*, 5 Rand. (Va.) 669.

4. *Towle v. State*, 3 Fla. 202; *Com. v. Gore*, 3 Dana (Ky.) 474; *Peter v. State*, 4 Miss. (3 How.) 433; *Moore v.*

(c) *Whose Name May be Endorsed.*—It is thought that those statutes which require the name of the prosecutor to be endorsed on the indictment contemplate that the name of the injured party shall be endorsed as such prosecutor, yet, it is thought that where the injured party is an infant or a married woman, the purpose of the statute is better answered by permitting the name of the father or husband to be endorsed as prosecutor.¹ In Mississippi, the foreman of the grand jury may be endorsed as prosecutor;² and in North Carolina the prosecuting officer has the discretionary power to endorse the governor as prosecutor on an indictment whenever he thinks the public interest requires it.³

(d) *For What Offences.*—The indictments which must and those which need not be endorsed with the name of the prosecutor are regulated entirely by the statutes providing for such indorsements.⁴

State, 21 Miss. (13 Smed. & M.) 259; Kirk v. State, 21 Miss. (13 Smed. & M.) 406; State v. Joiner, 19 Mo. 224.

In some states, while a failure to endorse the indictment is a cause for quashing, yet such defect cannot be taken advantage of after verdict. See Vezain v. People, 40 Ill. 397; Hayden v. Com., 10 B. Mon. (Ky.) 125.

1. State v. Harrison, 19 Ark. 564; see Moyers v. State, 11 Humph. (Tenn.) 40.

No conviction in Tennessee can be had upon a bill of indictment which was endorsed with the name of a married woman as prosecutrix, when sent to the grand jury by the state attorney, nor will any amendment be allowed in this respect after the bill has been returned by the grand jury. Moyers v. State, 11 Humph. (Tenn.) 40.

2. King v. State, 6 Miss. (5 How.) 730.

3. State v. English, 1 Murph. (N. C.) 435.

4. Allen v. Com., 2 Bibb (Ky.) 210; Com. v. Gore, 3 Dana (Ky.) 474; Lucy v. State, 8 Mo. 134; State v. Goss, 74 Mo. 592; State v. Moles, 9 Mo. 685; State v. Hurt, 7 Mo. 321; State v. McCourtney, 6 Mo. 649; State v. Robinson, 29 N. H. (9 Fost.) 274; Wortham v. Com., 5 Rand. (Va.) 669.

Wag. Mo. St., p. 1084, § 22, requiring the name of a prosecutor to be endorsed on an indictment, only applies to cases where the indictment charges a *trespass* against the person or property of another. State v. Goss, 74 Mo. 592.

The statute of Missouri (Rev. Code 481), requiring the name of a prosecutor to be endorsed on all indictments "for any *trespass* to the person or property of

another, not amounting to a felony," does not apply to an indictment for a disturbance by loud noises merely. State v. Moles, 9 Mo. 685.

Under the statute of Missouri (Rev. Code, 1885, § 451), requiring the name of the prosecutor to be endorsed upon an indictment for any *trespass* not amounting to a felony, petty larceny was held to be but a *trespass*. State v. Hurt, 7 Mo. 321.

In Trespass.—The name of the prosecutor must be set at the foot of an indictment for a *trespass* or a misdemeanor before it is presented to the grand jury; and it is not sufficient to set it there after the indictment is found. Allen v. Com., 2 Bibb (Ky.) 210.

An indictment for a *trespass* upon the person of an individual must have the name of the prosecutor, who is answerable for costs, his town or county, and title or profession, written at the foot of it; and an omission of this addition is a fatal defect, not cured by security for the costs required of and given by, the prosecutor. Com. v. Gore, 3 Dana (Ky.) 474.

Whether in an indictment to recover a fine or penalty of which one-half is for the use of the prosecutor, it be necessary to name him, *quære*. State v. Robinson, 29 N. H. (9 Fost.) 274.

In Virginia, in an indictment for a *trespass* or misdemeanor, it is not necessary to insert the name or surname of the prosecutor at the foot of the indictment, if it appears that the indictment was found true on the evidence of a witness sent to the grand jury, either at their own request or by direction of the court, and whether there was a previous

(e) *Sufficiency of Indorsement to be Valid.*—It is thought that the indorsement must be voluntarily made by the party, or with his consent, or at his request.¹

No particular form of words is necessary to render the indorsement valid; any form conveying the idea will be adequate.²

The indorsement of the name of the prosecutor need not be made upon any particular part of the indictment, it being equally good whether found on the face or on the back.³

(4) *Names of Witnesses*—(a) *Statutory Requirements, Directory or Mandatory.*—It has been said that statutes requiring the noting of names of witnesses on the indictment are mandatory, and that a disregard of it is sufficient to quash the indictments;⁴ but the weight of authority seems to be to the effect that such a provision is merely directory.⁵

presentment or not. *Worthum v. Com.*, 5 Rand. (Va.) 669.

In Riot.—But it must be endorsed upon an indictment for a riot. *State v. McCourtney*, 6 Mo. 649.

1. *State v. Hodson*, 74 N. C. 151; *Parr v. State*, 74 Ga. 406; *Haught v. Com.*, 2 Va. Cas. 3.

2. *State v. Denton*, 14 Ark. 343; *Haught v. Com.*, 2 Va. Cas. 3; *Com. v. Dove*, 2 Va. Cas. 29.

Thus where an indictment was endorsed "by the information of James Baker, laborer, of Harrison county, sworn in court and endorsed as prosecutor, at his request," has been held to be a sufficient indorsement. *Haught v. Com.*, 2 Va. Cas. 3.

So also has the indorsement "on the information of P. S." *Com. v. Dove*, 2 Va. Cas. 29.

A presentment stated at its foot that it was "on the information of P. S." At the foot of the information were these words; "This information is filed by order of the court, on the presentment of the grand jury. Held, that this was sufficient evidence that P. S. was prosecutor and liable for costs. *Com. v. Dove*, 2 Va. Cas. 29. Held, also, that after verdict he could not show, by parol evidence, that he was called on by the grand jury, and did not voluntarily give the information. *Haught v. Com.*, 2 Va. Cas. 3.

An indorsement reciting simply that "this indictment is preferred upon the testimony of the party injured, who was summoned on presentation and by order of the grand jury," is not such an indorsement as the statute contemplates. *State v. Denton*, 14 Ark. 343. Death of endorser will not abate the indictment.

See *Com. v. Cunningham*, 5 Litt. (Ky.) 292; *State v. Loftis*, 3 Head (Tenn.) 500.

3. *Williams v. State*, 9 Mo. 270; *U. S. v. Mundell*, 1 Hughes C. C. 415.

At the Foot.—In some of the states it is customary to endorse the name of the prosecutor at the foot of the indictment. See *Allen v. Com.*, 2 Bibb (Ky.) 210; *Haught v. Com.*, 2 Va. Cas. 3.

4. *McKinney v. People*, 7 Ill. (2 Gilm.) 540, 552; s. c., 43 Am. Dec. 65; *Andrews v. People*, 117 Ill. 195; see *Scott v. People*, 63 Ill. 508; *Gardner v. People*, 4 Ill. (3 Scam.) 83; *Nomaque v. People*, 1 Ill. (Breese) 109; *Ray v. State*, 1 G. Greene (Iowa) 316; s. c., 48 Am. Dec. 379; *People v. O'Hare*, 2 Mich. N. P. 170; *State v. Patterson*, 73 Mo. 695; *State v. Nugent*, 71 Mo. 136; *Rex v. Ford*, Yelv. 99.

5. See *State v. Hollingsworth*, 100 N. C. 535; *State v. Sheppard*, 97 N. C. 401; *State v. Hines*, 84 N. C. 810; *State v. Roberts*, 2 Dev. & B. (N. C.) 540; *State v. Baldwin*, 1 Dev. & B. 195; *Steele v. State*, 1 Tex. 142; *Walker v. State*, 19 Tex. App. 176; *State v. Enoch*, 26 W. Va. 253; *Wyoming Ter. v. Anderson*, 1. Wy. Ter. 20.

Indorsement of List of Witnesses.—Code N. C., § 1742, requiring the foreman of the grand jury, when the oath is administered by him, to mark on the bill the names of the witnesses examined, is directory merely, and a non-compliance therewith is neither ground for motion to quash nor arrest of judgment. *State v. Hollingsworth*, 100 N. C. 535.

A statutory requirement that the name of a witness be endorsed on the indictment is merely directory, and the

(b) *Necessity and Sufficiency in General.*—Where the statute requires the names of the witnesses who testify before the grand jury to be endorsed upon the indictment, it will be sufficient if the names of all the material witnesses are endorsed,¹ and a failure to make such indorsement is ground for quashing the indictment.² It is said that the court in the exercise of its discretion may permit the names of witnesses for the prosecution to be endorsed upon the information at any time, even after trial has begun.³ Where the testimony has gone to the jury without objection, the absence of the witnesses named from the indictment will not be sufficient cause for setting aside the verdict and granting a new trial.⁴

court may allow the indorsement to be made at the trial. *Wyoming Tr. v. Anderson*, 1 Wy. Tr. 20. So also the requirement that the plea of the defendant shall be endorsed on the indictment. *Wyoming Tr. v. Anderson*, 1 Wy. Tr. 20.

The 15th section of the act of 1846, in Texas, regulating juries, which requires the foreman of the grand jury to endorse on the back of each presentment or indictment the name or names of the witnesses for the prosecution, upon whose evidence the presentment or indictment was found, certifying thereto as foreman, is merely directory, and such endorsement is not a constituent part of the indictment, or of the finding of the grand jury, and is not essential to its validity; and, more especially, the party indicted cannot complain that the names of two witnesses were endorsed thereon, of whom one only was examined. *Steele v. State*, 1 Tex. 142.

1. See *State v. Little*, 42 Iowa 51; *State v. Cook*, 30 Kan. 82; *State v. Roy*, 83 Mo. 268.

Under the Iowa statute, the names of witnesses who testified to no material facts before the grand jury need not be endorsed upon the indictment. *State v. Little*, 42 Iowa 51.

The statement, endorsed on an indictment for trespass to personal property, that it was found on the testimony of several persons—naming them,—whose property was not injured, and signed by the prosecuting attorney, held, a substantial compliance with a statute requiring that the name of the prosecutor shall be endorsed on the indictment, or that the names of the witnesses upon whose testimony it was found, other than the party injured, shall be stated, and that a statement of

the fact shall be made at the end of the indictment. *State v. Scott*, 25 Ark. 107.

Place of Indorsement.—The Illinois statute requiring the names of the witnesses upon whose evidence an indictment is found, to be noted thereon, is complied with when they are endorsed on the indictment, just under the name of the prosecuting attorney. *Scott v. People*, 63 Ill. 508.

2. *State v. Roy*, 83 Mo. 268.

3. *State v. Cook*, 30 Kan. 82.

4. *Ray v. State*, 1 G. Greene (Ia.) 316; s. c., 48 Am. Dec. 379.

When objections are not made on the trial to the admissibility of evidence, they will not be considered on appeal. See *Carlock v. Spencer*, 7 Ark. (2 Eng.) 12; *Norwich & W. Ry. Co. v. Cahill*, 18 Conn. 484; *Parker v. Griswold*, 17 Conn. 288; s. c., 42 Am. Dec. 739; *Lunday v. Thomas*, 26 Ga. 537; *Parke v. Foster*, 26 Ga. 465; s. c., 71 Am. Dec. 221; *Hovey v. Hobson*, 55 Me. 256; *Dodge v. Greeley*, 31 Me. 343; *Hewett v. Buck*, 17 Me. 147; s. c., 35 Am. Dec. 243; *Nesbitt v. Dallam*, 7 Gill. & J. (Md.) 494; s. c., 28 Am. Dec. 236; *Sasscer v. Walker's Exrs.* 5 Gill. & J. (Md.) 102; s. c., 25 Am. Dec. 272; *Jones v. Hardesty*, 10 Gill. & J. (Md.) 404; s. c., 32 Am. Dec. 180; *Foote v. Beecher*, 78 N. Y. 155; s. c., 7 Abb. N. C. (N. Y.) 358; *Barton v. Syracuse*, 37 Barb. (N. Y.) 292; s. c., 36 N. Y. 54; *Rundle v. Allison*, 34 N. Y. 180; *Ashley v. Marshall*, 29 N. Y. 494; *Forrest v. Forrest*, 25 N. Y. 501; *Shorter v. People*, 2 N. Y. 193; s. c., 51 Am. Dec. 286; *Worrall v. Parmelee*, 1 N. Y. 519; s. c., 49 Am. Dec. 350; *Rainsford v. Rainsford*, 57 Barb. (N. Y.) 58; *Deifendorff v. Gage*, 7 Barb. (N. Y.) 18; *Smith v. Kerr*, 1 Barb. (N. Y.) 155; *Forrest v. Forrest*, 6 Duer (N. Y.) 102; 3 Abb. Pr. 144;

(c) *Misnomer*.—The mere misnomer in respect to the christian name of a witness endorsed on the indictment will not prevent the State from using him on the trial where his identity appears from the facts;¹ but where the name is wrongfully endorsed, it will be fatal.²

(d) *Presumption as to*.—Where the foreman of the grand jury has noted the names of a certain number of witnesses on the indictment, the presumption is that he did his duty by noting the names of all who testified;³ and this is true even though he adds a reference to other sources for additional witnesses.⁴ The

Hunt v. Bennett, 4 E. D. Smith (N. Y.) 647; Beach v. Raymond, 2 E. D. Smith, (N. Y.) 496; Patterson v. O'Hara, 2 E. D. Smith (N. Y.) 58; Renaud v. Peck, 2 Hilt. (N. Y.) 137; Wilcox Silver Plate Co. v. Green, 9 Hun (N. Y.) 347; 72 N. Y. 17; Bennett v. Austin, 5 Hun (N. Y.) 536; Beekman v. Frost, 18 Johns. 544; s. c., 9 Am. Dec. 246; Ahern v. Standard L. Ins. Co., 2 Sweeney (N. Y.) 441; Gardenier v. Tubbs, 21 Wend. (N. Y.) 169; Benjamin v. Smith, 12 Wend. (N. Y.) 404; Crary v. Sprague, 12 Wend. (N. Y.) 41; s. c., 27 Am. Dec. 110; Clark v. State, 12 Ohio, 483; s. c., 40 Am. Dec. 481; Eckert v. Cameron, 43 Pa. St. 120.

1. State v. Stanley, 33 Iowa 526. See State v. Briggs, 68 Iowa 416; State v. Schlagel, 19 Iowa 169; State v. Pierce, 8 Iowa 231.

Where the name of "Mrs. H." was endorsed on the indictment as one of the witnesses, and the state on the trial offered "Mrs. Mary E. H." as a witness, and it was objected that her name was not endorsed on the indictment, *held*, that it was the duty of the court to determine whether "Mrs. H." and "Mrs. Mary E. H." were the same persons, and that in so doing, it was competent to consult such minutes, and therein found sufficient evidence. State v. Briggs, 68 Iowa 416.

Error was assigned because the court permitted Jacob W. Dillon to testify when his name was not endorsed upon the indictment, nor any notice given that he would be used as a witness. The name on the back of the indictment was "J. W. Dillon." *Held*, that there was no error. State v. Schlagel, 19 Iowa 169.

Where the name of L. H. Mason was endorsed on the indictment as a witness for the state, and on the trial Levi H. Mason was called, to whom the defendant objected that his name was not upon the indictment and that the notice re-

quired by "an act amending section 2913 of the Code" had not been given, it was *held* that the witness was properly allowed to testify, as it sufficiently appeared that both names referred to the same person. State v. Pierce, 8 Iowa 231.

Where a witness is as unmistakably described on the back of an indictment as he would be by the use of his Christian or whole name, that object is fully met, and no prejudice can result to the defendant from the omission to insert the Christian name. State v. McComb, 18 Iowa 43.

2. The name of a witness, as given by him to the grand jury, and endorsed on the indictment, was F. D., but his true name was G. D. *Held*, that under Cal. Pen. Code, §§ 943, 995, the indictment was properly set aside. People v. Crowey, 56 Cal. 36.

3. See Andrews v. People, 117 Ill. 195; State v. O'Day, 89 Mo. 559.

Indorsement of List of Witnesses.—Where the indictment is endorsed with the names of three witnesses, the state may call other witnesses, as additional evidence, the presumption being that the indictment was found on the evidence endorsed, and the case differs from a case where no witnesses' names are endorsed on the indictment. State v. O'Day, 89 Mo. 559.

An indictment had the names of five witnesses noted thereon by the foreman of the grand jury, as required by statute, and also the statement, "See, for other witnesses, Off. Cosgrove and Palmer." *Held*, that no presumption arose that witnesses other than those whose names were noted testified before the grand jury, and the statement might be rejected entirely, as no part of the indictment. Andrews v. People, 117 Ill. 195.

4. Such as "see, for other witnesses, Off. C. & P." Andrews v. People, 117 Ill. 195.

fact that the names of witnesses do not appear endorsed on the indictment in the record of a conviction in a capital case, if no motion in regard to it appears to have been made, such absence is not ground for reversal, because the presumption is that the names were so endorsed, and that if they were not so endorsed, it is an irregularity which is waived by pleading to the indictment without objection.¹

Where a witness is objected to on the trial of a criminal case on the ground that his name was not noted upon the indictment according to the requirements of the statute, and the objection was overruled, the proceedings should be made matter of record by a bill of exceptions in order to make it cause by error.²

(e) *Examination at Trial of Witnesses Omitted.*—It is held, in some cases, that where the statute requires the names of witnesses to be endorsed upon the indictment, a witness whose name is not so endorsed cannot testify against the objection of the defendant.³ But other cases hold that it is not a valid objection to the admission of a witness in the criminal case, on the part of the State, that his name is not endorsed on the indictment.⁴

(f) *Examination of Witnesses Endorsed.*—The prosecution in a criminal case is not compelled to call all the witnesses that were before the grand jury which found the indictment;⁵ and in examining those who are called, the State will not be confined to the testimony given by the witness before the grand jury, when

1. McKinney v. People, 7 Ill. (2 Gilm.) 540; s. c., 43 Am. Dec. 65.

2. Ray v. State, 1 G. Greene (Iowa) 316; s. c., 48 Am. Dec. 379.

3. See Smith v. State, 4 G. Greene (Iowa) 189; Stevens v. State, 19 Neb. 647; Parks v. State, 20 Neb. 515.

It was claimed that the trial court erred in permitting a witness to testify whose name was not endorsed on the indictment, but it is not shown what the witness's testimony was, or that any objection was made. *Held*, that no error is shown. State v. Shenkle, 36 Kan. 43.

4. State v. McClintock, 8 Iowa (8 Clarke) 203; see People v. Jocelyn, 29 Cal. 562; State v. Abrahams, 6 Iowa 117; s. c., 71 Am. Dec. 399.

The names of witnesses on whose evidence the grand jury acted must be endorsed on the indictment, but others not before the grand jury, and whose names are not thus endorsed, may be used by the state at the trial. State v. Abrahams, 6 Iowa 117.

In a criminal case the people may examine a witness who did not testify before the grand jury and whose name is not endorsed on the indictment, without first giving notice of such intended

examination. And the rule in respect to surprise is the same as to the evidence of such a witness as to that of any other witness. People v. Jocelyn, 29 Cal. 562.

5. The failure on the part of the state to call all the witnesses named on the back of an indictment is not such a withholding of testimony as to warrant the jury in presuming that such evidence would be favorable to the defendant.

State v. McCoy, 20 Iowa 262; State v. Ostrander, 18 Iowa 435.

Under the Illinois practice in criminal causes, the people are not compelled to introduce all the witnesses whose names are on the back of the indictment, and if they fail to do so, and defendant introduces a witness whose name is thus endorsed, he becomes defendant's witness. Bressler v. People, 117 Ill. 422.

Witnesses whose names are endorsed upon the indictment, as notice to the defendant, are properly permitted to testify in an action under the Code of 1851, although there were no minutes of the evidence given by them before the grand jury, filed with the indictment as required by the revision of 1860. State v. McComb, 18 Iowa 43.

the new matter is not material to the conviction, but corroborating only.¹

(5) *Signature of Prosecuting Officer*—(a) *Necessity*.—At common law, and under some of the State statutes, neither a presentment nor an indictment need be signed by anyone publicly returning them into court, and being there recorded renders them effectual.² In some of the States such indorsement is common, though not required by the statutes.³ While in other States such signature is made essential by the statute.⁴

(b) *Effect of Omission*.—Where the statute requiring the prosecuting officer to sign the indictment is mandatory, a failure to so sign will be fatal.⁵ The want of the prosecuting officer's official signature to an indictment is not cured by his signature to an indictment thereon.⁶

(c) *Sufficiency*—c.¹ *Generally*.—If the name of the prosecuting officer is legibly attached to the indictment, it is a sufficient signing of the indictment within the meaning of the statute, and when so appended to an indictment, the presumption is that it was by his authority.⁷ Where the prosecuting attorney signs the

1. *State v. McCoy*, 20 Iowa 262; *State v. Ostrander*, 18 Iowa 435.

2. See *Harrall v. State*, 26 Ala. 52; *Ward v. State*, 22 Ala. 16; *Anderson v. State*, 5 Pike (Ark.) 444; *Dukes v. State*, 11 Ind. 557; s. c., 71 Am. Dec. 370; *State v. Wilmoth*, 63 Iowa 380; *State v. Reed*, 67 Me. 127; *Com. v. Stone*, 105 Mass. 469; *Keithler v. State*, 18 Miss. (10 Smed. & M.) 192, 235; *State v. Murphy*, 47 Mo. 274; *Thomas v. State*, 6 Mo. 457; *State v. Mace*, 86 N. C. 668; *State v. Cox*, 6 Ired. (N. C. L.) 440; *State v. Salge*, 2 Nev. 321; *Eppes v. State*, 10 Tex. 474; *People v. Lyman*, 2 Utah 30; *U. S. v. McAvoy*, 4 Blatchf. C. C. 418; *State v. Vincent*, 1 Cr. L. Rep. 493.

The signature of a United States attorney constitutes no part of an indictment, and is only necessary as evidence to the court that he is prosecuting the offender conformably to the duty imposed on him by statute. *U. S. v. McAvoy*, 4 Blatchf. C. C. 418.

3. *Harrall v. State*, 26 Ala. 52; *Ward v. State*, 22 Ala. 16; *Anderson v. State*, 5 Pike (Ark.) 444, 453; *Com. v. Stone*, 105 Mass. 469; *Keithler v. State*, 18 Miss. (10 Smed. & M.) 192; *Thomas v. State*, 6 Mo. 457; *State v. Farrar*, 41 N. H. 53, 60; *Eppes v. State*, 10 Tex. 474.

4. See *Cooper v. State*, 79 Ind. 206; *Vanderkarr v. State*, 51 Ind. 91; *Heacock v. State*, 42 Ind. 393; *Johnson v. State*, 23 Ind. 32; *Jackson v. State*, 4

Kan. 150; *Moore v. State*, 21 Miss. (13 Smed. & M.) 259; *State v. Bruce*, 77 Mo. 193; *State v. Lockett*, 3 Heisk. (Tenn.) 274; *Foute v. State*, 3 Hayw. (Tenn.) 98.

In Mississippi, indictments are by statute required to be endorsed by the prosecutor; and such indorsement must be made before the indictment goes to the grand jury; at least it is too late to make it after verdict, and pending a motion for arrest of judgment. *Moore v. State*, 21 Miss. (13 S. & M.) 259.

5. See *Hamilton v. State*, 103 Ind. 96; s. c., 53 Am. Rep. 491; *Stout v. State*, 93 Ind. 150.

Prejudicing Defendant by Failure to Sign.—In the case of *Hamilton v. State*, 103 Ind. 96; s. c., 53 Am. Rep. 491, the court say that "whether the failure to the prosecuting attorney to sign an indictment would constitute such a defect or imperfection as would tend to the prejudice of the substantial rights of the defendant upon the merits of the cause, seems never to have been at any time fully considered by this court, and may hence be recorded as still an open question in this state. *Heacock v. State*, 42 Ind. 393; *Dukes v. State*, 11 Ind. 557;" s. c., 71 Am. Dec. 370.

6. *State v. Lockett*, 3 Heisk. (Tenn.) 274.

7. *Hamilton v. State*, 103 Ind. 96; s. c., 53 Am. Rep. 491.

indictment by writing out his surname in full, and his christian name by the initials only, it is sufficiently signed.¹

c.² Official Designation.—While it is proper that the official designation should be added to the name of the prosecuting officer, its omission will not be fatal.² Neither will it be fatal to add an erroneous official designation, such as "prosecuting attorney" instead of "district attorney," "attorney general" instead of "attorney for the State," and the like,³ because the court takes judicial notice of the signature of its officers, and, where it appears that he intended to sign officially, will disregard the omission of any or the adding of an imperfect official designation.⁴

c.³ Designation of County or District.—While it is proper and desirable that the county or district for which the officer acts should be designated, yet it is not necessary that the signature of such officer should specify the county or district for which he acts.⁵

It is a sufficient indorsement of an indictment by the prosecutor that his name is written on the face of the indictment. *Williams v. State*, 9 Mo. 270.

1. *Vanderkarr v. State*, 51 Ind. 91.

2. 1 Bish. Cr. Proc., § 703.

3. See *People v. Ashnauer*, 47 Cal. 98; *Malone v. State*, 14 Ind. 219; *Baldwin v. State*, 12 Ind. 383; *State v. Nulf*, 15 Kan. 404; *State v. Tannahill*, 4 Kan. 117; *Craft v. State*, 3 Kan. 450; *Com. v. Beaman*, 74 Mass. (8 Gray) 497; *State v. Kinney*, 81 Mo. 101; *Greenfield v. State*, 7 Baxt. (Tenn.) 18; *State v. Evans*, 8 Humph. (Tenn.) 110; *State v. Brown*, 8 Humph. (Tenn.) 89; *State v. Myers*, 85 Tenn. 203.

Signature.—Where the same prosecuting officer is designated in the constitution and statutes of Tennessee as "attorney for the state," "attorney general," and "district attorney," an indictment signed by such officer under the title of "district attorney" is good. *State v. Myers*, 85 Tenn. 203.

An information in a criminal action, signed and filed by the proper prosecuting officer, who describes himself therein as "prosecuting attorney," and not as "county attorney," is sufficient, if so in other respects. *State v. Nulf*, 15 Kan. 404.

An indictment signed by the proper officer as "attorney general," instead of "attorney for the state," held to be good. *Greenfield v. State*, 7 Baxt. (Tenn.) 18.

An indictment signed "A. B., prosecuting attorney," instead of "A. B., district attorney," is good. *Baldwin v. State*, 12 Ind. 383.

It is immaterial that the officer signs himself "district attorney prosecutor," instead of "district attorney." *Malone v. State*, 14 Ind. 219.

An indictment presented Dec. 5, 1865, signed by the prosecuting attorney as "district attorney," was not for that reason void, under the act of Feb. 12th, 1864, creating the office of county attorneys and repealing the act creating district attorneys, as the proviso in the 16th section of the latter act continued in office the district attorneys elected in 1863 until January, 1866. *Craft v. State*, 3 Kan. 450.

4. *State v. Meyers*, 85 Tenn. 203. See *State v. Kinney*, 81 Mo. 101. However, it has been held by the Supreme Court of Tennessee, in the case of *Teas v. State*, 7 Humph. (Tenn.) 174, that a bill of indictment must be signed by the attorney general, and that if signed by an officer styling himself solicitor general, it is invalid; there being no such officer as a solicitor general in Tennessee.

5. See *People v. Ashnauer*, 47 Cal. 98; *State v. Tannahill*, 4 Kan. 117; *Com. v. Beaman*, 74 Mass. (8 Gray) 497; *State v. Salge*, 2 Nev. 321; *State v. Evans*, 8 Humph. (Tenn.) 110; *State v. Brown*, 8 Humph. (Tenn.) 89.

An indictment which is required to be signed by the district attorney of D. county, should not be quashed because it is signed by the "prosecuting attorney of the eighth judicial district," when that district consists of D. county and nothing else. *State v. Salge*, 2 Nev. 321.

Where an indictment found in Jeffer-

c.⁴ Deputy or Assistant.—While the better practice is for the name of the prosecuting attorney to be signed to an indictment, yet where his deputy signs his own name as deputy prosecuting attorney, this is not such an imperfection as will regard the reversal of a judgment or conviction under such indictment.¹

c.⁵ Special or pro tem. Prosecuting Officer.—An indictment may properly be signed by a special prosecuting attorney or an attorney appointed *pro tem.* to act in the place of the prosecuting officer, appointed under the statute as well as by the prosecuting officer in person.² Where an indictment is signed by a special prosecuting officer, or an officer acting *pro tem.*, the due appoint-

son county was signed "A. S., county attorney for Jackson county," and the record showed that the defendant admitted that A. S. was county attorney for Jefferson county, it was held to be error to grant a motion to quash. *State v. Tannahill*, 4 Kan. 117.

An indictment signed "Nathaniel Baxter, attorney general," was held to be sufficiently signed, without adding the name of the district of which he was attorney general. *State v. Brown*, 8 Humph. 89; *State v. Evans*, 8 Humph. (Tenn.) 110.

1. *Taylor v. State*, 113 Ind. 471; *Hamilton v. State*, 103 Ind. 96; *State v. Hayes*, 88 Mo. 344; *State v. Farrar*, 41 N. H. 53; *U. S. v. Nagle*, 17 Blatchf. C. C. 258.

An indictment signed by the assistant circuit attorney is a sufficient compliance with R. S., § 1798, requiring that it should be signed by the circuit attorney. *State v. Hayes*, 88 Mo. 344.

It is no objection to an information filed in the open court by the sworn assistant of the district attorney, that the signature of the district attorney to the information was written by such assistant by virtue of a general authority conferred upon him by the district attorney. *U. S. v. Nagle*, 17 Blatchf. C. C. 258.

An indictment signed by the solicitor for the county is sufficient without averring the absence of the attorney general. *State v. Farrar*, 41 N. H. 53.

In the case of *Hamilton v. State*, 103 Ind. 96, the court say: "As the prosecuting attorney is required to sign an indictment as a matter of verification merely, there is no reason for enforcing a more rigid rule as to the validity of his signature, than in those cases of ordinary business transaction to which the authorities above cited mainly have reference. This is plainly inferable

from the fact that a prosecuting attorney may appoint a deputy, who, by virtue of his appointment, becomes authorized to sign the name of such prosecuting attorney to indictments, as well as to other pleadings filed, on behalf of the State, in a criminal cause." *Stout v. State*, 93 Ind. 150.

2. *Choen v. State*, 85 Ind. 209; *Territory v. Harding*, 6 Montana 323; *Isham v. State*, 1 Sneed (Tenn.) 112; *State v. Johnson*, 12 Tex. 231; *Reynolds v. State*, 11 Tex. 120; *Eppes v. State*, 10 Tex. 474.

Where an indictment is signed "A. B., district attorney, *pro tem.*," and the court below has recognized the official authority of the person who acted as district attorney, it will be presumed by the supreme court, in the absence of proof to the contrary, that such person was duly appointed so to act. *Eppes v. State*, 10 Tex. 474.

The indictment being signed and preferred by the attorney general, it will be presumed, in the absence of anything to the contrary, that an attorney general *pro tem.* who conducted the trial was properly appointed. *Isham v. State*, 1 Sneed (Tenn.) 112.

The district court possesses the power, in the absence of the district attorney, to appoint a suitable person to represent the state; and an indictment is valid if signed by an attorney so appointed. *State v. Johnson*, 12 Tex. 231.

The district court of Montana, being a court of general criminal jurisdiction, may, in the absence of the district attorney, appoint a special prosecuting attorney for a particular case, whose signature to an indictment will be sufficient, although Rev. Stat. Montana, § 57, p. 414, declaring the duties of the district attorney, requires him to sign "all bills of indictment;" § 156, p. 309, providing with regard to the requisites of an indictment, that it must be signed

ment of such officer will be presumed in the absence of proof to the contrary.¹

(6) *Signature by Grand Jury*—(a) *Necessity*.—At common law it was not necessary that an indictment should be signed by the foreman of the grand jury where it was in writing and read in their presence;² but the statutes of many of the States require that an indictment must be signed by the foreman of the grand jury.³

(b) *Effect of Omission*.—It has been said that where the statute peremptorily requires the foreman's indorsement of an indictment and signature thereto, where such indorsement is not made, the proceedings become *coram non judice*.⁴ On the other hand, it is held that it is not a valid exception, either to the former substance of an indictment that the signature of the foreman of the grand jury does not appear to it, or to its indorsement as a true bill, and that the omission may be supplied by amendment.⁵

It has been said⁶ that in the absence of a mandatory statute, it is the better view that both the words "a true bill" and the signature of the foreman may be dispensed with, if the fact of the

by "the attorney prosecuting." *Territory v. Harding*, 6 Montana 323.

1. See *State v. Farrar*, 41 N. H. 53; *Isham v. State*, 1 Sneed (Tenn.) 112; *Eppes v. State*, 10 Tex. 274; U. S. v. *McAvoy*, 4 Blatchf. C. C. 418.

2. See *McGuffie v. State*, 17 Ga. 497; 1 *Chitty*, Cr. L. 163; *Deer's Crim. Proc.* 135; 1 *Gude*, Cr. Prac. 84.

There is no positive law requiring that the foreman of the grand jury should sign the finding of "true bill" on the indictment, though such practice is advisable. *McGuffie v. State*, 17 Ga. 497.

3. *Gardiner v. People*, 4 Ill. (3 Scam.) 83; *Eppes v. State*, 10 Tex. 474. See *Nomaque v. People*, 1 Ill. (Breese) 109; *Johnson v. State*, 23 Ind. 32; *State v. Mertens*, 14 Mo. 94; *Steele v. State*, 1 Tex. 142.

4. *Nomaque v. People*, 1 Ill. (Breese) 109. See *Strange v. State*, 110 Ind. 354; *Johnson v. State*, 23 Ind. 32; *State v. Mertens*, 14 Mo. 94; *Com. v. Diefenbaugh*, 3 Pa. Co. Court, 299; *Steele v. State*, 1 Tex. 142.

A defendant cannot be tried on an indictment which is not signed by the foreman of the grand jury. *Com. v. Diefenbaugh*, 3 Pa. Co. Ct. 299.

Indorsement.—An indictment not endorsed by the foreman of the grand jury as required by Rev. Stat. Ind. 1881, § 1669, is bad, upon motion to quash. *Strange v. State*, 110 Ind. 354.

Where the indictment upon which the appellant was tried and convicted was not endorsed by the foreman of the grand jury, the judgment must be reversed. *Strange v. State*, 110 Ind. 354.

5. *Hannah v. State*, 1 Tex. App. 578. See *State v. Tinney*, 26 La. An. 460; *Robinson v. State*, 24 Tex. App. 4; *Pinson v. State*, 23 Tex. 579; *Weaver v. State*, 19 Tex. App. 547; s. c., 53 Am. Rep. 389; *Jones v. State*, 10 Tex. App. 552; *Campbell v. State*, 8 Tex. App. 84; *State v. Powell*, 24 Tex. 135. The law does not say because the foreman of the grand jury cannot write his name, an indictment found by a grand jury of which he is foreman shall not be good. *State v. Tinney*, 26 La. An. 460.

The want of the signature of the foreman of the grand jury is not a matter of exception to an indictment and cannot affect its validity. *Robinson v. State*, 24 Tex. App. 4.

Jones v. State, 10 Tex. App. 552; *Weaver v. State*, 19 Tex. App. 547; *Pinson v. State*, 23 Tex. 579; *State v. Powell*, 24 Tex. 135.

The requirement of Tex. Code, art. 420, that an indictment "shall be signed officially by the foreman of the grand jury," is, in effect, nullified by art. 529, making the want of such signature no cause of exception. *Campbell v. State*, 8 Tex. App. 84.

6. 1 *Bish. Cr. Proc.*, 3d ed., § 700.

jury's finding appears in any other form in the record, and that where a statute requires the words "A true bill" to be endorsed, the foreman's signature to the indorsement is not necessary.¹

(c) *Time of Signing*.—It seems that while the indictment should be signed by the foreman of the grand jury at the term of court at which it is filed, yet he may properly sign it at any subsequent term.²

(d) *Sufficiency*—*d.*¹ *Generally*.—It has been held that an indictment endorsed as a true bill, a return by the authority of the whole grand jury is sufficient without the special appointment of a foreman;³ also that it is not error when the name of the foreman is marked on the indictment as the prosecutor,⁴ and that an indictment is not vitiated by reason of one of the grand jurors having signed as foreman.⁵

The indorsement of an indictment as "A true bill," signed with the foreman's name written in his presence and by his direction by the clerk of the grand jury as the foreman's signature, does not invalidate the indictment.⁶ It is immaterial on what part of the bill the foreman's signature appears.⁷

1. *Com. v. Walters*, 6 Dana (Ky.) 290.

It is said in *Rookwood's Case*, 13 How. St. Tr. 139-159, that "An indictment is not an indictment until it be found, it is only a writing prepared for the ease of the grand jury and for expedition; it is nothing till it is found, for the jury make it an indictment by finding it; they may alter it if they please or refuse it absolutely, and if the jury upon examining the witnesses would only present a matter of fact with time and place, the court might cause it to be drawn up into form without carrying it to the jury. Again, there needs no *billa vera*, for that is only the jury's owning that which the court has prepared for them." See, regarding the necessity for an indorsement by the foreman of the grand jury, the following cases, to wit: *State v. Lassley*, 7 Port. (Ala.) 526; *People v. Johnson*, 48 Cal. 549; *People v. Lawrence*, 21 Cal. 368; *McGuffie v. State*, 17 Ga. 497; *Johnson v. State*, 23 Ind. 32; *Wau-kon-chaw-neek-kaw v. U. S.*, 1 Morris (Iowa) 332; *Com. v. Walters*, 6 Dana (Ky.) 290; *Com. v. Ripperdon*, Lit. Sel. Cas. (Ky.) 194; *Webster's Case*, 5 Me. 432; *State v. Shippey*, 10 Minn. 223; s. c., 88 Am. Dec. 70; *State v. Murphy*, 47 Mo. 274; *State v. Burgess*, 24 Mo. 381; s. c., 69 Am. Dec. 433; *State v. Mertens*, 14 Mo. 94; *Greeson v. State*, 6 Miss. (5 How.) 33; *State v. Squire*, 10 N. H. 558; *State v. Collins*,

3 Dev. (N. C.) 117; *State v. Cox*, 6 Ired. (N. C.) 440; *State v. Creighton*, 1 Nott & McC. (S. C.) 256; *Bennett v. State*, 8 Humph. (Tenn.) 118; *Gilman v. State*, 1 Humph. (Tenn.) 59; *Brown v. State*, 7 Humph. (Tenn.) 155; *State v. Muzingo*, 1 Meigs (Tenn.) 112; *Hopkins v. Com.*, 14 Wright (Pa.) 9; *Hannah v. State*, 1 Tex. App. 578; *State v. Flores*, 33 Tex. 444; *State v. Powell*, 24 Tex. 135; *Pinson v. State*, 23 Tex. 579.

2. See *Bassham v. State*, 38 Tex. 622.

3. *Peters v. State*, 4 Miss. (3 How.) 433; *Friar v. State*, 4 Miss. (3 How.) 422.

An indictment, endorsed by the foreman and the clerk, in these words, "Presented in open court, and filed in presence of the grand jury, this 27th day of May, A. D. 1858," and signed by the clerk, was held to be sufficiently endorsed. *State v. Shepard*, 10 Iowa 126.

4. *King v. State*, 6 Miss. (5 How.) 730.

5. *Com. v. Ripperdon*, Lit. Sel. Cas. (Ky.) 194.

6. *Benson v. State*, 68 Ala. 544.

7. *State v. Bowman*, 103 Ind. 69. See *Stout v. State*, 96 Ind. 407; *Galvin v. State*, 93 Ind. 550; *Wood v. State*, 92 Ind. 269, 272; *Overshiner v. Com.*, 2 B. Mon. (Ky.) 344; *State v. Hogan*, 31 Mo. 342; *State v. Paddock*, 24 Vt. 312; *Burgess v. Com.*, 2 Va. Cas. 483.

*d.*² *Designation as "Foreman."*—The designation "foreman" appended to the signor of an indictment means the foreman of the grand jury, and is sufficient;¹ and it has been held that an omission by foreman of a grand jury of the word "foreman" to the signature of the words "A true bill," written by him on the indictment, does not invalidate the indictment.²

*d.*³ *Name and Initials of Foreman.*—The signature of the foreman of the grand jury by his surname in full, and the initials of his christian name to the indorsement on the indictment is sufficient;³ and where the record of his appointment states his name at length, and he signs by the initials of his first name, this will not be a material variance.⁴

(e) Indorsement as "A True Bill"—*e.*¹ *Necessity.*—It is thought that in the absence of a mandatory statute the indorsement by the foreman of the grand jury "A true bill" is not essential to the legality and essentials of the indictment, but is only evidence of its having been found; this end is equally attained where the indictment is presented by the grand jury in open court, and is filed by the clerk in other records.⁵ Under some statutes, however, it is necessary, in order to give the court the right to try a prisoner, that the bill of indictment found by the grand jury

1. U. S. v. Plumer, 3 Cliff. C. C. 28.

2. State v. Brown, 31 Vt. 602. See McGuffie v. State, 17 Ga. 497; State v. Sopher, 35 La. An. 975; Com. v. Read, Thatch. C. C. 180.

Signature by Juror.—The finding having been signed by a juror, though not "as foreman," it being supposed that it could have been shown that he who signed was the foreman, it is sufficient since "that is certain which may be made certain." McGuffie v. State, 17 Ga. 497.

Where an indictment is signed by a juror, and it does not appear that he signed it as foreman, the court may examine the records to determine who was the foreman; and, if such juror was the foreman, the indictment will be deemed good. Com. v. Read, Thatch. Crim Cas. (Mass.) 180.

The record showed that A was appointed foreman; the indictment was signed "B, foreman"; the court presumed, in the absence of proof to the contrary, that A had been discharged and B appointed. Mohler v. People, 24 Ill. 26.

Where the record showed that R was appointed foreman *pro tem.*, and an indictment was endorsed a true bill by him as "special foreman of the grand jury," *held*, that the absence or dis-

charge of the regular foreman was to be presumed. State v. Collins, 6 Baxt. (Tenn.) 151.

3. Wassels v. State, 26 Ind. 30; Anderson v. State, 26 Ind. 89; Easterling v. State, 35 Miss. 210; State v. Taggart, 38 Me. 298; State v. Groome, 10 Iowa 308; Com. v. Gleason, 110 Mass. 66.

An indictment for murder will not be quashed on the ground that in the signature of the foreman of the grand jury his christian name was resigned by the initial letter only. Com. v. Gleason, 110 Mass. 66.

Where Alexander R. Hutcheson was appointed foreman of the grand jury, and a bill of indictment was endorsed "Alexander R. Hutchinson," it was *held* that, if necessary, the court would intend the two names to indicate the same person. State v. Stedman, 7 Port. (Ala.) 496.

4. State v. Collins, 3 Dev. (N. C.) 117.

5. See People v. Lawrence, 21 Cal. 368; White v. Com., 29 Gratt. (Va.) 824.

Indorsement of an indictment as "A true bill" is not necessary to its validity. Where the indorsement was a true bill, but the grand jury duly returned the indictment into court as found, and the clerk entered it accord-

should be endorsed "A true bill," and signed by the foreman, an indictment without such indorsement being a nullity.¹

e.² Statute Provisions Directory.—It is thought that statutes requiring an indictment to be endorsed "A true bill" are directory merely, and that the omission of such indorsement cannot be made a ground of objection after trial and conviction had thereon, although the indictment may be quashed on that ground before trial and conviction.²

c.³ Effect of Omission.—In the absence of a directory statute, an indictment need not be certified by the foreman of the grand jury to be "a true bill," and the omission of these words is not a cause for an arrest of judgment;³ but it is otherwise where the statute is directory.⁴

e.⁴ Sufficiency.—A return by the grand jury "a true bill" is sufficient,⁵ particularly where it is signed by the foreman.⁶

ingly, and the accused pleaded not guilty and was tried, *held* that the irregularity in the indorsement did not vitiate the conviction. *White v. Com.*, 29 Gratt. (Va.) 824.

1. *Com. v. Walters*, 6 Dana (Ky.) 290; *Nomaque v. People*, 1 Ill. (Breese) 109; s. c., 12 Am. Dec. 157.

In Kentucky the words "A true bill" must be endorsed upon every indictment so found; but it is not necessary that they should be signed by the foreman. *Com. v. Walters*, 6 Dana (Ky.) 290.

2. *Wau-kon-chaw-neek-kaw v. U. S.*, 1 Morr. (Iowa) 332; *State v. Murphy*, 47 Mo. 275; *State v. Burgess*, 24 Mo. 381; s. c., 69 Am. Dec. 433; *State v. Mertens*, 14 Mo. 94. *Compare Nomaque v. People*, 1 Ill. (Breese) 109; s. c., 12 Am. Dec. 157.

The statute of Missouri, requiring the foreman of the grand jury to certify on each indictment found that it is a true bill, is directory merely, and the objection cannot be raised on motion in arrest. *State v. Mertens*, 14 Mo. 94.

The statutory provision that an indictment returned shall be endorsed "A true bill," signed by the foreman, is directory merely; and although this is the proper evidence of the return of a bill, a due return, in the absence of it, may be proved by other evidence. *Wau-kon-chaw-neek-kaw v. U. S.*, 1 Morr. (Iowa) 332.

3. *Com. v. Smyth*, 65 Mass. (11 Cush.) 473; *State v. Freeman*, 13 N. H. 488; *State v. Magrath*, 44 N. J. L. (15 Vr.) 227.

In *New Jersey*, when indictments

are drawn after and not before investigation by the grand jury, an indictment is not fatally defective because not endorsed "A true bill," nor signed by the foreman. *State v. Magrath*, 44 N. J. L. (15 Vr.) 227.

4. See *Commissioners v. Graham*, 4 Colo. 201; *Nomaque v. People*, 1 Ill. (Breese) 109; s. c., 12 Am. Dec. 157; *State v. Morrison*, 30 La. An., pt. 2, 817; *Webster's Case*, 5 Me. 432.

Indictment not endorsed "A true bill," with the name of the foreman of the grand jury signed to such indorsement as prescribed by statute, is a nullity. *Nomaque v. People*, 1 Ill. (Breese) 109; s. c., 12 Am. Dec. 157.

An indictment not endorsed, in the presence of the grand jury by the foreman, "A true bill," is fatally defective. *State v. Morrison*, 30 La. An., pt. 2, 817.

An indictment not certified to be "a true bill," though signed by the foreman of the grand jury, is bad. *Webster's Case*, 5 Greenl. (Me.) 432.

An instrument not found by the grand jury to be "a true bill" is not an "indictment," for the drawing of which the Colo. law of 1874, p. 153, allows fees to the district attorney. *Arapahoe County Commissioners v. Graham*, 4 Colo. 201.

5. *Epps v. State*, 102 Ind. 539; 3 West. Rep. 380.

"True Bill," without the prefix of the article "a," endorsed on a bill of indictment, properly signed, is a sufficient finding, and judgment will not be arrested for such omission. *State v. Elkins*, 1 Meigs (Tenn.) 109.

6. *McKee v. State*, 82 Ala. 32; *Wes-*

*e.*⁵ *Effect of Indorsement.*—The indorsement "A true bill," signed by the foreman of the grand jury, is evidence proper and conclusive that it was found by a legal grand jury.¹ An indictment endorsed "Not a true bill," cannot be considered by the same grand jury, but a new bill may be signed.²

ley v. State, 52 Ala. 182; *Tilly v. State*, 21 Fla. 242; *State v. Jolly*, 7 Iowa 15; *Wrocklege v. State*, 1 Iowa 167; *Herring v. State*, 1 Iowa 205; *Patterson v. Com.* (Ky.), 5 S. W. Rep. 765; *Spratt v. State*, 8 Mo. 247; *McDonald v. State*, 8 Mo. 283.

An indorsement, "A true bill. J. Kent, foreman. Filed Oct. 21, 1857, E. J. Leach, clerk, by D.H. Lester, dept." is sufficient. *State v. Jolly*, 7 Iowa 15.

An indictment endorsed on the back in printing the words "A true bill," which indorsement is signed by the foreman of the grand jury, as such foreman, is a compliance with the statute in that respect. *Tilly v. State*, 21 Fla. 242.

The indorsement of an indictment by the foreman of the grand jury as "A true bill" is sufficient record of the finding and filing, and is all that should be made until the defendant is arrested. *Herring v. State*, 1 Iowa 205; *Wrocklege v. State*, 1 Iowa 167.

An indictment endorsed "A true bill," and signed by the foreman, and also endorsed and signed by the clerk "Filed in the open court by the foreman of the grand jury, in the presence of fourteen other members of the grand jury," on a day named of the term at which the indictment was found, shows a literal compliance with the requirements of the Alabama statute. *Wesley v. State*, 52 Ala. 182.

On the trial of an indictment for murder, the statement in the record that "the foreman of the grand jury, in the presence of the grand jury, reported an indictment a true bill" against defendant, shows sufficient compliance with the provisions of *Crim. Code Ky.*, §§ 119, 121, that an indictment must be endorsed "A true bill," and must be presented by the foreman. *Patterson v. Com.* (Ky.), 5 S. W. Rep. 765.

When an indictment is endorsed "A true bill," which indorsement is signed by the foreman of the grand jury; also "Filed in open court," which indorsement is signed by the clerk, and bears date within the term at which the indictment was found, it is a sufficient compliance with the provisions of *Ala. Code*, § 4821, requiring the indict-

ment to be returned to the court by and in the presence of the grand jury. *McKee v. State*, 82 Ala. 32.

1. *Dutell v. State*, 4 G. Greene (Iowa) 125; *Harriman v. State*, 2 G. Greene (Iowa) 270; *Laurent v. State*, 1 Kan. 313; *Territory v. Hart* (Mont.), 14 Pac. Rep. 768; *State v. McNeill*, 93 N. C. 552; *Burgess v. Com.*, 2 Va. Cas. 483.

An indictment duly exhibited in open court, and endorsed "A true bill," is taken to have been duly found by a legal grand jury, unless the records of the county show that the selection was illegal. *Dutell v. State*, 4 G. Greene (Iowa) 125.

The indorsement "A true bill," by the foreman, on the back of the indictment, raises a presumption that every member of the grand jury concurred in the finding. The point that all did not concur must be pleaded in abatement, and proved. *State v. McNeill*, 93 N. C. 552.

The evidence required to show the concurrence of the requisite number of the grand jury in the finding of an indictment is the indorsement thereof as "A true bill," and its signature by the foreman. *Laurent v. State*, 1 Kan. 313.

Under *Rev. Stat. Mont.*, §§ 150-152, div. 3, providing that no indictment can be found except on the concurrence of at least twelve members of the grand jury, and requiring a bill so found, and not otherwise, to be endorsed by the foreman "A true bill," such indorsement is simply *prima facie* evidence of such concurrence, and the accused, on motion to vacate the indictment, has the right to ask the individual members of the grand jury as to whether or not twelve of their number had voted for the finding of the indictment. *Territory v. Hart* (Montana), 14 Pac. Rep. 768.

Where an indictment filled a whole sheet, and was enveloped in another blank sheet, upon which the attorney endorsed the name of the case, and immediately below, the foreman of the grand jury, with his own hand, endorsed "A true bill," with his name, it was *held*, after verdict, that the enclosed indictment must be considered as the one upon which the grand jury passed. *Burgess v. Com.*, 2 Va. Cas. 483.

2. *State v. Brown*, 81 N. C. 568.

i. CONCLUSION—(1) *Common Law Form; Against the Peace, etc.*—(a) *Necessity.*—Both by the common law and by the statute law of nearly all the states of the Union, every indictment, whether for a felony or a misdemeanor, must conclude, “against the peace and dignity of the state.”¹

(b) *Effect of Omission.*—Where an indictment fails to conclude with the words “against the peace and dignity of the state,” it is fatally defective, except in those states where such form has been specially dispensed with by statute.² This is true whether the indictment is specially excepted to in the court below or not.³

(c) *Sufficiency*—c.¹ *Generally.*—It is said that an indictment which states in the commencement correctly the name of the commonwealth by the authority of which it proceeds may well conclude against the peace and dignity of the commonwealth, without stating the name;⁴ and it is said that where the statute or constitutional requirement is not mandatory, an indictment concluding, “against the peace and dignity,” omitting the words “of the state,” is not fatally defective;⁵ but the

1. See *State v. Cadle*, 19 Ark. 613; *State v. Clevenger*, 25 Mo. App. 655; *Com. v. Paxton*, 14 Phila. (Pa.) 665; *Com. v. Carney*, 4 Gratt. (Va.) 546; *Williams v. State*, 27 Wis. 402; *Rex v. Taylor*, 5 D. & R. 422; *Rex v. Cook*, Russ. & Ryl. 176; 2 Hawk., P. C., ch. 25, § 92.

In some of the states this form is rendered unnecessary by statutory enactments, while in other states it is expressly required by the constitutions. See *State v. Cadle*, 19 Ark. 613; *Anderson v. State*, 5 Pike (Ark.) 444; *State v. Johnson*, 1 Miss. (1 Walk.) 392; *State v. Clevenger*, 25 Mo. App. 655; *State v. Kean*, 10 N. H. 347; *Com. v. Paxton*, 14 Phila. (Pa.) 665; *State v. Anthony*, 1 McC. (S. C.) 285; *State v. Yancey*, 1 Tread. (S. C.) 237; *State v. Washington*, 1 Bay (S. C.) 120.

The words “against the peace and dignity of the commonwealth of Pennsylvania,” at the conclusion of an indictment, are words of form and not of substance, and the fact that they are required by the constitution makes them no less so. *Com. v. Paxton*, 14 Phila. (Pa.) 665.

2. *State v. Nunn*, 29 La. An. 589; *Damon's Case*, 6 Me. 148; *State v. Pemberton*, 30 Mo. 376; *State v. Lopez*, 19 Mo. 254; *State v. Clevenger*, 25 Mo. App. 655; *State v. Sims*, 43 Tex. 521; *State v. Durst*, 7 Tex. 74; *Holden v. State*, 1 Tex. App. 425; *Williams v. State*, 27 Wis. 402; *U. S. v. Crittenden*,

1 Hemp. C. C. 61; *U. S. v. Lemons*, 1 Hemp. C. C. 62.

The failure of a presentment for a misdemeanor to conclude “against the peace and dignity of the commonwealth” is not a fatal defect. *Com. v. Christian*, 7 Gratt. (Va.) 631.

The omission of the formula “against the peace and dignity of the state,” required by Wis. Const., art. 7, § 17, to conclude every indictment, does not invalidate an information filed by the district attorney. *Nichols v. State*, 35 Wis. 308.

If an indictment for an offence against the statutes of Massachusetts, committed before the separation of Maine, does not charge the offence to have been committed against the peace of Massachusetts and the laws of that commonwealth, the omission will be fatal. *Damon's case*, 6 Greenl. (Me.) 148.

3. *State v. Sims*, 43 Tex. 521.

4. *Com. v. Young*, 7 B. Mon. (Ky.) 1.

5. *Anderson v. State*, 5 Pike (Ark.) 444; *Packer v. People*, 8 Colo. 361; *Zarresseller v. People*, 17 Ill. 101; *State v. Parker*, 81 N. C. 531; *State v. Washington*, 1 Bay (S. C.) 120; *State v. Anthony*, 1 McCord (S. C.) 285.

Under the constitution of Arkansas, which provides that indictments shall conclude “against the peace and dignity of the state of Arkansas,” an indictment “against the peace and dignity of the people of the state of Arkansas”

words "against the peace and dignity" cannot be omitted.¹

*c.*² *Necessity of Following Form.*—Where the constitution of the state requires that all prosecutions shall conclude, "against the peace and dignity of the state," the omission of the word "the" before "state," in an information, is fatal to it.² A material variance from the form prescribed by the statute or constitution will render the indictment void.³

(d) Separate Counts—Repetition.—The conclusion "against the peace and dignity of the state" must be repeated in each count,⁴

was held good and sufficient. *Ander-son v. State*, 5 Pike (Ark.) 444.

An indictment found after Colorado became a state, for a murder committed before, concluded "against the peace and dignity of the people of the state of Colorado," held not objectionable. *Packer v. People*, 8 Colo. 361.

An indictment concluding "against the peace and dignity of the people of the state of Illinois" is good. *Zarresseller v. People*, 17 Ill. 101.

An indictment beginning "South Carolina," (instead of "the state of South Carolina") and concluding "against the peace and dignity of said state," was held good. *State v. Anthony*, 1 McCord (S. C.) 285.

An indictment for an offence against a statute "in force in the state of South Carolina," concluding "against the peace and dignity of the same state," is good. *State v. Washington*, 1 Bay (S. C.) 120.

1. *State v. Joyner*, 81 N. C. 534.

A conclusion "to the great damage of the said L. C. P. (the prosecutor) against the peace of the state, the government and dignity of the same," is defective. *Com. v. Jackson*, 1 Grant's Cas. (Pa.) 262.

2. *Thompson v. State*, 15 Tex. App. 39, 168; *State v. Allen*, 8 W. Va. 680.

3. See *State v. Waters*, 1 Mo. App. 7; *State v. Kean*, 10 N. H. 347; *State v. Robinson*, 27 S. C. 615; *State v. Yancey*, 1 Const. Rep. Tread. (S. C.) 237; *Haun v. State*, 13 Tex. App. 383; s. c., 44 Am. Rep. 706; *State v. Allen*, 8 W. Va. 680; *Lemons v. State*, 4 W. Va. 755.

Thus it has been said that an indictment which includes the peace and dignity of "W. Virginia," instead of "West Virginia," as required by the constitution, is insufficient. *Lemons v. State*, 4 W. Va. 755.

But an indictment concluding "against the peace and dignity of the state of West Virginia" is not repugnant to

Const., art. 2, § 8, which requires indictments to conclude "against the peace and dignity of the state." *State v. Allen*, 8 W. Va. 680.

An indictment in South Carolina concluding "against the peace and dignity of the same state aforesaid," when Const., art. 4, § 31 declares that all indictments shall conclude "against the peace and dignity of the state," is not valid. *State v. Robinson* (S. C.), 4 S. E. Rep. 570.

An indictment concluding "against the peace and dignity of the state, this the third day of November, 1882," held a violation of the constitutional provision that indictments conclude "against the peace and dignity of the state." *Haun v. State*, 13 Tex. App. 383; s. c., 44 Am. Rep. 706.

An indictment was held good which concluded "against the peace and dignity of this state," instead of "against the peace and dignity of the said state." *State v. Yancey*, 1 Tread. Const. Rep. (S. C.) 237.

The provision in the constitution of New Hampshire, requiring all indictments to terminate with the words "against the peace and dignity of the state," is sufficiently complied with by an indictment concluding "against the peace and dignity of our said state." *State v. Kean*, 10 N. H. 347.

Indictment which concludes "against the peace and dignity of our said state," instead of "the peace and dignity of the state," as required by the constitution, is not such a substantial variance as to vitiate the same. *State v. Kean*, 10 N. H. 347; s. c., 34 Am. Dec. 162.

4. *Williams v. State*, 47 Ark. 230; *State v. Hazle*, 20 Ark. 156; *State v. Coadle*, 19 Ark. 613; *State v. Strickland*, 10 S. C. 191; *Com. v. Carney*, 4 Gratt. (Va.) 546.

A count in an indictment which omits the conclusion "against the peace and dignity of the commonwealth" is de-

except in those cases where the indictment concludes, "against the peace and dignity of the state;" in each case it is thought that each count need not so conclude.¹

(e) *Misspelling and Abbreviations*.—An indictment is not bad in concluding "aganst" instead of "against the peace and dignity of the state."² But an indictment concluding "against the state of W. Va." has been held to be fatally defective for non-compliance with the constitutional requirements that indictment shall conclude, "against the peace and dignity of the state of West Virginia."³

(2) *Statutory Offences—Contra Formam Statuti*⁴—(a) *Necessity*.—An indictment on a public statute need not set out the statute or specially refer to it, but must conclude, "against the form and dignity of the statute; in such case made and provided,"⁵ or at least refer clearly and explicitly to the statute as

fective, and should be quashed. *Com. v. Carney*, 4 Gratt. (Va.) 546.

An indictment against the defendant and others, in four counts, concluded against the peace and dignity of the state in each count, except the second, which had no such conclusion. The defendant was charged only on the first two counts, and found guilty only on the second; the other defendants, who were the only ones charged in the last two counts, being acquitted altogether. *Held* that the second count was fatally defective. *State v. Strickland*, 10 S. C. 191.

The first count in an indictment was defective in omitting the words "against the peace and dignity of the state," as required by statute, but the second count was good in form and substance. *Held* that this was sufficient to sustain the verdict and judgment, on appeal. *Williams v. State*, 47 Ark. 230.

The fact that one count of an indictment concludes "against the peace and dignity of the commonwealth of Pennsylvania," while another does not, authorizes the application of the words to the count from which they are omitted. *Com. v. Paxton*, 14 Phila. (Pa.) 665.

Under the constitutional provision of Kentucky, that indictments shall conclude as "against the peace and dignity of the commonwealth," it is not necessary in an indictment that each specification of a former conviction of felony shall so conclude. *Boggs v. Com. (Ky.)*, 5 S. W. Rep. 307.

1. *McGuire v. State*, 37 Ala. 61; *Rice v. State*, 3 Heisk. (Tenn.) 215.

2. *Hudson v. State*, 10 Tex. App. 215.

3. See *Lemons v. State*, 4 W. Va. 755; s. c., 6 Am. Rep. 293.

4. See also *X.*, 7.

5. *Stevens v. State*, 18 Fla. 903; *Downing v. State*, 66 Ga. 160; *McCullough v. Com.*, Hard. (Ky.) 95; *Com. v. Hoye*, 77 Mass. (11 Gray) 462; *Reed v. Northfield*, 30 Mass. (13 Pick.) 94; s. c., 23 Am. Dec. 662; *Com. v. Cooley*, 27 Mass. (10 Pick.) 37; *Com. v. Stockbridge*, 11 Mass. 279; *Com. v. Springfield*, 7 Mass. 9; *Com. v. Northampton*, 2 Mass. 116; *State v. Buckman*, 8 N. H. 203; s. c., 29 Am. Dec. 646; *State v. Dayton*, 23 N. J. L. (3 Zab.) 49; s. c., 3 Am. Dec. 270; *People v. Enoch*, 13 Wend. (N. Y.) 159; s. c., 27 Am. Dec. 197; *State v. Jim*, 3 Murph. (N. C.) 3; *State v. Minton*, Phill. (N. C.) 196; *Warner v. Com.*, 1 Pa. St. 154; s. c., 44 Am. Dec. 114; *Com. v. Searle*, 2 Binn. (Pa.) 332; s. c., 4 Am. Dec. 446; *Chapman v. Com.*, 5 Whart. (Pa.) 427; s. c., 34 Am. Dec. 565; *Respublica v. Newell*, 3 Yates (Pa.) 407; s. c., 2 Am. Dec. 381; *State v. Wilbor*, 1 R. I. 199; s. c., 36 Am. Dec. 245; *State v. Gray*, 14 Rich. (S. C.) L. 174; *State v. Soragan*, 40 Vt. 450; *U. S. v. LaCoste*, 2 Mason C. C. 129.

Thus a conclusion "against the peace and dignity of the commonwealth," has been held to be bad. *Com. v. Springfield*, 7 Mass. 9; *Com. v. Northampton*, 2 Mass. 116. And so also is a conclusion "against the law in such cases made and provided." *Com. v. Stockbridge*, 11 Mass. 279. However, a conclusion against the peace and the statute is good. *Com. v. Caldwell*, 14 Mass. 330.

In North Carolina an indictment against A for breaking an unoccupied

the foundation of the suit.¹ Some courts, however, hold an indictment is sufficient if it shows intelligibly the offence intended to be charged, and that it need not conclude, "against the form of the statute."²

Where an indictment concludes, "against the form of the statute," it will support a conviction thereunder, notwithstanding the offence charged is a creature of several statutes.³

(b) *Sufficiency Generally*.—An allegation that a statutory offence was committed "contrary to the form of the statute" is sufficient without a specific reference to the statute.⁴

dwelling house in the day time, and feloniously taking therefrom a bank note of the value of £5, must conclude against the "form of the statutes." *State v. Jim*, 3 *Murph.* (N. C.) 3.

Violation of City Ordinance.—A complaint for violation of a city ordinance should conclude against the statute, and also against the peace and dignity of the state. *State v. Soragan*, 40 *Vt.* 450.

Prohibiting Sale of Kerosene Oil.—An accusation complying with the statute prohibiting the sale of kerosene oil below the statutory test need not conclude "*contra formam statuti*." *Downing v. State*, 66 *Ga.* 160.

1. See *Com. v. Cooley*, 27 *Mass.* (10 *Pick.*) 37; *Com. v. Stockbridge*, 11 *Mass.* 279; *Com. v. Springfield*, 7 *Mass.* 9; *Com. v. Northampton*, 2 *Mass.* 116; *Warner v. Com.*, 1 *Pa. St.* 154; s. c., 44 *Am. Dec.* 114; *Chapman v. Com.*, 5 *Whart.* (Pa.) 427; s. c., 34 *Am. Dec.* 565.

2. *Com. v. Kennedy*, 15 *B. Mon.* (Ky.) 531. See *Brown v. State*, 13 *Ark.* 96; *Chiles v. Com.*, 2 *Va. Cas.* (Va.) 260.

The conclusion in an indictment, *contra formam statuti*, is mere matter of form, and not made necessary by the constitution. *Brown v. State*, 13 *Ark.* 96.

Horse Stealing.—Indictments for horse stealing need not conclude *contra formam statuti*; and even if it were proper that they should, the omission is cured by the *Virginia* statute of jeofails. *Chiles v. Com.*, 2 *Va. Cas.* 260.

3. *State v. Wilbor*, 1 *R. I.* 199; s. c., 36 *Am. Dec.* 245.

4. *Hudson v. State*, 1 *Blackf.* (Ind.) 317; *Zumhoff v. State*, 4 *Greene* (Iowa) 526; *State v. Karn*, 16 *La. An.* 183; *People v. Stockham*, 1 *Park. Cr. Cas.* (N. Y.) 424; *State v. Turnage*, 2 *Nott & McC.* (S. C.) 153; *U. S. v. Smith*, 2 *Mason C. C.* 143.

The conclusion, "contrary to law," of an indictment for murder, is sufficient. *Hudson v. State*, 1 *Blackf.* (Ind.) 317.

If an indictment alleges all the facts which the statute requires to constitute the offence, concluding against the form of the statute, etc., it is, in general, sufficient. *People v. Stockham*, 1 *Parker Cr. Cas.* (N. Y.) 424.

An indictment concluding "contrary to the form of the statute in such case made and provided," must be intended to mean the statute of the state of *Louisiana*. The criminal statutes of no other government are cognizable, properly speaking, by our courts. *State v. Karn*, 16 *La. An.* 183.

A conclusion to an indictment founded on a statute, "contrary to the true intent and meaning of the act of the congress of the United States in such case made and provided" is good, and equivalent to a conclusion "against the form of the statute in such case made and provided." *U. S. v. Smith*, 2 *Mason C. C.* 143.

British Statutes.—An indictment concluding "against the act of assembly in such case made and provided" will not be supported by proof which would convict under a British statute on the same subject made of force in that state. *State v. Sanford*, 1 *Nott & McC.* (S. C.) 512.

An indictment concluding against the form of the statute in such case made and provided, and made of force in the state aforesaid, cannot be sustained under an act of assembly of this state, although it be entitled "an act for putting in force" certain English statutes, and the English statute relating to the offence be copied nearly *verbatim* in the act of assembly. *State v. Holley*, 1 *Brev.* (S. C.) 35.

Indictment as Evidence.—Where a complaint is in a form declared by

An indictment charging a person with having committed an offence, made such by a statute in contempt of the laws of the United States of America, without specifying the statute, is bad.¹ And where a statute imposes upon a person or corporation a duty, an indictment which alleges that the act was done *contra formam statuti* will be applied to the statute as creating a duty, and not as imposing a penalty.²

(c) *Exact Language of Statute.*—The conclusion of an indictment following the form prescribed by the statute under which it is found is good.³

(d) *Separate Counts—Repetition.*—An indictment containing a charge against certain of the defendants as principals, and another charge against others as accessories, closing with the usual words, "contrary to the form of the statute," etc., is sufficient, and these words need not be repeated after each count.⁴ And where the statutes permit a count for a statutory offence, as receiving stolen goods, to be joined with one for an offence at common law, as larceny, it is not fatal to the indictment that each does not conclude, "against the form of the statute."⁵

(e) *Single and Plural Forms*—e.¹ *Generally.*—Where an indictment is founded upon a single statute, and not upon any other in conjunction with it, its conclusion must be in the singular.⁶

statute to be sufficient, the words "against the statute," etc., may be read as a part of the charge, if the charge without them would not set forth the offence with completeness. *State v. Murphy*, 15 R. I. 543.

1. *U. S. v. Andrews*, 2 Paine C. C. 451.

2. *State v. Morris Canal & Banking Co.*, 22 N. J. L. (2 Zab.) 537.

3. *Camp v. State*, 25 Ga. 689. See *State v. Tribatt*, 10 Ired. (N. C.) L. 151; *The Idaho*, 29 Fed. Rep. 187.

Where an offence was charged to be against "an act of the assembly," instead of against the "statute," which is the proper expression, it was held not to be a fatal defect. *State v. Tribatt*, 10 Ired. (N. C.) 151.

An information on a seizure on land or water, and particularly the latter, need not allege that the act or omission on account of which the seizure was made was done or omitted contrary to the form of the statute in such case made and provided, but it is sufficient if such act or omission is described in the words of the statute. *The Idaho*, 29 Fed. Rep. 187.

4. *State v. Travis*, 39 La. An. 356.

5. *State v. Beatty*, Phill. (N. C.) 52.

But a count in an indictment, defective in not alleging the offence to

have been committed against the form of the statute, is not aided by another count in the same indictment for another offence, founded upon the same facts, in which there is that allegation. *State v. Soule*, 20 Me. 19.

6. *King v. State*, 2 Ind. 523; *State v. Casey*, 45 Me. 435; *State v. Cassel*, 2 Har. & G. (Md.) 407; *State v. Sandy*, 3 Ired. (N. C.) L. 570; *Kane v. People*, 8 Wend. (N. Y.) 203. Compare *Townley v. State*, 3 Harr. (N. J.) 311.

Where there is but one statute, an indictment concluding against the form of the "statutes" is bad. *State v. Sandy*, 3 Ired. (N. C.) L. 570. But see *Townley v. State*, 3 Harr. (N. J.) 311.

Where one statute continues a former one in part, or explains what was doubtful, or regulates its operation, the conclusion of the indictment should be in the singular. *King v. State*, 2 Ind. 523.

Although two statutes are set forth in an indictment, it is not necessary to allege the offence to have been committed *contra formam statutorum*, where it is wholly created by one of the statutes, and the second merely makes some alterations in the first, without affecting the offence. *Kane v. People*, 8 Wend. (N. Y.) 203.

Where the indictment is founded on two statutes, it should conclude, "contrary to the form of the statutes."¹ But it is not absolutely necessary that it should so conclude.²

*e.*³ *Statutes Imposing Punishment or Penalty.*—Where the offence and penalty declared by the same statute, though in different sections, and the indictment is founded on the same statute, there is no necessity that it should refer to another, or conclude, "against the form of the statute."³ Where a statute imposes a new penalty for an offence punishable by a former statute, it is of little consequence whether the indictment concludes, "contrary to the form of the statute," or "of the statutes."⁴ Where one statute defines an offence and another prescribes the

A conclusion of an indictment "against the form of the statute" (in the singular) is sufficient in all cases, where the offence is distinctly within more than one independent statute. *U. S. v. Gibert*, 2 Sumn. C. C. 19. So a conclusion "against the form of the statutes" (in the plural) would, it seems, be good, even if the offence were punishable by a single statute only. *Com. v. Caldwell*, 14 Mass. 330. See also *Com. v. Cooley*, 27 Mass. (10 Pick.) 37; *Com. v. Stockbridge*, 11 Mass. 279; *Com. v. Springfield*, 7 Mass. 9; *Com. v. Northampton*, 2 Mass. 116.

1. *Tevis v. State*, 8 Blackf. (Ind.) 303; *State v. Hunter*, 8 Blackf. (Ind.) 212; *Francisco v. State*, 1 Ind. 179; *U. S. v. Trout*, 4 Biss. C. C. 105.

2. *State v. Dayton*, 23 N. J. L. (3 Zab.) 49; s. c., 53 Am. Dec. 270. See *Strong v. State*, 1 Blackf. (Ind.) 193; *Carter v. State*, 2 Ind. 617; *State v. Bell*, 3 Ired. (N. C.) L. 506; *State v. Wilbor*, 1 R. I. 199; s. c., 36 Am. Dec. 245.

It is not a fatal objection against an indictment that it concludes against the form of the "statute," instead of the "statutes," when there are more than one. *State v. Dayton*, 23 N. J. L. (3 Zab.) 49.

Indictment which concludes "against form of statute" will support a conviction, although the offence charged is the creation of several statutes. *State v. Wilbor*, 1 R. I. 199; s. c., 36 Am. Dec. 245.

Where an indictment concludes by charging an offence as having been committed "against the form of the statute," the indictment will be sustained, though the offence is the creation of a number of "statutes." *State v. Wilbor*, 1 R. I. 199; *Carter v. State*, 2 Ind. 617.

Where an indictment, founded upon two chapters of the statutes of the same year, concluded "against the form of the statute," it was held sufficient, all the acts passed at the same session of the legislature being considered but one statute. *State v. Bell*, 3 Ired. (N. C.) 506.

A person guilty of perjury, where the punishment was whipping, not exceeding 100 stripes, was prosecuted and convicted after the taking effect of a statute by which the punishment, for subsequent convictions of the crime, was changed to confinement in the penitentiary not exceeding seven years. Held, that the conclusion of the indictment in the singular, "*contra formam statuti*," was sufficient. *Strong v. State*, 1 Blackf. (Ind.) 193.

3. *Crawford v. State*, 2 Ind. 132; *Morrison v. Witham*, 10 Me. 421; *State v. Abernathy*, Busb. (N. C.) 428; *Com. v. Searle*, 2 Binn. (Pa.) 332; s. c., 4 Am. Dec. 446.

Where an offence is created and the penalty given in the same statute, it is sufficient, in an action brought to recover the penalty, to allege the offence to have been committed against the form of the statute, although there may be other statutes qualifying the mode of proceeding upon the former. *Morrison v. Witham* (Me.), 421.

Where a statute defines an offence, makes it indictable, and prescribes the punishment, an indictment on it is wholly founded on this statute, although it contains a reference to a former statute, giving a penalty to a common informer for the same act. And therefore an indictment should not conclude against the statutes, etc., which would render it fatally defective. *State v. Abernathy*, Busb. (N. C.) 428.

4. *State v. Robbins*, 1 Strobh. (S. Car.) 355.

punishment, the indictment must conclude in the plural.¹

(f) *Common Law Offences*.—Where an indictment concludes "against the form of the statute," it clearly indicates a prosecution under a statute, and not at common law.² Where the statute under which the indictment is found creates an offence, which did not exist at common law, the indictment should conclude *contra formam statuti*; it is otherwise, however, where the statute is merely declaratory of the common law.³

(3) *Surplusage*.—It is a general rule that mere surplusage will not vitiate an indictment;⁴ as where an indictment for an offence

1. *State v. Moses*, 7 Blackf. (Ind.) 244; *King v. State*, 2 Ind. 523; *Morrison v. Witham*, 10 Me. 421; *State v. Pool*, 2 Dev. (N. C.) 202.

Where one statute creates an offence, imposes a penalty, and gives an action to recover it, and another statute makes the offence indictable, it was held (HENDERSON, C. J., dissenting) that an indictment for the offence should conclude against the "form of the statutes." *State v. Pool*, 2 Dev. (N. C.) 202.

Where one statute creates an offence and inflicts the penalty, and a subsequent statute imposes another and further penalty, an indictment for the offence may well conclude, "*contra formam statuti*." *Butman's Case*, 8 Me. (Greenl.) 113.

2. *Paris v. People*, 27 Ill. 74.

3. *Fuller v. State*, 1 Blackf. (Ind.) 63; *Com. v. Hoxey*, 16 Mass. 385; *People v. Cook*, 2 Park. Cr. Cas. (N. Y.) 12; *People v. Enoch*, 13 Wend. (N. Y.) 159; s. c., 27 Am. Dec. 197; *State v. Phelps*, 11 Vt. 116; see also *Reed v. Northfield*, 30 Mass. (13 Pick.) 94; s. c., 23 Am. Dec. 662.

An indictment concluding "*contra formam statuti*" can be maintained, though the facts proved amount to an offence at common law, if they do not come within the purview of any statute. *Com. v. Hoxey*, 16 Mass. 385.

Where an offence exists at common law, and only the punishment is altered by statute, it is not necessary for the indictment to conclude "against the form of the statute." *State v. Ratts*, 63 N. Car. 503.

Where the grade of a common law offence has been made higher by statute the indictment must conclude against the statute; but where the punishment has been mitigated it may conclude at common law. *State v. Lawrence*, 81 N. C. 522.

Where a statute creates an offence or changes the nature of one known at the

common law, the indictment should be drawn in reference to the provisions of the statute and conclude *contra formam*. *People v. Enoch*, 13 Wend. (N. Y.) 159; s. c., 27 Am. Dec. 197. See also *Reed v. Northfield*, 30 Mass. (13 Pick.) 94; s. c., 23 Am. Dec. 662 *dictum*.

An indictment charging that which is an offence at common law to be "contrary to the statute" is bad. *State v. Phelps*, 11 Vt. 116.

The conclusion *contra formam statuti* does not vitiate an indictment at common law. *State v. White*, 15 S. C. 381; *Respublica v. Newell*, 3 Yeates (Pa.) 407; 2 Am. Dec. 381.

Where an offence is punishable either at common law or under an act of the legislature, the conclusion in the indictment "*contra formam statuti*" is not improper. *Davis v. State*, 3 Harr. & J. (Md.) 154.

4. *Lodano v. State*, 25 Ala. 64; *Rose v. State*, Minor (Ala.) 28; *State v. Stedman*, 7 Port. (Ala.) 495; *State v. Cocker*, 3 Harr. (Del.) 554; *Cruiser v. State*, 3 Harr. (N. J.) 206; *People v. Buchanan*, 1 Idaho, N. S. 681; *Pickett v. U. S.*, 1 Idaho, N. S. 523; *State v. Hutzell*, 52 Ind. 160; *Warren v. State*, 1 G. Greene (Iowa) 106; *Olive v. Com.*, 5 Bush (Ky.) 376; *Gregory v. Com.*, 2 Dana (Ky.) 417; *Richardson v. State*, 66 Md. 205; *Com. v. Parmenter*, 121 Mass. 354; *Com. v. McPike*, 57 Mass. (3 Cush.) 181; *Com. v. Kneeland*, 37 Mass. (20 Pick.) 215-216; *People v. Edwards*, 5 Mich. 22; *People v. Carmichael*, 5 Mich. 10; *State v. Munch*, 22 Minn. 67; *State v. Schloss*, 93 Mo. 361; *State v. Waters*, 1 Mo. App. 7; *State v. Reakey*, 1 Mo. App. 3; *Mobley v. State*, 46 Miss. 501; *Dick v. State*, 30 Miss. 631; *State v. Nichols*, 58 N. H. 41; *State v. Straw*, 42 N. H. 393; *State v. Webster*, 39 N. H. 96; *State v. Card*, 34 N. H. 510; *State v. Moore*, 12 N. H. 42; *State v. Buckman*, 8 N. H. 203; s. c., 29 Am. Dec. 646; *People v. Reh-*

at common law concluded "*contra formam statuti*."¹ Thus where an indictment concludes with the phrase "against the peace and dignity of the state," it will not be vitiated by any words following that phrase, if they form no part of it,² and such words will be rejected as mere surplusage.³ Where an offence is

mann, 2 Park. Cr. Cas. (N. Y.) 216; People v. White, 22 Wend. (N. Y.) 167, 169; State v. Bryson, 79 N. C. 651; State v. Woodman, 3 Hawks (N. C.) L. 384; State v. Haney, 1 Hawks (N. C.) L. 460; Smith v. State, 8 Ohio 294; Com. v. Bell, Addis. (Pa.) 156; State v. Harden, 1 Brev. (S. C.) L. 47; State v. Wimberly, 3 McC. (S. C.) L. 190; State v. Coppenburg, 2 Strobb. (S. C.) L. 273; State v. Pratt, 44 Tex. 93; State v. Welch, 37 Wis. 196; State v. Killough, 32 Tex. 74; Wilson v. State, 25 Tex. 169; State v. Elliott, 14 Tex. 423; Rowlett v. State, 23 Tex. App. 191; Com. v. Bennett, 2 Va. Cas. 235; Com. v. Scott, 10 Gratt. (Va.) 749; U. S. v. Dickinson, Hempst. C. C. 1; U. S. v. Burroughs, 3 McL. C. C. 405; Reg. v. Geach, 9 Car. & P. 499; Rex v. Batt, 6 Car. & P. 329; Rex v. Davis, 1 Car. & P. 306; Reg. v. Doddridge, 8 Cox C. C. 335; Reg. v. Hamp, 6 Cox C. C. 167; Reg. v. Jennings, Dears & B. C. C. 447; s. c., 7 Cox C. C. 397; Rex v. May, 1 Doug. 193; Rex v. Sadi, 1 Leach C. C. (4th ed.) 468; Reg. v. Turner, 2 M. & R. 214; Reg. v. Johnson, 11 Mod. 62; Reg. v. Hill, 2 Moo. C. C. 30; Rex v. Cox, Russ. & Ry. C. C. 362; Rex v. Hayward, 1 Russ. & Ry. C. C. 78.

1. State v. Wimberly, 3 McC. (S. C.) 190.

Where an indictment for an offence punishable at common law concludes, "*contra formam statuti*," those words may be rejected as surplusage and the indictment maintained. *Cruiser v. State*, 3 Harr. (N. J.) 206; *People v. Buchanan*, 1 Idaho N. S. 681; *Gregory v. Com.*, 2 Dana (Ky.) 417; *State v. Straw*, 42 N. H. 393; *State v. Card*, 34 N. H. 510; *State v. Buckman*, 8 N. H. 203; s. c., 29 Am. Dec. 646; *State v. Bryson*, 79 N. C. 651.

2. Rowlett v. State, 23 Tex. App. 191.

3. *Pickett v. U. S.*, 1 Idaho N. S. 523; *Richardson v. State*, 66 Md. 205; *State v. Schloss*, 93 Mo. 361; *State v. Waters*, 1 Mo. App. 7; *State v. Reakey*, 1 Mo. App. 3; *State v. Haney*, 1 Hawks (N. C.) 460.

Const. Mo., art. 6, § 38, provides

that all indictments shall conclude "against the peace and dignity of the state." To an indictment so stating was added: "and contrary to the form of the statute in such cases made and provided." Held that the latter clause was surplusage and the indictment was good. *State v. Schloss*, 93 Mo. 361.

Assault with Intent to Kill.—An indictment for an assault with intent to kill, concluding "against the peace and dignity of the state, and contrary to the form of the statute in such cases made and provided," is good; the words "contrary to the form of the statute," etc., being surplusage, so that the indictment will end in the words required by the constitution. *State v. Schloss*, 93 Mo. 361.

An indictment for murder, which ought to conclude "against the peace and dignity of the State," is not fatally defective because the conclusion is against the peace and dignity of the state, and against the form of the statute." The closing clause may be disregarded as surplusage. 1876, *State v. Reakey*, 1 Mo. App. 3; *State v. Waters*, 1 Mo. App. 7.

Where, upon an indictment for murder, the venue is laid "in the district court of the United States of America, for the first judicial district of Idaho Territory," the words "United States of America" are mere surplusage. *Pickett v. U. S.*, 1 Idaho N. S. 523.

"Scilicet"—Surplusage When.—In general, time is not traversable in an indictment, and if it be laid after a *scilicet*, and be repugnant to the time laid in a former part of the indictment, the *scilicet* will be rejected as superfluous. *State v. Haney*, 1 Hawks (N. Car.) L. 460.

As to Time of Offence.—In an indictment properly laying an offence on a particular day, a *continuando* may be rejected as surplusage. *State v. Nichols*, 58 N. H. 41.

Although the offence cannot be laid to have been committed after the finding of the indictment, yet if a day certain be laid before the finding the other may be rejected as surplusage. *State*

alleged in all the statutory terms in order to show a complete offence, the indictment will not be vitiated by adding something which makes the offence appear more enormous.¹

Unnecessary matter stated in an indictment which shows that no offence was committed, or for other reason that the prosecution is not maintainable, are not to be stricken out as surplusage.²

j. RECORD; FILING—(1) *Necessity*.—The statute requiring the filing of an indictment is directory.³ The omission to file

v. Woodman, 3 Hawks. (N. Car.) 384.

1. See *State v. Fleetwood*, 16 Mo. 448; *State v. Cozens*, 6 Ired. (N. Car.) L. 82; *State v. Cheatwood*, 2 Hill (S. Car.) L. 459; *Rex v. Foot*, 2 Show. 455.

Alleging Aggravating Matter.—The allegation of matter aggravating the crime beyond what is simply necessary to constitute the offence, whether under a statute or at common law is mere surplusage, does not need to be proven, and may be stricken out. See *Olive v. Com.*, 5 Bush (Ky.) 376; *State v. Brown*, 8 Humph. (Tenn.) 89; *Young v. State*, 44 Tex. 98; *Johnson v. State*, 1 Tex. App. 130; *Attorney General v. Macpherson, L. R.*, 3 P. C. 268, 281; s. c., sub. nom.; *Reg. v. Macpherson*, 11 Cox C. C. 604. See also *Eagan v. State*, 53 Ind. 162; *State v. Staples*, 45 Me. 320; *Butman's Case*, 8 Greenl. (Me.) 113; *Hodgman v. People*, 4 Den. (N. Y.) 235; *U. S. v. Dickinson*, Hempst. C. C. 1.

Rejecting Defective Allegations.—Where allegations are defective they may be rejected as surplusage, where enough remains after such allegation to satisfy the requirements of the law. See *McGuire v. State*, 50 Ind. 284; *Greer v. State*, 50 Ind. 267; *Rawlings v. State*, 2 Md. 201; *State v. Ansaleme*, 15 Iowa 44; *State v. Freeman*, 8 Iowa 428; *State v. Noble*, 15 Me. 476; *Com. v. Johns*, 72 Mass. (6 Gray) 274; *State v. Noyes*, 30 N. H. (10 Fost.) 279.

Thus in libel a needless inuendo inadequate in form may be properly rejected as surplusage. See *Com. v. Snelling*, 32 Mass. (15 Pick) 321; also *Fitch v. Rempubliam*, 3 Yeates (Pa.) 49.

A defective allegation may be rejected as surplusage, even though it be a matter which if well alleged would make the offence heavier. See *Greer v. State*, 50 Ind. 267; *McGuire v. State*, 50 Ind. 284; *Com. v. Hope*, 39 Mass. (22 Pick.) 1; *Com. v. Tuck*, 37 Mass. (20 Pick.) 356; *Green v. State*, 23 Miss.

509; *State v. Barker*, 28 Ohio St. 583; *Page v. Com.*, 26 Gratt. (Va.) 943. *Compare Com. v. Atwood*, 11 Mass. 93.

Unnecessary Words and Phrases.—It has been laid down that as a general rule, subject to certain qualifications, that "whenever the striking out of a needless word or phrase would make the indictment good it may be treated as though done." *State v. Corrigan*, 24 Conn. 286; *Com. v. Bolkom*, 20 Mass. (3 Pick.) 281; *Tift v. State*, 23 Miss. 567; *State v. Bailey*, 31 N. H. (11 Fost.) 521; *State v. Perrin*, 3 Brev. (S. C.) 152; s. c., 1 Tread. (S. Car.) Const. 446; *United States v. Howard*, 3 Sumn. C. C. 12; *Reg. v. Woolley*, 4 Cox C. C. 251; *Rex v. Morris*, 1 Leach (4th ed.) 109.

Meaningless words in an indictment which obstruct its sense may be rejected if thereby the instrument is made sensible. *Com. v. Randall*, 70 Mass. (4 Gray) 36; *Com. v. Hunt*, 21 Mass. (4 Pick.) 252; *Greeson v. State*, 6 Miss. (5 How.) 33, 42; *Rex v. Redman*, 1 Leach (4th ed.) 477.

2. See *Dukes v. State*, 11 Ind. 557; *Com. v. Unknown*, 72 Mass. (6 Gray) 489; *State v. Beason*, 40 N. H. 367; *Butler v. State*, 3 McC. (S. Car.) 383; *Reg. v. Woolley*, 4 Cox C. C. 251; *Rex v. Murray*, 1 Moo. C. C. 276; s. c., 5 Car. & P. 145; *Anon*, 4 Co. 48 a; 2 Hale P. C. 127; 2 Hawk. P. C., ch. 25, §§ 100-102.

3. *Dawson v. People*, 25 N. Y. 399. See *Walrod v. Shuler*, 2 N. Y. 134; *Marchant v. Langworthy*, 6 Hill (N. Y.) 646; *aff'd*, 3 Den. (N. Y.) 526; *Hall v. Tuttle*, 6 Hill (N. Y.) 38, 42; *Wiggin v. New York*, 9 Paige Ch. (N. Y.) 16; *People v. Allen*, 6 Wend. (N. Y.) 486; *Rex v. Loxdale*, 1 Burr. 447.

Where the defendant is not in custody, and has not been held to bail, the indictment should not be docketed nor entered on the minutes or records of the court. *State v. Corson*, 12 Mo. 404.

does not, it seems, avoid the indictment.¹ If otherwise, an averment that it has been filed with the clerk of the county is equivalent to an averment that it was filed in the proper court generally.²

(2) *General Requisites.*—While it is necessary to the validity of a presentment by a grand jury that it should be filed, yet it need not appear on the record book *in extenso*.³ It need not appear upon the face of an information that it was filed with the consent of the court, it being enough if the minutes of the court show the fact.⁴ Where an indictment has been substituted in order to establish the authenticity of the substituted instrument, the record must affirmatively show that there was an actual substitution.⁵

(3) *What Constitutes.*—An indictment becomes a part of the record when filed without any further act of the court.⁶ A presentment becomes a part of the record by being returned into the court by the jury and filed by the clerk without any memorandum upon the minutes of the court of these facts.⁷

(4) *Effect of Mistake—Informalities and Omissions.*—Generally, the mistake of the clerk in the date of his entry in endorsing upon the indictment the date of the filing, will not affect the validity of an indictment properly found and returned by the

1. *Dawson v. People*, 25 N. Y. 399. However, it is held by the supreme court of Mississippi, in the recent case of *Williamson v. State*, 64 Miss. 229, that an indictment marked filed with the date thereof signed by the clerk, is not sufficient to support a conviction.

2. *Dawson v. People*, 25 N. Y. 399.

3. *Com. v. Tiernan*, 4 Gratt. (Va.) 545.

4. *State v. De Serrant*, 33 La. An. 979.

The attorney general, who has received from the hands of a relator an information fully drawn up, is not bound to file that particular document, but he may exercise his discretion and file an information in such manner as his judgment shall direct, provided that it embodies substantially the same issue as that handed him by the relator. *Atty. Gen. v. Barstow*, 4 Wis. 567.

The record of a criminal case, after the caption, stating the time and place of holding the court, should consist of the indictment, properly endorsed, as found by the grand jury, the arraignment of the accused, his plea, the empanelling of the traverse jury, their verdict, and the judgment of the court. It is not necessary that it should appear by the record that the names of the witnesses were endorsed on the back of the indictment, that the prisoner was fur-

nished with a copy of the indictment, that the court committed the jury to the charge of a sworn officer during a recess, that they were placed in charge of a sworn officer when they retired to consider their verdict, or that the oaths to the witnesses were administered according to law. The defendant should take advantage of any irregularity, by objecting at the time, and if his objection was overruled, the fact should be preserved by a bill of exceptions. *McKinney v. People*, 2 Gilm. (Ill.) 540; *Pate v. People*, 3 Gilm. (Ill.) 644.

Informalities in the filing of an indictment not fatal, and the requisites of the criminal record, under Fla. Const., § 2. stated. *Collins v. State*, 13 Fla. 651.

5. *Rogers v. State*, 11 Tex. App. 608.

6. *Stewart v. State*, 24 Ind. 142.

7. *State v. Muzingo*, 1 Meigs (Tenn.) 112.

But it is otherwise with an indictment which is required to be filed before it becomes a part of the record. *Stewart v. State*, 24 Ind. 142.

The caption of an indictment, showing when, where, and by whom the court was held, and who were elected and sworn as grand jurors, may be looked to in aid of the indictment as a part of the record. *Noles v. State*, 24 Ala. 672.

grand jury;¹ and a mistake in numbering the indictment or the acts, so that the number of the indictment and the number of the acts are different, is immaterial where it appears that the indictment set out in the transcript was returned into court and the defendant pleaded thereto;² but where anything material has been omitted from the record, the conviction thereunder will be set aside and the case remanded.³

(5) *When Filed—Time.*—The return of an indictment by the grand jury should be endorsed at the term on which it was found; where such indorsement is not made, the defect may be cured at the next term by an entry *nunc pro tunc*.⁴

Where the papers containing the minutes of the evidence taken before a grand jury on which the indictment is found, are handed to the clerk and are kept by him on file in his office, this amounts to a filing under the statute;⁵ the indorsement of the filing by the clerk, although proper, is not necessary.⁶

(6) *Showing Finding, Return or Presentment*—(a) *Necessity.*—The fact that an indictment is returned and presented in court must appear on the record;⁷ and when so returned and filed, the

1. Terrell v. State, 41 Tex. 463.

Stamped Name on Indictment.—If an indictment is defective because the name of the clerk, with date of filing, is stamped upon the back of it, instead of being written, the defect is cured by another endorsement by the clerk, stating the facts, in his own handwriting, and signed by him. Lea v. State, 64 Miss. 294.

2. Mergentheim v. State, 107 Ind. 567; 5 West Rep. 851.

3. See Ross v. State, 23 Ark. 198; Conner v. State, 19 Ind. 98; Springer v. State, 19 Ind. 180; Conner v. State, 18 Ind. 428.

The supreme court will not affirm a conviction for felony upon a record which contains no indictment nor shows that any was presented, but will remand the cause for further proceedings. Ross v. State, 23 Ark. 198.

Where one accused in a criminal suit has been tried and convicted, but the record does not show the empanelling of a grand jury, nor the return by such body of an indictment, nor the endorsement thereon of "a true bill," nor the signature thereto of any person purporting to be foreman of such jury, the judgment must be reversed and the cause remanded. Conner v. State, 18 Ind. 428; Same v. State, 19 Ind. 98; Springer v. State, 19 Ind. 180.

4. State v. Pearce, 14 Ind. 426.

Where an indictment duly returned into the court by a proper grand jury

has there remained without being filed, and without any record of such return, it is the duty of such court, upon being informed of such facts, to direct the making of a proper *nunc pro tunc* entry showing the returning and filing of such indictment. Long v. State, 56 Ind. 133.

To a plea by the defendant in abatement of indictment alleging the failure of the court to endorse upon such indictment the time of its filing, and to enter of record of the same into court by the grand jury, a reply that such omissions have been cured by *nunc pro tunc* entry, made by order of such court, is sufficient. Long v. State, 56 Ind. 133.

5. State v. Briggs, 68 Iowa 416; State v. Guisenhouse, 20 Iowa 227.

6. State v. Briggs, 68 Iowa 416.

7. Green v. State, 19 Ark. 178; Kelly v. People, 39 Ill. 157; Brown v. State, 7 Humph. (Tenn.) 155. See Thornell v. People, 11 Colo. 305; 17 Pac. Rep. 904; Sattler v. People, 59 Ill. 68; State v. Willis, 3 Head. (Tenn.) 157.

It is error to put a defendant on trial on an indictment which was not returned in open court, and this fact must be shown by the record. Thornell v. People, 11 Colo. 305.

Before a party can be tried, it must appear from the record that the indictment was returned by the grand jury into open court. Such fact not appearing therefrom, a motion in arrest of judgment should be allowed. And al-

indorsement upon the indictment becomes a part of the indictment, and it is not necessary that the indorsement should be spread upon the minutes.¹

(b) *Effect of Omission.*—Where the record does not show that the grand jury returned the indictment into open court, the defect is fatal,² and a conviction thereunder should be reversed.³ An omission to record the finding of a grand jury when it is returned cannot be afterwards supplied by a paper purporting to be an indictment with an indorsement on it signed "a true bill," signed by the person who was foreman of the jury at the time;⁴ yet it would seem that if the indictment was properly endorsed, returned and filed, it is no objection that the return was not entered on the minutes of the court.⁵

Where an indictment has been withdrawn by leave of the court

though the minutes of the judge show the indictment to have been so returned, that does not have the force or effect of a record. *Sattler v. People*, 59 Ill. 68.

Prior to the adoption of the Utah Penal Code, the law prescribed no form of indorsement on an indictment when the same was presented to the court, and it was not necessary that any record of the finding thereof be entered in the minutes of the court. *People v. Lee*, 2 Utah 441.

Presumptions to Presentment.—It will be presumed that the indictment was presented to the court by the foreman of the grand jury, and in their presence, if the record shows nothing to the contrary. *People v. Lee*, 2 Utah 441.

In Misdemeanors.—In misdemeanors, the minutes of the court should show that the indictments are returned into court. But an omission to do so is not fatal. If brought to the notice of the court, by motion to quash or otherwise, at the term the indictment is found, the defect should be supplied; if at a subsequent term, the entry should be made *nunc pro tunc*. *State v. Willis*, 3 Head. (Tenn.) 157.

1. *Brown v. State*, 7 Humph. (Tenn.) 155.

2. *Milan v. State*, 24 Ark. 346; *Rainey v. People*, 8 Ill. (3 Gilm.) 71; *Nomaque v. People*, 1 Ill. (Breese) 109; *Jackson v. State*, 21 Ind. 79; *State v. Cox*, 6 Ired. (N. Car.) 440; *State v. Shields*, 33 La. An. 993; *State v. Pitts*, 39 La. An. 914; 3 So. Rep. 118; *Com. v. Johnson*, Thatch. Cr. Cas. (Mass.) 284; *Chappel v. State*, 8 Yerg. (Tenn.) 166; *Brown v. State*, 5 Yerg. (Tenn.) 367; *Com. v. Cawood*, 2 Va. Cas. 527; *Burgess v. Com.*, 2 Va. Cas. 483.

When the record fails to show that an indictment was returned into court by the grand jury, and does not show that any note was made on the back of the indictment of its having been returned into court and filed, judgment against the defendant must be reversed. *Milan v. State*, 24 Ark. 346.

In Virginia, when a bill of indictment has been found by the grand jury, and endorsed by the foreman "a true bill," it must be brought into court and presented by the grand jury, and then the finding must be recorded. *Com. v. Cawood*, 2 Va. Cas. 527. And an omission to record the finding cannot be supplied by a paper purporting to be an indictment, with an indorsement "a true bill," signed by the person who was foreman of the grand jury at that time. *Com. v. Cawood*, 2 Va. Cas. 527. Nor can it be supplied by the recital, in the record, that he "stands indicted," nor by his arraignment, nor by his plea of not guilty. *Com. v. Cawood*, 2 Va. Cas. 527. And where a prisoner has been examined by the county court for an offence, and two actual sessions of the superior court thereafter occur, and it does not appear from the record that an indictment has been found against him, he is entitled to be discharged from imprisonment, although he has been in fact arraigned and pleaded "not guilty." And if a third actual term has passed without such record of the finding, he is entitled, under the statute, to be discharged from the crime. *Com. v. Cawood*, 2 Va. Cas. 527.

3. *Milan v. State*, 24 Ark. 346; *Rainey v. People*, 8 Ill. (3 Gilm.) 71.

4. *State v. Heaton*, 23 W. Va. 773.

5. *Mose v. State*, 35 Ala. 421.

and recommitment to the grand jury, by whom it was found and returned into court, the record must show the fact.¹

(c) *Sufficiency*.—Where the record shows that the members of the grand jury were duly empanelled and sworn as such, and through their foreman presented to the court one or more indictments, each being endorsed "A true bill," and signed by the foreman, this shows a sufficient finding and presentment of the indictment.²

1. *State v. Davidson*, 2 Coldw. (Tenn.) 184.

2. *McKenzie v. State*, 24 Ark. 636; *Potsdamer v. State*, 17 Fla. 895; *Fitzpatrick v. People*, 98 Ill. 269; *Clare v. State*, 68 Ind. 17; *Beavers v. State*, 58 Ind. 530; *Willey v. State*, 46 Ind. 363; *Bailey v. State*, 39 Ind. 438; *Wall v. State*, 23 Ind. 150; *Millar v. State*, 2 Kan. 174; *Pearce v. Com. (Ky.)*, 8 S. W. Rep. 893; *Cooper v. State*, 59 Miss. 267; *Lee v. State*, 45 Miss. 114; *State v. Payton*, 90 Mo. 220.

Thus where the record shows that the grand jury came into open court and through their foreman returned one indictment, etc., it is a sufficient compliance with the statute. See *State v. Payton*, 90 Mo. 220.

And a recital of the record that "this day comes again the grand jury and presents to the court indictments in the following cases," sufficiently recites the presentment of an indictment in open court. *Fitzpatrick v. People*, 98 Ill. 269.

Where the record of a criminal prosecution showed that "the regular grand jury for said court," having been duly empanelled and sworn, "returned into open court, and upon their oaths presented" the indictment in question, *held* that the indictment was properly presented by a legal grand jury. *Beavers v. State*, 58 Ind. 530.

Where the records shows that the members of the grand jury were duly sworn as such, and the caption of the indictment states that the jurors, "duly chosen, empanelled and sworn diligently to enquire," etc., "do present," etc., this sufficiently shows a presentment "upon their oath." *Potsdamer v. State*, 17 Fla. 895.

Where the record recites that the grand jury came into "open court and returned the following indictment," giving its number and setting it out, it sufficiently shows that it was returned into open court, and sufficiently identifies the indictment. *Willey v. State*, 46 Ind. 363.

The record in a criminal trial showed that, on a certain juridical day of a certain term of the court, and before a judge of said court, the grand jury presented and filed, as true bills, certain indictments by their numbers, followed by copies of the same; and that the clerk had endorsed upon said indictments the words, "Filed in open court," with the date. *Held*, that the record showed that the indictments were "duly returned in open court and filed by the clerk." *Clare v. State*, 68 Ind. 17.

An indictment recited the style of the court, and state, the time and place of the session of the court, the names of the parties, and that the grand jurors were of the proper county, good and lawful men, duly and legally empanelled, charged and sworn to enquire, etc., etc. The accompanying record, upon a change of venue, recited that such indictment was returned into open court. *Held*, sufficient. *Bailey v. State*, 39 Ind. 438.

A recital in the record that "on the 12th day of October, 1869, the grand jury of said county filed in said circuit court of said county aforesaid an indictment in the words and figures following, to wit:" and a copy of the indictment following, on which the accused was tried, it not appearing that any objection was made in the court below to the indictment as not having been "filed," is sufficient to show that the indictment was duly presented and filed, as required by law. *Lee v. State*, 45 Miss. 114.

Where a transcript shows that a grand jury was sworn and empanelled, of which B. was appointed foreman, and that afterwards the same grand jury returned into court sundry bills signed by their foreman as true bills, and contains a statement by the clerk that the indictment which follows is one of these, and then the indictment is set out, endorsed "a true bill, B., foreman," the record sufficiently shows the return of the indictment into court by the grand jury. *Wall v. State*, 23 Ind. 150.

(d) *Admissibility and Sufficiency as Evidence.*—A proper indorsement by the clerk of the filing of an indictment, is sufficient evidence that the same was duly found and returned, notwithstanding an omission of the record to so state.¹ And the recorded entry of a presentment of an indictment is admissible in evidence to show the true date of the indictment.²

(7) *As to the Grand Jury*—(a) *Showing the Organizations, etc.* The record should show that the grand jury was duly empanelled, sworn and charged, as well as that the jurors came from the body or of the district in which the indictment was found, where the indictment itself states that the grand jury was duly empanelled, sworn and charged, the record sufficiently declares that the grand jury was lawfully empanelled.³

But to sustain an indictment it is not necessary that the record should show the mode in which the jurors for the term were drawn. This sufficiently appears from the venire, which is presumed legal.⁴

(b) *Appointment of Foreman.*—It is not necessary that the

Where the record shows that the grand jury in a body came into court, and through their foreman presented to the court six bills of indictment, each endorsed "a true bill" and signed by the foreman, and that at that term the grand jury of the state in and for the county (naming it), duly empanelled, sworn, and charged to enquire within and for said county through their foreman (naming him), presented to the court sundry bills of indictment, which are recorded, and among which is the record of one against the defendant, it was held that the record shows affirmatively that the indictment was returned into court by the grand jury. *Millar v. State*, 2 Kan. 174.

Under a statute providing that "the indictment must be presented by the foreman, in the presence of the grand jury, to the court, and filed with the clerk," is substantially complied with by the following record entries: "The grand jury appeared in open court, and by and through their foreman made the following report," followed by the entry of the indictment. And: "On the back of said indictment is the following indorsement, viz: 'A true bill, W. W., foreman.' And: 'Received from the foreman of the grand jury, in the presence of the grand jury, and filed in open court.'" *Pearce v. Com. (Ky.)*, 8 S. W. Rep. 893.

Indorsement as "Filed" by Clerk.—If an indictment is marked "filed," by the clerk, with the date and his signature, this is evidence of its legal return into

court by the grand jury. *Cooper v. State*, 59 Miss. 267.

An indorsement by the clerk of the court upon an indictment "filed in open court Nov. 30th, 1866," does not show that the indictment was returned into court by the grand jury, and judgment against the defendant must be reversed. *McKenzie v. State*, 24 Ark. 636.

1. *State v. Grate*, 68 Mo. 22.

2. So held, where it charged the offence to have been committed August 18th, and the clerk's indorsement represented it to have been filed of that date, but the record entry showed it was returned August 19th. *Kennedy v. State*, 11 Tex. App. 73.

3. *Walter v. State*, 105 Ind. 589. See *Padgett v. State*, 103 Ind. 550; *Epps v. State*, 102 Ind. 539; *Stout v. State*, 93 Ind. 150; *Powers v. State*, 87 Ind. 444; *Alley v. State*, 32 Ind. 476.

Giving the initial only, instead of the full Christian name of one of the grand jurors, in the record, held no objection to the indictment. *Stone v. State*, 30 Ind. 115.

4. *Collier v. State*, 2 Stew. (Ala.) 388.

Where the award of the venire was in the usual form for a jury to come, etc., "to recognize upon their oaths whether," etc., and it appears that one of the jurors was affirmed, the record is sufficient. *State v. Price*, 11 N. J. L. (6 Halst.) 203.

It is not necessary that it should appear on the record of an indictment by what authority and before whom the

record in a criminal case should show the appointment of a foreman to the grand jury who found the indictment.¹

(8) *Showing Venue or County*.—It must affirmatively appear in the record that the court was held not only in the county, but in the proper place in the county,² because it cannot be presumed by the court that an indictment was found by the grand jury of the proper county or in the proper place, in the absence of any statement in the record to that effect.³

(9) *Showing Signing and Indorsement*.—The record must show that the grand jury returned the indictment into court "a true bill," and this requisite is satisfied by an entry showing that the grand jury brought in the bill, which was endorsed by the foreman "a true bill," was spread on the record.⁴ It would seem that the short entry on the docket of simply "a true bill," is a sufficient record of the finding of the grand jury.⁵

Where the record does not show whether the indictment was or was not correctly endorsed, the decision of the trial court on that point will be held correct.⁶

(10) *Reciting Evidence and Names of Witnesses*.—It need not appear of record that the indictment was found on sworn testimony.⁷ Neither is it necessary that it should appear of record that the witnesses upon whose evidence the indictment was found were sworn in open court and sent to the grand jury to give evidence of the case;⁸ and although the names of the witnesses should be endorsed on the indictment, they need not be made a part of the record.⁹

traverse jury were returned and empanelled. Nor "when, where and before whom the traverse jurors were sworn or affirmed." *State v. Price*, 11 N. J. L. (6 Halst.) 203.

1. *Yates v. People*, 38 Ill. 527. See *People v. Roberts*, 6 Cal. 214.

2. *Carpenter v. State*, 5 Miss. (4 How.) 168.

3. *Clark v. State*, 1 Smith (Ind.) 161.

If the record states only that it was presented that the defendant, etc., but does not state that the indictment was found by the grand jury of the proper county, the indictment is bad, and may be quashed on motion, or judgment arrested. *Clark v. State*, 1 Ind. 253.

4. *Bennett v. State*, 8 Humph. (Tenn.) 118.

In *Indiana*, the record of an indictment need not show that the indictment was signed by the prosecuting attorney, nor that there was a foreman of the grand jury. *McGregg v. State*, 4 Blackf. (Ind.) 101.

Where a record shows that a grand jury was drawn and empanelled, sworn, and charged to enquire for the

state, of and concerning all offences, etc., and by such grand jury "it was presented in manner and form following, that is to say," setting out the bill of indictment, the record is sufficient without copying the entry of "a true bill," usual on the backs of indictments. *State v. Guilford*, 4 Jones L. (N. Car.) 83.

Recording or Filing.—Under Code Tenn., section 4854, requiring the clerk of the circuit court, in felony cases, to enter the indictment at full length on the minutes of the court, his failure to copy the indorsement of "a true bill" by the foreman of the grand jury required by section 5921, does not vitiate the indictment. *State v. Herron*, 86 Tenn. 442.

5. *Hopkins v. Com.*, 50 Pa. St. 9; s. c., 88 Am. Dec. 518.

6. *State v. Wilson*, 3 Mo. 125.

7. *United States v. Murphy*, 4 McAr. C. C. 375.

8. *King v. State*, 6 Miss. (5 How.) 730; *Gilman v. State*, 1 Humph. (Tenn.) 59.

9. *Harriman v. State*, 2 Greene (Iowa) 270.

(11) *Describing Offence and Defendants.*—The record of the finding of the grand jury need not particularly describe the offence, a general description being sufficient.¹

(12) *Designating Court.*—The record should show that the indictment was found and returned to and the trial had before a proper court, and where the judge who tried the case presided, by exchange with the regular judge of the district, if the transcript shows that fact in the caption of the case, it sufficiently shows the lawful authority of the judge who presided.²

(13) *Showing Arraignment and Plea.*—The record must show a formal arraignment and plea;³ but a failure of the clerk to

1. *Goodwyn v. State*, 12 Miss. (4 Smed. & M.) 520; *Rowlett v. State*, 23 Tex. App. 191; *Hasley v. State*, 14 Tex. App. 217; *Com. v. Nutter*, 8 Gratt. (Va.) 699; *Com. v. Snider*, 2 Leigh (Va.) 744; *State v. Heaton*, 23 W. Va. 773; *Crookham v. State*, 5 W. Va. 510.

Entry on Record.—As to what is a sufficient entry on the record of the finding of an indictment for a misdemeanor by a grand jury, see *Com. v. Nutter*, 8 Gratt. (Va.) 699.

Under Tex. Rev. Codes, it is not required that the entry of the presentment of an indictment shall state the offence charged. *Hasley v. State*, 14 Tex. App. 217.

The clerk of the trial court is not required to enter upon his minutes the name of the offence charged against an accused, and the fact that he misnamed the offence on his minute book cannot vitiate the indictment. *Rowlett v. State*, 23 Tex. App. 191.

The record of the finding of an indictment under the statute for maliciously shooting, stabbing, cutting, etc., as follows: "An indictment against Charles L. Crookham, malicious stabbing, a true bill," *Held* to be a sufficient entry, without describing it as an indictment for felony. This was necessarily implied in phrase "malicious stabbing." All malicious stabbings are felonies. *Crookham v. State*, 5 W. Va. 510.

The record stated that two indictments against surveyors of roads were found true bills by the grand jury, not naming the surveyors. *Held*, that there was no sufficient finding of the indictment shown by the record. *Com. v. Snider*, 2 Leigh (Va.) 744.

In the entry on the minutes of the court that an indictment has been found against A B an omission to state

the offence charged is not error, especially if the defect is supplied by a subsequent part of the record. *Goodwyn v. State*, 4 Sm. & M. (12 Miss.) 520.

2. *Wyers v. State*, 22 Tex. App. 258.

Where the caption of an indictment styled the court at which it was found as "the court of oyer and terminer, and general jail delivery, holden at N. B., in and for the county of M.," and the award of the *venire* styled the judges of whom one was a justice of the supreme court and the others judges of the court of common pleas, as "judges of the court of oyer and terminer, and general jail delivery," it was *held* that the style of the court was correct, as it was the title given in the statutes and reports, and that the style of the judges was correct for the same reason. *Berrian v. State*, 22 N. J. L. (2 Zab.) 9.

In *North Carolina*, in the record of an indictment, it is proper to state it as taken "at a superior court of law," and not a superior court of law and equity. *State v. Kimbrough*, 2 Dev. (N. Car.) 431.

3. *Harman v. State*, 11 Ind. 311. See *McJunkins v. State*, 10 Ind. 140.

A record, not expressly stating that the defendant was arraigned, but stating that he appeared, moved by his counsel to quash the indictment, and, on that motion being overruled, he pleaded not guilty, submitted his cause for trial to the court, moved for a new trial and in arrest, is sufficient. *Sohn v. State*, 18 Ind. 389.

Where a clerk stated in the record, in a criminal case, that "the said defendant, having been arraigned at the last term of the court, pleaded not guilty, and put himself upon the country," and there was in fact no arraignment mentioned in the record of the proceedings of the

mark the entry of a plea in a criminal case as fully as he ought to have done, cannot prejudice the defendant.¹ The record shows a sufficient arraignment of the defendant when it states that he appeared in proper person and by counsel, at the trial, and waived the reading of the indictment and pleaded not guilty.²

(14) *Change of Venue*—(a) *Place and Time of Recording or Filing*.—Where an indictment is found in one county and the venue changed to another county, and the trial had there, the indictment must be recorded in the county where it was found,³ and should constitute a part of the record of the county where the case is tried.⁴ On a change of venue the transcript of the record must be sent to the county to which it is removed,⁵ and where the original indictment is transferred at the term at which the same was transferred for trial, the court may at any time during the term, after conviction, order the indictment to be filed.⁶

(b) *Contents of Record—What Should Be Shown*.—Where an indictment is found in one county and tried in another, a transcript of the record in the original court should be filed in the new court, showing, among other things, the empanelling of the grand jury and the return by that body of the indictment into court.⁷ When an order was made for the delivery of the indictment to the latter court,⁸ and when the record of the

previous term, it was *held* that it did not legally appear that the accused ever was arraigned, it being incompetent for the clerk, at a subsequent term, to make an entry of what had transpired at the preceding term. *McQuillen v. State*, 16 Miss. (8 Smed. & M.) 587.

Where a defendant pleaded a former conviction in the lower court, with a profert of the record, and, on suggestion of the prosecuting officer of a diminution of the record, a *certiorari* issued to obtain a more complete record, and the prosecuting officer then filed a general demurrer to the plea, reciting that the *certiorari* had been returned, and that the whole record was before the court, but neither suggesting the diminution, nor praying over of the record as certified, it was *held* that, in determining the sufficiency of the plea, the court could not take notice of the record as certified. *Com. v. Roby*, 29 Mass. (12 Pick.) 496.

Plea in Absence of Prisoner.—In the absence of the prisoner, the statute in this state allows the plea of "not guilty" to be entered on the minutes of the court. *People v. Thompson*, 4 Cal. 238.

1. *People v. O'Leary* (Cal.), 16 Pac. Rep. 884.

2. *State v. Braunschweig*, 36 Mo. 397.

3. *Reed v. State*, 8 Ind. 200. Compare *Beauchamp v. State*, 6 Blackf. (Ind.) 299.

4. See *Doty v. State*, 7 Blackf. (Ind.) 427.

5. *Price v. State*, 8 Gill (Md.) 295.

6. *Annmons v. State*, 9 Fla. 530.

7. *Pulling v. State*, 16 Ind. 458; see *Doty v. State*, 7 Blackf. (Ind.) 427; *Cruiser v. State*, 3 Harr. (N. J.) 206.

The jurisdiction of the court that tried the cause can be shown only by a statement in the nature of a caption to its proceedings, that the indictment was filed there, and that the prisoner was tried upon it. *Doty v. State*, 7 Blackf. (Ind.) 427.

In a criminal cause, taken by a change of venue from one circuit court to another, the record, on a writ of error, must show, not only that the court before which the indictment was found had jurisdiction of the offence, but also the court which tried the cause. *Doty v. State*, 7 Blackf. (Ind.) 427.

8. *Cruiser v. State*, 3 Harr. (N. J.) 206.

first court was made of proceedings had on the indictment.¹

(c) *Presumptions in Favor of and Objections to the Record.*—Upon a change of venue, the court to which the case is removed is bound to presume that the record has been duly transmitted and delivered.² Any objection that the transcript does not properly certify the indictment and papers transmitted to be original and correct must be made before and not after verdict.³

(15) *Reciting Amendment.*—It is not necessary that the record should show that the defendant was present at the time when the motion to quash was tried, or when the indictment was amended in an immaterial matter, it is only necessary that the record should show that he was present at all the important proceedings taken in the course of the trial, and when the verdict of the jury was pronounced.⁴

13. Where Found—Venue⁵—a. JURISDICTION GENERALLY.—By the common law, crimes and misdemeanors are cognizable and punishable exclusively within the jurisdiction where they are committed.⁶

1. *Jenkins v. State*, 30 Miss. 408.

An indictment certified from one county to another, on a change of venue, must be identical with the original, and contain the names of all the persons indicted; otherwise, a judgment rendered on it will be reversed. *Smith v. State*, 36 Ill. 290.

Section 309 of the act regulating criminal proceedings provides: "When an indictment is found in the court of sessions for murder, manslaughter, etc., it shall be transmitted by the clerk to the district court sitting in the county, for trial, except," etc. An indictment found in the possession of the proper officer would not be invalidated because not endorsed by himself, as clerk of one court, to himself, as clerk of another court. *People v. Thompson*, 4 Cal. 238.

Change of Venue—Mistake of Clerk.—Upon the transfer of certain indictments from the district court to the county court, the clerk certified that all of them were signed by the foreman of the grand jury. The indictment in question was not so signed. *Held*, that the mistake of the clerk did not invalidate the indictment, where the transcript was in other respects sufficient to identify the indictment, as the clerk was not required to certify as to the signature. *Robinson v. State*, 24 Tex. App. 4.

2. *State v. Williams*, 3 Stew. (Ala.) 454.

3. *Sharp v. State*, 2 Clarke (2 Iowa) 454.

After an indictment has been removed

by *certiorari* from the oyer and terminer to the supreme court, carried down to the circuit court for trial, and a verdict rendered for the defendant, the state cannot be permitted to show, by a certificate of the clerk of oyer and terminer, or even by the production of an original indictment, that the return made by that court is untrue. *State v. Jones*, 40 N. J. L. (6 Halst.) 289.

Where the venue is changed, an objection that the indictment is a transcript of the original is of no force. *Pleasant v. State*, 15 Ark. 624.

The certified copy of the indictment (transmitted on a change of venue) may be read to the jury on the trial; and, therefore, if the entire transcript, containing a copy of the indictment, is offered, and the defendant objects to it as a whole, his objection may be overruled. *Harrall v. State*, 26 Ala. 52.

4. *State v. Pierre*, 39 La. An. 915; *State v. Clark*, 32 La. An. 558.

Code Crim. Proc. Tex., art. 551, directs all amendments of an indictment or information to be made by leave of the court, and under its direction. The allegation of the time when the term of court began at which an indictment was found, being surplusage. *Held*, that such statement might be stricken out, and an amendment of such date, though necessary, when made under direction of the court, need not be recited in the record. *Osborne v. State*, 24 Tex. App. 398.

5. See also IX., 10.

6. *Com. v. Kunzmann*, 41 Pa. St. 429.

b. INDIAN LANDS, WATERS, ETC.—Where lands are set apart by the government for the use of Indians who are quartered thereon, so far as the administration of justice to persons not belonging to the Indian nation or tribe is concerned, these lands form the integral part of the counties or districts within whose boundaries they are included, and all crimes or misdemeanors committed upon such reservations are to be indicted and punished in such county or district.¹

Where works are erected on the waters of a stream in one state or country which corrupt the waters of the same stream in another state or country, an indictment therefor can be prosecuted in the state or country where erected.²

An offence committed in a bay which is entirely land-locked and enclosed by reefs, is not committed on the high seas within the purview of the act of Congress of March 26th, 1804, ch. 40.³

A State statute providing that when a person shall commit an offence on board a vessel or float, he may be indicted in any county through any part of which the vessel or float may have passed on that trip or voyage, is not confined to that part of the voyage where the offence is committed, but extends to the entire trip.⁴

c. OFFENCES COMMITTED IN OTHER COUNTRIES.—It has been said that where an offence is committed out of the jurisdiction of the state, an indictment cannot be found and maintained in the state for such offence;⁵ but the general doctrine of the states of this country is that where a person commits larceny in one state and takes the stolen property into another, he may be indicted in the latter state for the larceny;⁶ and it has been said

Hiring Out Convicts—Name of Crime.

—A convict who has been sentenced to a term of imprisonment in the penitentiary is, in contemplation of law, still in the penitentiary, although he may have been hired out, in accordance with statutory provisions. Hence he may be indicted and tried in the county in which the penitentiary is located, for an offence—e. g., the murder of his guard—committed in another county. *Ruffin v. Com.*, 21 Gratt. (Va.) 790.

The constitution of Missouri conferring no power on the legislature to authorize the prosecution of a crime in a county other than that in which it was committed, *held* that Rev. Stat., § 1698, which authorizes an indictment to be found in either of two or more counties, where it is matter of doubt in which the offence was committed, and gives the court of the county where the indictment was found jurisdiction of the offence, is unconstitutional. *State v. Hatch*, 91 Mo. 568.

1. *Millar v. State*, 2 Kan. 174.

2. *Com. v. Lyons*, 1 Pa. L. J. 497.

Under an indictment for overflowing a highway, by means of the erection of a dam; *held* that, since the nuisance was in New Hampshire, it was of no consequence that the dam itself was in Maine. *State v. Lord*, 16 N. H. 357.

3. *U. S. v. Robinson*, 4 Mason (C.) 307.

4. *Nash v. State*, 2 G. Greene (Iowa) 286.

5. *Manley v. People*, 7 N. Y. 295.

As to the question of venue and where to be laid, see 4 Am. & Eng. Ency. of L., tit. CRIMINAL PROCEDURE, III., 2, b, p. 736.

6. *State v. Ellis*, 3 Conn. 185; s. c., 8 Am. Dec. 175; *State v. Bennett*, 14 Iowa 479; *Com. v. Andrews*, 2 Mass. 14; s. c., 3 Am. Dec. 17; *Com. v. Cullins*, 1 Mass. 116; *State v. Seay*, 3 Stew. (Ala) 123; s. c., 20 Am. Dec. 166; *People v. Burke*, 11 Wend. (N. Y.) 129; *U. S. v. Hamilton*, 1 Mason (C. C.) 152. *Contra*, *State v. Le Blanch*, 31 N. J. L. (2 Vr.) 82.

In such cases it is competent to ex-

that the receiver of goods stolen in one state and brought into another may be indicted for the receiving in such latter State.¹

d. OFFENCES COMMITTED IN OTHER COUNTIES—(1) Larceny and Receiving Stolen Goods.—As a rule, offences are to be indicted and punished in the county where they are committed, but where the crime is committed in one county and continued in another county, it may be punished in either county in which the accused is apprehended.² It is a usual rule that where goods are stolen in one county and carried by the thief into another county, he may be indicted and tried in any county in which he may be found in possession of the stolen goods; but an indictment and trial in that county will be a bar to an indictment and trial in any other county.³ And any one who aids and abets in a larceny in one county, and is afterwards concerned in the possession and disposal of stolen property in another county, although the goods were removed to this latter county without his agency or consent,

amine witnesses as to the original taking in another state. *McFarland v. State*, 4 Kan. 68.

Under section 274 of the criminal act, making the retention within this state of property stolen without equivalent to the original theft, each asportation, *animo furandi*, is a new caption, and the larceny may be indicted and punished in any county into or through which it may be brought. *McFarland v. State*, 4 Kan. 68.

For a full discussion of the subject see tit LARCENY.

1. U. S. *v. Hamilton*, 1 Mason (C. C.) 152.

2. See 4 Am. & Eng. Ency. of L., tit. CRIMINAL PROCEDURE III., 2, b, (1), pp. 736, 737.

3. *Aaron v. State*, 39 Ala. 684; *People v. Garcia*, 25 Cal. 531; *Tipkins v. State*, 14 Ga. 422; *Haskins v. People*, 16 N. Y. 344; *People v. Smith*, 4 Park. Cr. Cas. (N. Y.) 255; *State v. Groves*, Busb. (N. Car.) L. 191; *State v. Bryant*, 9 Rich. (S. Car.) L. 113; *Roach v. State*, 5 Coldw. (Tenn.) 39; *Com. v. Cousin*, 2 Leigh, (Va.) 708.

Two carmen of a railway company were sent with a wagon from a station in Middlesex to a place in Kent. On their arrival they took some oats, which had been put into nosebags and carried in the wagon during the journey, and which were intended for the horse's food, and sold them there for their own profit. *Held*, that the carmen might be tried in Middlesex for the larceny of the oats in the county of Kent, under the provisions of the stat. 7 Geo. 4, ch. 64, § 13; s. c., 6 Cox 418; *Dears, C. C.*

415; *Reg. v. Sharp*, s. c., 29 Eng. Law & Eq. 532.

A draft or order for a sum of money was drawn by defendant, agent of an insurance company in the city of B., upon the insurance company in the city of N. Y., where it was accepted, and a check drawn upon a bank in N. Y. to pay it, which check or its proceeds were received by the defendant in B. *Held*, that the alleged offence of larceny in obtaining the money, having been consummated in B., was within the jurisdiction of a court having local jurisdiction in that city, although the courts of N. Y. would also have jurisdiction, under the New York statute, that "where a crime is committed partly in one county and partly in another, or the acts or effects thereof, constituting or requisite to the consummation of the offence, occur in two or more counties, the jurisdiction is in either county." N. Y. Code Crim. Pro., § 134; *People v. Dimick*, 41 Hun 616; s. c., 5 N. Y. Crim. Rep. 185; 3 N. Y. St. Rep. 398.

An indictment alleged the theft of a watch from the person of one G., in W. county; but the proof showed that the watch was stolen, if at all, in E. county, and carried by defendant into W. county, where the owner recovered it. *Held*, that the crime was not within a provision of the Texas statute relating to ordinary theft, that "where property is stolen in one county and carried off by the offender to another, he may be prosecuted either in the county where he took the property, or in any other county through or into which he may have carried the same (Code Crim. Pro., art.

may be indicted and tried for larceny in such latter county.¹

(2) *Other Offences*.—There are other offences which may be indicted and punished in different counties, such as sending threatening letters,² taking a false impression of a key for the purpose of having a false key made;³ prescribing and delivering poison to a person in one county who takes it in another, and there dies;⁴ striking a fatal blow in one county and the party dies in another.⁵ It may be laid down as a general rule that where the crime is composed of several elements, and a material one exists in either of two counties, the courts of either county may, under statutory regulation to that effect, rightly take jurisdiction of that crime;⁶ but at common law, if a material act is performed in one county and death results in another, the place of the crime is held to be in the county where the first material act is committed.⁷

e. DIVISION OF COUNTY OR DISTRICTS.—Where a new county is formed, of territory formerly included in an old county, an indictment for an offence antecedently committed within the territory embraced in the new county may be maintained in the new county under the usual allegation setting out the offence as committed in the new county.⁸

216); theft from the person being a compound offence, composed of a trespass and a theft, both of which must have been committed in the county where the crime is laid. *Gage v. State*, 22 Tex. App. 123.

1. *Com. v. Dewitt*, 10 Mass. 154. See tit. LARCENY, this series.

2. Where threatening letters are written in one county, and sent by mail into another, and there received by the person to whom addressed, an indictment therefor should be found in the latter. *People v. Griffin*, 2 Barb. (N. Y.) 427. See tit. THREATENING LETTER.

3. *Griffin v. State*, 26 Ga. 493.

4. In such a case the county in which the party dies will have jurisdiction of the offence, although the accused was never in that county. *Robbins v. State*, 8 Ohio St. 131. See *Binfield v. State*, 15 Neb. 484.

5. See *State v. Johnson*, 38 Ark. 568; *State v. McGraw*, 87 Mo. 161; *Binfield v. State*, 15 Neb. 484; *Mack v. People*, 82 N. Y. 235; *Gage v. State*, 22 Tex. App. 123; *McElmurray v. State*, 21 Tex. App. 691; *Reed v. State*, 16 Tex. App. 586; *Cole v. State*, 16 Tex. App. 461.

6. See *Archer v. State*, 106 Ind. 426; *State v. Johnson*, 38 Ark. 568; *Tipkins v. State*, 14 Ga. 422; *Com. v. Macloon*, 101 Mass. 1; s. c., 100 Am. Dec. 89; *Com. v. Parker*, 19 Mass. (2 Pick.)

550; *Tyler v. People*, 8 Mich. 320; *Steerman v. State*, 10 Mo. 503; *Hanks v. State*, 13 Tex. App. 289; *Ex parte Rogers*, 10 Tex. App. 655; *Ham. v. State*, 4 Tex. App. 645; *State v. Pauley*, 12 Wis. 537.

7. However, there is some conflict of authority as to whether the jurisdiction is in the courts of the place where the death occurred, or where the fatal blow was given, and to remove all doubt on the point the body has frequently been taken to the county where the first blow was struck. See *Green v. State*, 66 Ala. 40; s. c., 41 Am. Rep. 744; *People v. Gill*, 6 Cal. 637; *Archer v. State*, 106 Ind. 426; *Com. v. Macloon*, 101 Mass. 1; s. c., 100 Am. Dec. 89; *Com. v. Parker*, 19 Mass. (2 Pick.) 550; *Tyler v. People*, 8 Mich. 320; *State v. Gessert*, 21 Minn. 369; *Steerman v. State*, 10 Mo. 503; *Hunter v. State*, 40 N. J. L. (12 Vr.) 495; *Riley v. State*, 9 Humph. (Tenn.) 646, 657.

8. *State v. Bunker*, 38 Kan. 737; *State v. Stokely*, 16 Minn. 282; *State v. Kring*, 74 Mo. 612; *State v. Jones*, 9 N. J. Law (4 Halst.) 357; s. c., 17 Am. Dec. 483; *U. S. v. Hackett*, 29 Fed. Rep. 848.

An indictment found by a jury of the county of St. Louis, before the separation of county and city, for a crime committed in the city, held to remain in force after the separation, and to be

VII. AMENDMENT.¹—1. Power and Jurisdiction to Allow; Effect.—

The general powers which courts have over pleadings does not extend to indictments, which cannot be amended without the concurrence of the grand jury by which they were found.² And a statute which authorizes a material amendment to be made in an indictment, if an offence which the constitution requires shall be prosecuted by indictment only, the statute, it is thought, will be a nullity.³

triable in the city court. *State v. Kring*, 74 Mo. 612.

The defendant was indicted for murder committed in the county of St. Louis, an organized county, to which the unorganized counties of Lake Carlton and Itasca were attached for judicial purposes, by an indictment entitled in the counties of St. Louis, Lake Carlton and Itasca, and found by a grand jury selected from those counties. *Held*, that the indictment was properly entitled and found. *State v. Stokely*, 16 Minn. 282.

Under act of congress of August 5th, 1886, dividing California into two judicial districts, and providing in section 11 that "all offences heretofore committed in the district of California shall be prosecuted, tried and determined in the same manner, and with the same effect, to all intent and purposes, as if this act had not been passed," the old district and circuit courts for the district of California are practically continued in existence for the purpose of prosecuting offences antedating the passage of the act, and an indictment for such an offence found by the grand jury of the old district or circuit court after the passage of the act is properly found. *U. S. v. Hackett*, 29 Fed. Rep. 848.

1. For a full discussion of the subject of amendment, see 1 Am. & Eng. Ency. of L., tit. AMENDMENT, pp. 546-555.

2. *Ganaway v. State*, 22 Ala. 772; *State v. Sexton*, 3 Hawks. (N. Car.) 184; s. c., 14 Am. Dec. 484; *State v. Harrison*, 10 Yerg. (Tenn.) 542; *Bradshaw v. Com.*, 16 Gratt. (Va.) 507; s. c., 86 Am. Dec. 722.

If an indictment is defective, lost or destroyed, the remedy of the prosecution is to have the accused reindicted. See *Ganaway v. State*, 22 Ala. 772; *State v. Harrison*, 10 Yerg. (Tenn.) 542; *Bradshaw v. Com.*, 16 Gratt. (Va.) 507; s. c., 86 Am. Dec. 722.

It is questionable whether the court can authorize any amendment to an affi-

davit on which a criminal proceeding before a justice is based; but if permissible it can only be made by interlineation and swearing anew to the original affidavit, or by substitution of a new one. *Strong v. State*, 105 Ind. 1.

An indictment may be withdrawn by leave of the court and recommitted for amendment to the grand jury by whom it was found, and returned into court. *State v. Davidson*, 2 Coldw. (Tenn.) 184.

A justice may allow a complaint to be amended, either as to jurisdictional or other facts. *Linhart v. Buiff*, 11 Cal. 280.

An indictment will not be held defective or insufficient if enough remains to constitute it good after striking out the objectionable parts. *State v. Wall*, 39 Mo. 532.

Power of the court to allow erroneous allegations in an indictment in respect to anything or person to be corrected under sections 281, 293, 294, Code Crim. Proc.; *People v. Richards*, 44 Hun (N. Y.) 278.

Amending of name is permissible. *Haywood v. State*, 47 Miss. 1; *State v. Manning*, 14 Tex. 402. Or even adding to where the offence is otherwise set out. *Turpin v. State*, 19 Ohio St. 540; *Rough v. Com.*, 78 Pa. St. 495.

Where a person has been indicted by a wrong name, and he discloses his true one before pleading, such name shall be inserted in place of the one under which he is indicted. See *People v. Kelly*, 6 Cal. 210; *Dukes v. State*, 11 Ind. 557; s. c., 71 Am. Dec. 370; *Com. v. Holley*, 69 Mass. (3 Gray) 458; *State v. Schricker*, 29 Mo. 265.

3. *State v. Startup*, 39 N. J. L. (10 Vr.) 423, 432; *Calvin v. State*, 25 Tex. 789.

English statutes have been passed authorizing amendments to be made to material parts of an indictment. See *Reg. v. Gumble*, L. R., 2 C. C. 1; s. c., 12 Cox C. C. 248; 21 W. R. 299; 27 L. T., N. S. 692; 42 L. J., M. G. 7; *Reg. v. Hewins*, 9 Car. & P. 786; *Reg. v.*

2. Consent.—To permit an indictment to be amended on motion, even in an immaterial matter, without the consent of the defendant, is an error for which the judgment will be reversed.¹

3. Concurrence of Grand Jury; Resubmission.—Where an indictment has been filed with the court, no change can be made in the body of the instrument by order of the court or by the prosecuting attorney without resubmission of the case to the grand jury. The fact that the court may deem the change immaterial, such as striking out words, makes no difference. The instrument as thus changed is no longer the instrument of the grand jury which presented it.²

Orchard, 8 Car. & P. 565; Reg. v. Ashburton, 5 Q. B. 48; Graves's Lord Campbell Acts 129; Archibald's New Crim. Proc. 99.

Statute of Jeofail.—In this country some of the states have passed statutes of jeofails for the cure of mere formal defects. State v. Sides, 64 Mo. 383; State v. Craighead, 32 Mo. 561; Aldridge v. Com., 2 Va. Cas. 447; Com. v. Ervin, 2 Va. Cas. 337; Com. v. Bennet, 2 Va. Cas. 235; Trimble v. Com., 2 Va. Cas. 143. See Gregory v. State, 46 Ala. 151; Johnson v. State, 46 Ala. 212; State v. Kreps, 8 Ala. 951; State v. Brown, 4 Port. (Ala.) 410; Dennis v. State, 5 Ark. 230; People v. Kelly, 6 Cal. 210; Morrison v. Dapman, 3 Cal. 255; Cain v. State, 4 Blackf. (Ind.) 512; State v. Elder, 21 La. An. 157; State v. Durbin, 20 La. An. 408; Com. v. Holley, 69 Mass. (3 Gray) 458; People v. Cook, 10 Mich. 164; State v. Armstrong, 4 Minn. 335; Miller v. State, 53 Miss. 403; Garvin v. State, 52 Miss. 207; Gamblin v. State, 45 Miss. 658; Kline v. State, 44 Miss. 317; Rocco v. State, 37 Miss. 357; McGuire v. State, 35 Miss. 366; s. c., 72 Am. Dec. 124; State v. Craighead, 32 Mo. 561; State v. Runnals, 49 N. H. 498; State v. Hart, 4 Ired. (N. C.) L. 246; Myers v. Com., 79 Pa. St. 308; Com. v. Buzzard, 5 Gratt. (Va.) 694; Evans v. State, 25 Tex. Sup. 303; Bossard v. State, 25 Tex. Sup. 207; Com. v. O'Brien, 2 Brews. (Pa.) 566.

1. Johnson v. State, 46 Ala. 212; Gregory v. State, 46 Ala. 151; McCorkle v. State, 14 Ind. 39; People v. Campbell, 4 Park Cr. Cas. (N. Y.) 386.

The court cannot acquire jurisdiction to try an offence by consent, not can the averment in an indictment be changed by consent so as to embrace any other offence than that presented

by the grand jury. People v. Campbell, 4 Park Cr. Cas. (N. Y.) 386.

The consent of the defendant to a correction of the indictment in open court, with reference to the date of the alleged defence, is binding on him. McCorkle v. State, 14 Ind. 39.

Where, on demurrer to an indictment for larceny in stealing a dog, it was stipulated that the indictment should be considered as alleging that the dog had been made tame, and that the defendant, knowing it to be such, feloniously took and carried away, etc., it was held that the stipulation should be disregarded in deciding the demurrer. People v. Campbell, 4 Park Cr. Cas. (N. Y.) 386.

2. *Ex parte* Bain, 121 U. S. 1; bk. 30, L. ed. 849; 9 Cr. L. Mag. 646; 2 Am. L. Reg. 433; 35 Alb. L. J. 424. See State v. Withrow, 47 Ark. 551; McGuire v. State, 35 Miss. 366; s. c., 72 Am. Dec. 125; State v. Sexton, 3 Hawks. (N. Car.) L. 184; s. c., 14 Am. Dec. 584; State v. McCarty, 2 Pin. (Wis.) 513; 2 Chand. (Wis.) 199; s. c., 54 Am. Dec. 150.

This was the doctrine of the English courts under the common law. It is the uniform ruling of the American courts except where statutes prescribe a different rule, and it is the imperative requirement of the provisions of the Texas constitution, which would be of little avail if an indictment once found can be changed by the prosecuting officer, with the consent of the court to conform to their views of the necessities of the case. *Ex parte* Bain, 121 U. S. 1.

Upon an indictment so changed the court can proceed no further. There is nothing upon which, in the language of the constitution, the prisoner can "be held to answer." A trial on such indictment is void. There is nothing to

4. Time of Amending.—*a.* **GENERALLY.**—An indictment may be amended by the grand jury with leave of the court at any time before their finding is recorded and they have left the court.¹ And a criminal information which has been filed by an officer of the government, and not founded upon the oath of the grand jury, may be amended at any time before trial.²

b. **CAPTION.**—The caption is no part of an indictment, and may be amended at any time.³

try. *Ex parte Bain*, 121 U. S. 1.

When an indictment is quashed on demurrer, and its defects, real or supposed, can be easily amended by resubmission of the matter to the grand jury, it should be done, instead of appealing the judgment on the demurrer to this court. *State v. Withrow*, 47 Ark. 551.

Constitutional Amendment.—The fifth amendment to the United States Constitution, providing that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of the grand jury," forbids the making of a change or amendment in the body of an indictment, after it has been filed, by order of court or by prosecuting attorney, without resubmitting the indictment to the grand jury, although the change is only in striking out surplus words. *Ex parte Bain*, 121 U. S. 1.

Correcting christian name is a material amendment. See *Garvin v. State*, 52 Miss. 209; *Kline v. State*, 44 Miss. 321; *McGuire v. State*, 35 Miss. 366; s. c., 72 Am. Dec. 124.

1. *State v. Creight*, 1 Brev. (S. Car.) 169; s. c., 2 Am. Dec. 656.

2. *State v. Weare*, 38 N. H. 314.

There is no authority for withdrawing an indictment at the term of court subsequent to the term at which it has been found, and recommitting it to a different grand jury for amendment by the addition of new counts or otherwise. *State v. Davidson*, 2 Coldw. (Tenn.) 184.

3. See *Territory v. McFarlain*, 1 Mart. (La.) 216; s. c., 5 Am. Dec. 706; *State v. Jenkins*, (N. H.) 10 Atl. Rep. 699; *State v. Jones*, 9 N. J. L. (4 Halst.) 357; s. c., 17 Am. Dec. 483; *Brown v. Com.*, 78 Pa. St. 122; *State v. McCarty*, 2 P. n. (Wis.) 513; s. c., 2 Chand. 199; 54 Am. Dec. 150; *State v. Creight*, 1 Brev. (S. Car.) 169; s. c., 2 Am. Dec. 656; *State v. Gilbert*, 13 Vt. 647; *Allen v. State*, 5 Wis. 329; *U. S. v. Thompson*, 6 McL. C. C. 56.

The caption of an indictment which erroneously states the year when it was found, may be amended. *State v. Jenkins* (N. H.), 10 Atl. Rep. 699.

The caption of an indictment may be amended by the minutes of the court, or by what appears on the bill itself, even after conviction and after motion in arrest for the defect. *State v. Creight*, 1 Brev. (S. Car.) 169; s. c., 2 Am. Dec. 656.

Same—Amendment.—Any error in the caption is amendable at any time before the indictment is removed to a higher court. *U. S. v. Thompson*, 6 McL. (C. C.) 56.

The preface to a bill of indictment is no part of the presentment of the grand jury, and may be wholly omitted or amended at any time, so as to conform to the other records of the term. *State v. Gilbert*, 13 Vt. 647.

Same—Certificate Nunc pro Tunc.—A caption may be amended and the indictment certified, *nunc pro tunc*, after trial, conviction, sentence and writ of error. *Brown v. Com.*, 78 Pa. St. 122.

Same—Amendment in Appellate Court.—The caption to an indictment may be amended in the supreme court, after its removal thereto by *certiorari*, upon proof of the necessary facts; or it may be sent back to the lower court, there to be amended from the record. *State v. Jones*, 9 N. J. L. (4 Halst.) 357; s. c., 17 Am. Dec. 483.

Amendment to Show Presentment.—The caption may be amended so as to show that the actual presentment was after the commission. *Allen v. State*, 5 Wis. 329.

Mr. Bishop says (see 1 Bish. Crim. Proc., §§ 661, 662) that "there are, connected with the caption in what may be termed the American sense—in other words, the extended commencement used instead of the English caption—some questions which are a little difficult on the authorities, though perhaps plain enough when considered in the light of principle. In matter of legal

c. AS TO TIME; DATES.—An immaterial or an impossible date in an indictment may be corrected at any time.¹

d. OF RECORD.—The state can have an amendment of the record at any time after the commencement of the trial in a criminal case, or after the end of the term, if the court is clearly satisfied that it accords with the facts.²

5. As to What Matters.—a. ERRORS AND DEFECTS GENERALLY.—It is the duty of the presiding judges to cause proper corrections to be made in the minutes of their courts to the end that the same may conform to the truth, especially when errors or omissions are within their personal knowledge.³

principle, this extended commencement or caption is no part of the indictment as sworn to by the grand jury; it is a mere formal statement which, though placed at the head of the indictment, is still of no higher nature than is an entry on the docket made in court by the clerk—a thing which, if erroneous, is subject, like a docket entry, to be corrected by an order of the judge; or when it becomes transferred into the permanent records, to be amended to the same extent as any other part of those records. And it is believed, that though the decided cases may not be very distinct to this effect, and though some of them may even seem to come short, this doctrine is, on the whole, sustained by the adjudged law."

1. *State v. Pierre*, 39 La. An. 915. See *State v. Dominique*, 39 La. An. 323; *Myers v. Com.*, 79 Pa. St. 308.

Under the Pennsylvania act of 1850, section 13, allowing an amendment "in the name of description of anything," the time laid in the indictment for homicide may be changed after the jury has been empanelled. *Myers v. Com.*, 79 Pa. St. 308.

An amendment of an indictment or information in a case of larceny, changing the name of the alleged owner of the stolen property, may be allowed after arraignment, and the accused cannot complain, after conviction, that he was not arraigned under the indictment or information as amended. *State v. Dominique*, 39 La. An. 323.

Under Code Crim. Pro. Tex., art. 550, which limits the right to amend an indictment as to matters of form to "any time before an announcement of ready for trial upon the merits" by both parties, but not afterwards, leave cannot be granted to amend the indictment by the substitution of "fourth Monday" for "first Monday," in the allegation of the time at which the term of the dis-

trict court was being held when the indictment was presented, after the parties have announced themselves ready for trial upon the merits. *Osborne v. State*, 23 Tex. App. 431.

The indictment referred to in the constitution is the presentation to the proper court, under oath, by the grand jury, duly empanelled, of a charge describing an offence against the law for which the party charged may be punished. *Ex parte Bain*, 121 U. S. 1.

2. *Bilansky v. State*, 3 Minn. 427. See *Franklin v. State*, 28 Ala. 9; *Bodkin v. State*, 20 Ind. 281; *Com. v. Magoun*, 80 Mass. (14 Gray) 398.

Where the record, in a criminal prosecution on indictment, fails to show that a grand jury properly empanelled has returned the indictment into court, the court has authority at any time during the term of the trial, to make a sufficient entry of record, to rectify this defect. *Bodkin v. State*, 20 Ind. 281.

The copies certified by a magistrate to the superior court in a criminal case may be amended by him according to the truth, after the commencement of the trial there, and the defendant may be arraigned and tried on the amended papers. *Com. v. Magoun*, 80 Mass. (14 Gray) 398.

Where the trial and conviction occur at the term at which the indictment was found, the court may, at any time during that term, as well after as before the conviction, cause its clerk to endorse on the indictment "filed," and to date such indorsement according to the fact, and to sign it; and may also cause an entry to be made on the minutes, that the indictment was returned into court. Over such matters the court has control during the term, and may alter, amend, or set aside as justice may require. *Franklin v. State*, 28 Ala. 9.

3. *State v. Pierre*, 39 La. An. 915; see *State v. Stebbins*, 29 Conn. 463; s.

b; FORMAL MATTERS.—Mere formal and not the substantial defects of an indictment may be corrected by amendment.¹

c. CHARGING OFFENCES; GENERALLY.—An indictment cannot be amended by adding new charges or materially altering those already charged by amending by inserting words and phrases and the like.²

c., 79 Am. Dec. 223; *Territory v. Christensen* (Dakota), 31 N. W. Rep. 847; *State v. Freeman*, 59 Vt. 661; *State v. Gilmore*, 9 W. Va. 641.

An amendment is allowable where there is no certificate of the oath of a private prosecutor to a complaint. *State v. Freeman*, 59 Vt. 661.

The record of the proceedings at the trial of an indictment for murder disclosed a plea of defendant that did not substantially conform to the statutory form, but after the term of the judgment, and upon written notice served upon defendant's attorneys, the record was amended from the recollections of the clerk of the district attorney, and of the judge presiding at the trial, and from the inspection of the records and papers filed in the action. *Held*, that the court had power to so correct the errors in the record as would make it conform to the facts, and to sustain, but not modify or disturb, the judgment. *Territory v. Christensen* (Dakota), 31 N. W. Rep. 847.

Clerical Errors and Omissions.—Error in the record of empanelling a grand jury, and of their finding of an indictment,—corrected; and disregarded as being merely clerical. *State v. Gilmore*, 9 W. Va. 641.

Information may be amended after jury is empanelled and sworn. and the trial has commenced, by erasing the word "Norwalk" in the description of a railroad company, and inserting in lieu thereof the words "New Haven," where the place on the railroad at which the crime was alleged to have been committed was more fully described in said information as being between Westport and Norwalk, particularly when the information contains other counts, quite sufficient to proceed with the trial upon, which had not been altered. *State v. Stebbins*, 29 Conn. 463; s. c., 79 Am. Dec. 223.

Amendment of Conclusion.—Where two counts charge same crime, one ending with and the other without the words "contrary to the form, force, etc., and against the peace," the defective count may be amended by adding the

words prescribed by the constitution. *State v. Amadon*, 58 Vt. 524; s. c., 1 N. E. Rep. 355.

1. *State v. Armstrong*, 4 Minn. 335; *Kline v. State*, 44 Miss. 317; *Sanders v. State*, 26 Tex. 119; *Bosshard v. State*, 25 Tex. (Supp.) 207; *Evans v. State*, 25 Tex. (Supp.) 303.

The *Mississippi* statute authorizing the amendment of indictments applies to such defects only as are merely formal, and not to those which are material; such as the omission of the words "not being a druggist or apothecary" in an indictment under the statute prohibiting the sale of goods on Sunday. *Kline v. State*, 44 Miss. 317.

After going to trial, an indictment for robbery cannot be amended by inserting the word "feloniously" before the word "rob." *State v. Durbin*, 20 La. An. 408.

2. *Com. v. Rodes*, 1 Dana (Ky.) 595. See *State v. Joseph*, 38 La. An. 33. *State v. Runnals*, 49 N. H. 498; *The Edward*, 14 U. S. (1 Wheat.) 261.

A complaint which charges the respondent with breaking and entering a dwelling house, and making an assault and battery upon its owner, cannot be amended by striking out the charge for breaking and entering, thus leaving it a complaint for a simple assault and battery. *State v. Runnals*, 49 N. H. 498.

Where one is indicted, and convicted of a lesser offence, and judgment is arrested because on the face of the indictment a prosecution for such lesser offence, is barred by prescription, the case cannot be remanded to enable the prosecuting officer to amend by averring facts showing a suspension of prescription. *State v. Joseph*, 38 La. An. 33.

Where the evidence is sufficient to show a breach of the law, but the information is not sufficiently certain to authorize a decree, the supreme court of the United States will remand the cause to the circuit court, with directions to allow the information to be amended. *The Edward*, 14 U. S. (1 Wheat.) 261.

Wrong Number.—By inadvertence the

d. DESCRIPTION OF PERSON; MISNOMER.—It is error to change an indictment by a material amendment, such as correcting the christian name of the accused without the intervention of the grand jury.¹

e. OWNERSHIP; DESCRIPTION OF PROPERTY.—In some states it is held that an indictment may be amended for the purpose of correcting the allegation as to the ownership of the property for

county attorney endorsed on the substituted information a different number than that by which the case was originally entered upon the docket; and the defence therefore objected to the substitute. *Held*, that the mistake should have been corrected upon the motion of the county attorney, or by the trial court upon its own motion. *Stiff v. State*, 21 Tex. App. 255.

Wrong Word.—The information in the alleged malicious prosecution was for perjury, and alleged that the present plaintiff's evidence in a certain prior action was material to the issue therein, etc., but in the certified copy of such information offered in evidence of this action, and also in the complaint therein, the word mentioned is substituted for material by a mere clerical error. *Held*, that no formal amendment was necessary in either case; and the allowance of such an amendment was not error. *Winn v. Peckham*, 42 Wis. 493.

"And" Instead of "Or."—An indictment that defendant did "send and convey," when the statute makes it an offence to "send or convey," may be cured by amendment. *Larison v. State*, 49 N. J. L. (20 Vr.) 256.

The omission of a figure cannot be supplied in an indictment. *State v. Street*, 1 Tayl. (N. Car.) 158.

Omission of "Did."—An indictment charging that the defendant "then and there, without lawful authority, molest, disturb, and take into his possession," etc., is fatally defective by reason of the omission of the word "did," and the court cannot supply such omission. *State v. Daugherty*, 30 Tex. 360.

The omission of the word "did," in charging an offence, cannot be supplied by infendment in an indictment. *State v. Hutchinson*, 26 Tex. 111.

The omission of the word "manner" after the words "undue, angry and threatening," in an indictment for exhibiting a deadly weapon, contrary to the Mississippi Code, art. 56, is a formal defect, and therefore subject to amend-

ment. *Gamblin v. State*, 45 Miss. 658.

Same.—The word "dollars" omitted from an indictment for larceny may be inserted, during the same term, by the grand jury. *Garvin v. State*, 52 Miss. 207.

Omission of Words of Description.—Where it is claimed, on the introduction of the note in evidence, the signature to which is alleged to have been fraudulently obtained, that there is a variance between the note and the description of it in the information, in that the words "North Branch," appended to the date, were omitted in the pleading, it is competent to allow an amendment to meet the objection. *People v. Mott*, 34 Mich. 80.

1. See *Shiff v. State*, 84 Ala. 454; *Garvin v. State*, 52 Miss. 209; *Kline v. State*, 44 Miss. 321; *McGuire v. State*, 35 Miss. 366; s. c., 72 Am. Dec. 124; *State v. Lyon*, 47 N. H. 416; *People v. Johnson*, 104 N. Y. 213; *Rough v. Com.*, 78 Pa. St. 495; *State v. Washington*, 15 Rich. (S. Car.) L. 39; *Jackson v. State*, 11 Tex. 261; *Reg. v. Larkin*, 6 Cox C. C. 377; s. c., 26 Eng. L. & Eq. 572; *Dears. C. C.* 365; 18 Jur. 539; 23 L. J. M. C. 125. Compare *Negro Annie Hammond v. State*, 14 Md. 135.

An indictment for larceny of a pocket book "of the goods, chattels and property of J R and J E R, copartners, in the name of J R and Son" cannot be amended by striking out the words "J R and" and the words "copartners in the name of J R and Son," so that it would read "of the goods, chattels and property of J E R." *State v. Lyon*, 47 N. H. 416.

A count in an indictment for receiving stolen goods, alleging that the prisoner received the goods of A. B., "he, the said A. B., then knowing them to have been stolen," cannot be amended by substituting the name of the prisoner after verdict. *Reg. v. Larkin*, 6 Cox C. C. 377; s. c., 26 Eng. L. & Eq. 572; *Dears. C. C.* 365; 18 Jur. 539.

such amendment will not prejudice the defendant;¹ but an indictment which fails to allege the value of the thing stolen, or to otherwise properly describe such property, cannot be amended.²

f. PLACE.—In those cases where the variation is not material

Under Code Ala., 1886, § 4389, providing that an indictment may be amended "with the consent of the defendant, when the name of the defendant is incorrectly stated," it is reversible error to allow an indictment to be amended so as to correct a misnomer set up by the defendant's plea of abatement, where the record does not show affirmatively that defendant consented to the amendment. *Shiff v. State*, 84 Ala. 454.

The provisions of the N. Y. Code Crim. Proc. §§ 293-295, authorizing the amendment of indictments in respect to the name of any persons, are not in violation of the constitution. *People v. Johnson*, 104 N. Y. 215.

Under the Pennsylvania act of 1869, § 13, relating to criminal procedure, an indictment may be amended after the trial has begun, by inserting the name of the person to whom intoxicating liquor has been sold. *Rough v. Com.*, 78 Pa. St. 495.

Plea in Abatement—Substitution of Real Name.—The district judge may, after a plea in abatement for misnomer, amend an information for larceny by the substitution of the real name of the defendant. *State v. Washington*, 15 Rich. (S. C.) L. 39.

Seduction Under Promise of Marriage.—In an indictment for seduction under promise of marriage, the surname of the woman was incorrectly given as "Oliver" instead of "Oilphant." *Held*, that the defect was one which might be cured by amendment at the outset of the trial, and that the statute allowing such an amendment (N. Y. Code Crim. Proc., §§ 293-295) was not in violation of the provision of the state constitution that "no person shall be held to answer for a capital or otherwise infamous crime . . . unless upon presentment or indictment of a grand jury" (art. 1, § 6). *People v. Johnson*, 104 N. Y. 213.

Amending Foreman's Name.—Where, on a plea that the foreman's name was not there, it appeared to the court below that the wrong christian name was recorded in the book, but that the foreman was sometimes known by one and sometimes by the other, and the judge

allowed the record to be amended, it was *held* no error. *Jackson v. State*, 11 Tex. 261.

1. See *State v. Hanks*, 39 La. An. 234; *State v. Dominique*, 39 La. An. 323; *Garvin v. State*, 52 Miss. 207; *People v. Herman*, 45 Hun (N. Y.) 175.

An indictment may be amended after arraignment in a case of larceny, by changing the name of the owner of the stolen property. *State v. Dominique*, 39 La. An. 323.

Under La. Rev. Stat., § 1047, the information or indictment for larceny may be amended for the purpose of correcting the allegation as to the ownership of the property, if the judge is satisfied that such amendment will not prejudice the defence. *State v. Hanks*, 39 La. An. 234.

This act is not repugnant to La. Const., art. 8, providing that accused shall have the right to be informed of the nature and cause of the accusation, etc. *State v. Hanks*, 39 La. An. 234.

Where, upon a trial for larceny, there is a variance between the allegation and proof as to the owner of the goods alleged to have been stolen, the indictment may be amended in that respect. The name of the owner is no material attribute of the crime charged. *People v. Herman*, 45 Hun (N. Y.) 175.

Section 293, Code Crim. Proc., allowing such amendment, is not unconstitutional. *People v. Herman*, 45 Hun (N. Y.) 175.

An indictment for larceny erroneously alleged the ownership of the property stolen. *Held*, that an amendment, after the trial had commenced, would be allowed, under a statute authorizing amendments in such cases, on or before trial, where the variance is not material to the merits, and the defendant cannot thereby be prejudiced (La. Rev. Stat., § 1047). *State v. Hanks*, 39 La. An. 234.

Inserting Middle Initial in Name of Owner.—In an indictment for larceny the initial of the middle name of the owner of the stolen property may be inserted, as of course, by the district attorney. *Garvin v. State*, 52 Miss. 207.

2. *State v. Goodrich*, 46 N. H. 186.

to the merits, a charge of the place in which the offence is said to have been committed is not necessary, and not material.¹ In such a case an amendment is allowable, even after trial has commenced, a reasonable delay being granted, if requested by the defendant.²

g. TIME.—The time when an offence is alleged to have been committed is a matter of substance, and for that reason, if defective, cannot be cured by amendment.³

Where defendant was indicted for feloniously stealing shoes belonging to a certain corporation, and the People failed to prove the incorporation of the company, but it appeared by the evidence that one B was its superintendent, having lawful possession, care and custody of the property mentioned in the indictment; and before this evidence was taken the People applied to the court to amend the indictment by stating that B was the owner of the stolen property,—the granting of the amendment was proper under N. Y. Code Crim. Proc., § 293, which provides substantially that when a variance between the allegation and proof shall arise, etc., if the defendant cannot be prejudiced in his defence on the merits, the court may direct the indictment to be amended according to proof. *People v. Herman*, 45 Hun 175.

1. *State v. Stebbins*, 29 Conn. 463; *People v. Waller* (Mich.), 38 N. W. Rep. 261.

An information in one count charged a theft committed on the railroad cars "between Westport and Norwalk, two of the stations of the New York and Norwalk Railroad Company." After the jury was empanelled and the trial had commenced, the attorney for the state moved to amend the information by inserting the word New Haven in the place of Norwalk in the description of the railroad company, which, against the objection of the prisoner, was allowed by the court. There were three other counts in the information in which the railroad was properly described. *Held*, that the amendment was properly allowed. *State v. Stebbins*, 29 Conn. 463.

Amendment as to Place.—An information alleging the crime to have been committed in S. township was by permission of the court amended so as to allege the commission in T. township, in the same county, under *How. Stat. Mich.*, § 9537, providing that an amendment may be allowed in case of a varia-

tion between the statement in an indictment and the proof as to the name of a county or place, etc., and in all cases when the variation is not material to the merits. *Held*, that while the amendment was not necessary there was no error in allowing it, the court taking judicial cognizance of the division of counties into townships, and its jurisdiction being co-extensive with the body of the county. *People v. Waller* (Mich.), 38 N. W. Rep. 261.

2. *State v. Stebbins*, 29 Conn. 463.

It is otherwise where the information contains no such defect, but the attorney for the state is unable to bring the proof necessary for a conviction. In this case the attorney has no right to withdraw the prosecution and commence another, but the defendant is entitled to an acquittal. *State v. Stebbins*, 29 Conn. 463.

3. *Com. v. Seymour*, 2 Brews. (Pa.) 567; *State v. Davidson*, 36 Tex. 325; *Sanders v. State*, 26 Tex. 119; *Huff v. State*, 23 Tex. App. 291; *State v. Kennedy*, 36 Vt. 563. *Compare Williams v. State*, 55 Ga. 391; *State v. Barnett*, 3 Kan. 250; s. c., 87 Am. Dec. 471; *State v. Fontenette*, 38 La. An. 61; *State v. Blaisdell*, 49 N. H. 81; *State v. Jenkins* (N. H.), 10 Atl. Rep. 699; *Osborn v. State*, 24 Tex. App. 398; *Mitten v. State*, 24 Tex. App. 346.

Where an indictment charged the offence as adultery to have been committed in the year 1800, *held*, that the commonwealth could not amend by inserting the word "sixty-eight." *Com. v. Seymour*, 2 Brews. (Pa.) 567.

Date Subsequent to Finding of Indictment.—Although the laying of the commission of the alleged offence in an indictment at a date later than that of the finding of the indictment was a clerical error, the indictment cannot be amended. *State v. Davidson*, 36 Tex. 325.

An indictment for the sale of liquor, which does not state the year in which such sale was made, and which alleges

a former conviction in a certain year, without naming the month and day, cannot be amended after appeal to the supreme court. *State v. Kennedy*, 36 Vt. 563.

Amending Date an Affidavit of Attorney.—An information charged an offence to have been committed on or about the 1st day of April, while the complaint on which it was founded alleged the offence to have been committed on the 21st day of April, some twenty days subsequent to the commission of the offence as laid in the information. On affidavit of the county attorney, stating that the date in the complaint had been changed by someone since the filing of the information, by the insertion of the figure "2" before the figure "1" in the complaint, so as to make the same read "21st" instead of "1st," as originally written by him, and on motion of the county attorney the complaint was ordered to be amended so as to correspond with the information in that particular. *Held*, error. The remedy under Tex. Crim. Code Proc., art. 434, was by substituting another indictment or information. *Huff v. State*, 23 Tex. App. 291.

An indictment for burglary, defective in charging the time of the offence, is curable by amendment, or by verdict. *State v. Elaisdell*, 49 N. H. 81.

Where the blank for the year in an indictment is unfilled it may be amended even after the evidence is closed. *State v. Fontenette*, 38 La. An. 61.

But it has been *held* that an indictment, in which no time at all is stated as the date of the commission of the offence, will not support an indictment or conviction. See *State v. Beckwith*, 1 Stew. (Ala.) 318; s. c., 18 Am. Dec. 46; *State v. Roach*, 2 Hayw. (N. Car.) L. 352; s. c., 2 Am. Dec. 262.

An erroneous statement in an indictment of the year in which it was found may be cured by amendment. *State v. Jenkins* (N. H.), 10 Atl. Rep. 699.

Correcting by Minutes of the Court.—If it appears from the minutes of the court that a bill of indictment was found in the present year, an entry at the conclusion of the bill, giving it date in a future year, will be disregarded. *Williams v. State*, 55 Ga. 391.

Misstatement—Form and Substance.—The misstatements in an indictment as to the day on which the term of the court to which the same was presented began, go to its form, and not to its substance, and should be amended un-

der the order of the court by merely erasing the wrong date and substituting the proper one; but such amendment is unnecessary, as the allegation of the time when the term began is mere surplusage. *Osborn v. State*, 24 Tex. App. 398.

Where an information charges in the past tense that an offence has been committed, but names a date subsequent to the date of the information, the court may permit an amendment so as to place the date prior to that of the information without trespassing upon the substantial rights of the defendant. *State v. Cooper*, 31 Kan. 508; *State v. Barnett*, 3 Kan. 250; s. c., 87 Am. Dec. 471.

Transfer Certificate—Correction.—An indictment alleged the commission of the offence on and for one year prior to the first day of December, 1884. The case was transferred to the county court, and the certificate of the district clerk recited that the term of the district court was held in December, 1885, and that the indictment was presented December 18th, 1886. Defendants moved to quash the certificate, and pleaded to the jurisdiction, alleging that if the certificate was correct, the indictment was presented more than two years after the commission of the offence, and was barred under the Tex. Crim. Code Proc., art. 200. The motion and plea were overruled by the court, as by an inspection of the record the court was satisfied that a clerical error had been committed in writing 1886 for 1885. *Held*, the transfer certificate being amendable should have been corrected by the proper officer, and in case the prosecution refuse to amend, the motion and plea should have been sustained. *Mitten v. State*, 24 Tex. App. 346.

Impossible future date is fatal to an indictment. *State v. Sexton*, 3 Hawks (N. Car.) 184; s. c., 14 Am. Dec. 584.

"On or About."—Where an indictment or information for murder alleges the offence to have been committed "on or about the 11th day of August" in a given year, the words "on or about" in view of the provisions of the Criminal Code of Kansas, may be treated as surplusage, and the averment in the information as to time will be sufficiently specific and certain. *State v. Harp*, 31 Kan. 498; *State v. Barnett*, 3 Kan. 250; s. c., 87 Am. Dec. 471.

Charging Offence in Past Tense.—Where an information charges in the past tense, that an offence has been com-

VIII. CONTENTS; AVERMENTS.—1. Formal and Technical Matters.

—*a*. POSITION OR LOCALITY OF AVERMENT.—The venue should be laid and the time stated with certainty and precision for every material and issuable allegation in an indictment, either in the margin or body of the count, or by words of reference.¹ It is

mitted, but names a date subsequent to the date of the information, the court may permit an amendment so as to place the date prior to that of the information, without trespassing upon the substantial rights of the defendant. *State v. Cooper*, 31 Kan. 508; *State v. Barnett*, 3 Kan. 250; s. c., 87 Am. Dec. 471.

1. See *Nicholson v. State*, 18 Ala. 529; s. c., 54 Am. Dec. 168; *State v. Watrous*, 13 Iowa 489; *Territory v. Freeman*, McCah. (Kan.) 56; *State v. Thurstin*, 35 Me. 205; s. c., 58 Am. Dec. 596; *State v. Turnbull*, 78 Me. 393; 3 N. Eng. Rep. 46; *Com. v. Bolkom*, 20 Mass. (3 Pick.) 281; *Com. v. Springfield*, 7 Mass. 9; *People v. Gregory*, 30 Mich. 371; *State v. Cotton*, 24 N. H. 143; *State v. Dayton*, 23 N. J. L. (3 Zab.) 49; s. c., 53 Am. Dec. 270; *Halsey v. State*, 4 N. J. L. (1 South.) 346; *Houser v. People*, 46 Barb. (N. Y.) 33; *Blasdell v. Hewit*, 3 Cal. (N. Y.) 137; *People v. Mather*, 4 Wend. (N. Y.) 229; s. c., 21 Am. Dec. 122; *Heikes v. Com.*, 26 Pa. St. 513; *Melton v. State*, 3 Humph. (Tenn.) 389; *State v. McClure*, 13 Tex. 23; *Seacey v. State*, 4 Tex. 450; *State v. Bacon*, 7 Vt. 222; *State v. Kube*, 20 Wis. 319; s. c., 91 Am. Dec. 390; *Mau-zau-mau-ne-kah v. U. S.*, 1 Pinn. (Wis.) 124; s. c., 39 Am. Dec. 279. Compare *Morgan v. State*, 19 Ala. 556; *Haskins v. People*, 16 N. Y. 344; *Wickham v. State*, 7 Coldw. (Tenn.) 525; *U. S. v. Wilson*, 1 Bald. (C. C.) 78.

Place is essential only upon the question of jurisdiction. *Heikes v. Com.*, 26 Pa. St. 513.

The place where the crime is alleged to have been committed must be set forth with such distinctness that the judgment rendered on the indictment may be pleaded in bar to a second indictment for the same offence. *State v. Cotton*, 24 N. H. (4 Fost.) 143.

An indictment pursuant to Hart. Dig., art. 481, for disturbing religious worship, must allege that the offence was committed in some one of the places mentioned therein. *State v. McClure*, 13 Tex. 23.

Affidavit and information need not specifically describe the location of an alleged public nuisance. *Droneberger v. State*, 112 Ind. 105.

An indictment for selling liquors contrary to the New York act (1 R. L. 484) should state the place of the sale. *Blasdell v. Hewit*, 3 Cal. (N. Y.) 137.

An indictment for extortion must show the place where the offence was committed, in express words. *Halsey v. State*, 4 N. J. L. (1 South.) 324.

A complaint which does not name any county, in laying the offence, is fatally defective; the complaint should show upon its face, in substance, that such offence has been committed as the justice has authority to deal with, which it does not unless it shows that it was committed within the county. *People v. Gregory*, 30 Mich. 371.

An indictment which does not lay the venue of the offence, other than if the "second judicial district, Territory of Kansas," is bad, because such indictment does not lay the venue in any county in such judicial district. *Territory v. Freeman*, McCahon (Kan.) 56.

Where the record showed that the court was held at L, that the jurors were from L county, and that the grand jury were sworn to enquire for the body of the county of L, it was held that it sufficiently appeared that the court was held for L county, without an express allegation to that effect. *Melton v. State*, 3 Humph. (Tenn.) 389.

The addition of the county of the defendant's residence is mere matter of form, and the failure to aver it does not affect the validity of an indictment. *Morgan v. State*, 19 Ala. 556.

In an indictment for a simple larceny, it is sufficient to allege the taking to have been in the county where the indictment is found. *Haskins v. People*, 16 N. Y. 344.

An indictment laying the offence in the words of the law creating it, need not state the county in which the offence was committed, providing it shows that the court had jurisdiction. *U. S. v. Wilson*, 1 Bald. (C. C.) 78.

It is not necessary, under the provisions of the Tennessee Code, to allege, in an indictment, that the offence charged was committed in any particular county. But the proof should show a state of facts bringing the of-

immaterial in which part of an indictment a necessary averment is found if the averment is otherwise sufficient.¹

b. FORMAL AND TECHNICAL ERRORS.—Although an indictment may be technically faulty and informal, yet if all the averments required by statute are sufficiently made, and the accused is fully apprised of the offence with which he is charged, it is substantially good.² Formal and technical errors are fatal only where they affect the indictment or the substantial rights of the defendant. Thus an omission to lay a venue of the offence charged is a fatal defect,³ except in those cases where place is not

fence within the jurisdiction of the county in which the indictment was preferred. *Wickham v. State*, 7 Coldw. (Tenn.) 525.

In a proceeding before a mayor for a violation of a municipal ordinance, the warrant need not allege that the offence was committed in the county in which the municipality is situated. *Beasley v. Beckley*, 28 W. Va. 81.

In Trespass.—If the county be named in an indictment for trespass, the nearest meridian need not be stated. *State v. Watrous*, 13 Iowa 489.

In Misdemeanors.—Indictments in cases of misdemeanor or felony must not only aver the town, but also the county, where an offence is committed, if, from the terms of the location of the town or district, by the act of incorporation, the court cannot conclude that the whole town, district, or unincorporated place, lies in one county. *Com. v. Springfield*, 7 Mass. 9. But it seems that an indictment for a capital offence, in all cases, should lay both the county and town. *Com. v. Bolkom*, 20 Mass. (3 Pick.) 281.

1. *State v. Divoll*, 44 N. H. 140.

Referring to Former Court.—It is not good pleading to refer to a former court in aid of the averments of another, but it is a matter of form only, and cured by Rev. Stat. U. S., § 1025. U. S. v. Jolly, 37 Fed. Rep. 108.

Where a charge is properly laid in one count of an indictment, it may be referred to in another count by the words "said" and "aforesaid," to constitute a sufficient averment. *Frazier v. Felton*, 1 Hawks (N. Car.) 231.

2. *Com. v. Goulding*, 135 Mass. 552; *State v. Coulter*, 46 Mo. 564; *Fitch v. Respublicam*, 3 Yeates (Pa.) 49; *Thomas v. State*, 18 Tex. App. 213.

An indictment, defective in a mere formality, is sufficient *prima facie* evidence to remand the prisoner, on the reversal of the judgment against him.

Peter v. State, 4 Miss. (3 How.) 433.

In Georgia, all technical exceptions to indictments, which would be good at common law, are unavailing under the penal code; provided the offence is charged in the terms and language of the code, or so plainly that the nature of the offence charged may be easily understood by the jury. *Studstill v. State*, 7 Ga. 2.

3. *Com. v. Carroll*, 145 Mass. 403; *State v. Williamson*, 8 N. C. (3 Murph.) 216; *Smith v. State*, 25 Tex. App. 454; *Orr v. State*, 25 Tex. App. 453; *Jane v. State*, 3 Mo. 61; *State v. Hardwick*, 2 Mo. 226.

Allegation of Venue.—An offence charged to have been committed in a certain place named, which is within the jurisdiction of the court, is well pleaded. *Com. v. Carroll*, 145 Mass. 403.

Under Code Crim. Proc. Tex., art. 430, subd. 5, providing that "it must appear" from an information "that the place where the offence is charged to have been committed is within the jurisdiction of the court where the information is filed," an information omitting the allegation of venue is fatally defective, and that the complaint alleges the venue does not cure the defect. *Orr v. State*, 25 Tex. App. 453; *Smith v. State*, 25 Tex. App. 454.

Where an information fails to allege the venue as required by Code Crim. Proc. Tex., art. 430, subd. 5, but such venue is alleged in the complaint, the prosecution will not be dismissed, but the cause will be remanded, that a new information may be presented. *Orr v. State*, 25 Tex. App. 453; *Smith v. State*, 25 Tex. App. 454.

Under the criminal code of Texas (Pasch. Dig., art. 2863, 2864 and 3105), no person can be convicted of crime unless the indictment charges the offence to have been committed within the jurisdiction of the court. *Field v. State*, 34 Tex. 39.

essential to the description of the crime.¹

c. UNPREJUDICIAL ERRORS.—Mere clerical errors will not vitiate an indictment unless they change the word or obstruct the meaning;² and where an indictment can be clearly seen to be a mere clerical mistake, a motion to quash will be denied.³ Thus

An indictment charging the commission of an offence at a certain city and county, which are within the jurisdiction of the court, lays the venue sufficiently. *People v. Lafuente*, 6 Cal. 202.

Where the statute directed the courts to be held at "Conwayborough," and the indictment alleged that the bill was found at "Horry Court House," both names meaning the same place, the latter was regarded as the more precise term, and it was *held* that they were equivalent, and that the bill was good. *State v. Thayer*, 4 Strobb. (S. Car.) 286.

Where it becomes necessary in charging the commission of an offence to allege that a certain term of a county court was duly holden, if it be alleged that a particular cause was tried by and before the chief judge, it should appear in the indictment that one or both of the other judges assisted to try it, or that they were unable or disqualified to sit on the trial. *State v. Freeman*, 15 Vt. 722.

The allegation in an indictment that the offence was committed "at the city of Little Rock," is a sufficient allegation that it was committed "within" the city. *Graham v. State*, 1 Ark. 171.

Where an indictment was filed in the circuit court of Shelby, charging that the offence was committed in the county of Shelby; and the circuit court had jurisdiction over a part only of said county, it was *held* that the indictment was defective in not showing that the court had jurisdiction. *McBride v. State*, 10 Humph. (Tenn.) 615.

The respondent was described as of Somersworth, where he kept a store, and attended to his business in business hours, but he lived with his family in Berwick, in the state of Maine. *Held*, that he was properly described in the indictment as of Somersworth. *State v. Moore*, 14 N. H. 451.

Upon an indictment for murder, the venue was laid, "In the district court of the United States of America, for the first judicial district of Idaho Territory." *Held*, that the venue was

properly laid; that the words "United States of America" were mere surplusage. *Pickett v. U. S.*, 1 Idaho (N. S.) 523.

Alleging Term of Court.—Where it becomes necessary, in charging the commission of an offence, to allege that a certain term of a county court was duly holden, it is not sufficient to allege that it was holden by and before the chief judge of such court, without mention of any assistant judge. If either of the judges is named, it should appear that at least a quorum of the court held the term. *State v. Freeman*, 15 Vt. 722.

An indictment for bastardy, under Md. Code, art. 13, need not set forth the residence of the mother, but must show in what county the child is at the time of the indictment. *Robinson v. State*, 68 Md. 617.

If a respondent in an indictment be described as of A, it will be sufficient if the evidence prove him to be conversant, that is, employed or engaged in A, although his family reside in another place. *State v. Moore*, 14 N. H. 451.

1. *State v. Moore*, 24 S. Car. 150; s. c., 58 Am. Rep. 241.

An indictment is sufficient without a venue, if it lays the commission of the offence within the jurisdiction of the court. *State v. Glasgow*, C. & N. (N. Car.) 38.

An indictment or justice's warrant is not vitiated by a failure to lay the venue properly. *State v. Williamson*, 81 N. Car. 540.

2. *State v. Thompson*, Wright (Ohio) 617; *State v. Wimberly*, 3 McCord (S. Car.) 190; *Harris v. State*, 3 Lea. (Tenn.) 324.

Where an indictment charged a misdemeanor in the violations of the provisions of Tennessee act of March 16th, 1850, ch. 81, whereas the charge would constitute an offence under the act of 1860, but not under the former act, *held*, that the clerical error in the date of the statute would not vitiate the indictment. *Harris v. State*, 3 Lea. (Tenn.) 324.

3. *State v. Shaw*, 58 N. H. 74.

where the name of the State and county are given in the caption of the indictment, and the county only is stated in the body of the indictment, the error is unprejudicial, the venue being sufficiently laid.¹

d. USE OF A WRONG WORD.—The use of a wrong word will not affect the validity or sufficiency of an indictment where the meaning is not thereby changed, and the substantial rights of the defendant thereby prejudiced.² Thus an indictment charging an offence "at" a county, sufficiently charges that it was committed in the county.³ However, it is otherwise where the word changes the meaning of the instrument.⁴

1. *Wedge v. State*, 12 Md. 232; *State v. Beauleigh*, 92 Mo. 490; *State v. Dawson*, 90 Mo. 149; *State v. Arnold* (Mo.), 2 S. W. Rep. 269.

The place where the offence was committed must be charged in the body of the indictment; it is not sufficient to charge it in the margin only. *Missouri v. Cook*, 1 Mo. 547.

Under Rev. Stat. Mo., § 1813, it is not necessary to state any venue in the body of an indictment when the county is named in the margin thereof, and an indictment that fails to state any venue at all is rendered valid by Rev. Stat., § 1821. *State v. Arnold* (Mo.), 2 S. W. Rep. 269.

Averment of Locus in Quo.—Rev. Stat. Mo., § 1813, provides that the venue named in the margin of an indictment shall be taken as that of all the facts in the body of the same. The indictment herein laid the venue in a certain county in the margin and first three counts, and in the fourth and fifth laid the venue on a railroad train which passed through said county. The offence charged being both proved and admitted to have occurred in said county, *held*, that an instruction that but one offence is intended to be charged and authorizing a verdict on any one of the counts was correct. *State v. Beauleigh*, 92 Mo. 490.

2. See *Meyers v. State*, 101 Ind. 379; *O'Connor v. State*, 79 Ind. 104; *Stout v. State*, 96 Ind. 407; *State v. Sammons*, 95 Ind. 22; *Galvin v. State*, 93 Ind. 550; *Wood v. State*, 92 Ind. 269, 272; *Dukes v. State*, 11 Ind. 557; s. c., 71 Am. Dec. 370; *State v. McDonald*, 106 Ind. 233; *Sample v. State*, 104 Ind. 289; *Thomas v. State*, 103 Ind. 419; *State v. Anderson*, 103 Ind. 170; *State v. Bowman*, 103 Ind. 69; *State v. Gurlock*, 14 Iowa 444; *Jane v. Com.*, 3 Met. (Ky.) 18; *Com. v. Magowan*, 1 Met. (Ky.) 368; *People v. Duford* (Mich.), 33 N. W. Rep. 28;

Patterson v. State, 48 N. J. L. (19 Vr.) 381; *State v. Lee Ping Bow*, 10 Oreg. 27; *State v. Drake*, 64 N. Car. 589; *State v. Caffey*, 2 Murph. (N. Car.) 320; *Jackson v. State*, 1 Smith (Ind.) 124; *State v. Vermont C. R. Co.*, 27 Vt. 103.

By section 727 of the Criminal Procedure act, it is provided that no judgment given upon any indictment shall be reversed for any imperfection, omission, defect in or lack of form, or for any error except such as shall or may have prejudiced the defendant in maintaining his defence upon the merits. *Patterson v. State*, 48 N. J. L. (19 Vr.) 381.

The court of appeals cannot pronounce an indictment insufficient or disturb a judgment thereon, for any defect in the indictment which does not tend to the prejudice of the substantial rights of the defendant on the merits. *Jane v. Com.*, 3 Met. (Ky.) 18.

3. *Augustine v. State*, 20 Tex. 450.

Thus it has been *held* that where the word in the indictment was "received" and in the instrument produced it was "receivd," the omission of the last e did not change the meaning, and the difference was not material. See *Rex v. Hart*, 1 Leach C. C. (4th ed.) 145; s. c., 2 East P. C. 977. The same is true of the use of the word "Messrs." in the indictment, when the instrument produced was found to be "Mess." omitting the final r. *Oldfields Case*, Russell on Crimes (3rd ed.) 376. And the same is true of the use of "undertood" for "understood." *Rex v. Beech*, 1 Doug. 194; s. c., Loft 785; 1 T. R. 237, note; 1 Leach (4th ed.) 133; s. c., *sub nom.*, *Rex v. Beach*, Cowp. 229.

4. "**Corporeal Oath**" for "**Solemn Oath**."—The term "corporal oath" in an indictment are synonymous with "solemn oath;" and where, in an indictment for perjury, it was alleged that the

e. OMISSION OF WORDS.—Omissions of words in an indictment which are by common understanding implied in that which is expressed, will not render the indictment invalid;¹ but an indictment cannot be aided by intendment or by omissions therefrom supplied by construction.² But where an indictment charges an offence to have been committed in a designated county or State, it will be sufficient without the use of the word State before the name of the particular State, such allegation being sufficient to show that the crime was committed within such State.³

defendant took his "corporal oath," the allegation was *held* sufficient. *Jackson v. State*, 1 Smith (Ind.) 124.

"Injuriously and Wrongfully" for "Unlawfully." — "Injuriously and wrongfully" is as good as "unlawfully," in an indictment. *State v. Vermont Cent. R. Co.*, 27 Vt. 103.

"Is" for "Are."—An indictment, otherwise sufficient, against several defendants, is not fatally defective because, at the commencement, "is" is used instead of "are." *State v. Lee Ping Bow*, 10 Oreg. 27.

"Not" for "nor."—It has been adjudged that the use of "not" for "nor" is fatal. See *Reg. v. Drake*, Holt 347, 352; s. c., 2 Salk. 660; s. c., 3 Salk. 224; s. c., 11 Mod. 78.

"Sabbath" for "Sunday."—An indictment for hunting on Sunday is not fatally defective for using the expression "the Sabbath" instead of "Sunday"; nor for referring to the same day by a wrong day of the month. *State v. Drake*, 64 N. C. 589.

"Suit" for "Cause."—Where the word "suit" was misrecited for the word "case," the variance was *held* immaterial, if the indictment did not profess to give the tenor. *State v. Caffey*, 2 Murph. (N. C.) 320.

"Was" for "Did."—Where an information correctly stated the offence, the error of using the word "was" instead of "did," before "willfully," must be merely clerical and formal, and the defect should have been taken advantage of by demurrer or motion to quash. *People v. Duford*, Mich. 33 N. W. 28.

1. *People v. Bennett*, 37 N. Y. 117; s. c., 93 Am. Dec. 55; *Schrumpf v. People*, 14 Hun (N. Y.) 13; *Long v. State*, 1 Tex. App. 466; *Hauck v. State*, 1 Tex. App. 357.

Defects and Omissions.—That mere formal errors in an indictment, such as the omission of the word "court" in the clause showing in what part the indictment was presented, are not available

on exception. See *Long v. State*, 1 Tex. App. 466; *Hauck v. State*, 1 Tex. App. 357.

2. *State v. Chicago, B. & P. R. Co.*, 63 Iowa 508; *Williams v. State*, 19 Tex. App. 409; *Jones v. State*, 21 Tex. App. 349.

If an indictment omits a material word, although it be but a preposition or a helping verb, the court will not, from a knowledge of the language, supply the missing word so as to supply the probable intention of the grand jury. The charging part of the indictment read as follows: " . . . Adam Carpenter and R. Jones, on the tenth day of May, 1884, did then and there, unlawfully and with malice aforethought, make an assault in and upon the person of John Long, with intent, him, the said Long, then and there kill and murder," etc. *Held*, that the omission of the word "to" before the words "kill and murder" was fatal to the sufficiency of the indictment. *Jones v. State*, 21 Tex. App. 349.

3. See *State v. Schreiber*, 98 Ind. 184; *State v. Lillard*, 59 Iowa 479; *State v. Walter*, 14 Kan. 375; *Com. v. Quin*, 71 Mass. (5 Gray) 478; *State v. Vincent*, 91 Mo. 662; *State v. Wentworth*, 37 N. H. 196; *State v. Jordan*, 12 Tex. 205; *State v. Cook*, 38 Vt. 437.

Alleging Place of Offence.—An indictment charging that the act was done "in the county of Rusk," without saying in the state of Texas, is good. *State v. Jordan*, 12 Tex. 205.

Where an offence is charged to have been done in a specific house on a certain lot and block "in the city of Ottawa, and county of Franklin," and against the peace and dignity of the state of Kansas, the venue is sufficiently alleged, although it is not alleged in any other way that the offence was committed in the State of Kansas. *State v. Walter*, 14 Kan. 375.

Where it sufficiently appears from the words of the first count of the

f. UNGRAMMATICAL LANGUAGE; WRONG PUNCTUATION.—Bad grammar does not vitiate an indictment unless it changes the words or obstructs the meaning of the instrument;¹ neither will bad punctuation vitiate an indictment.²

g. MISSPELLING—(1) *Generally*.—The misspelling of words in an indictment does not render it invalid where the word is not changed into one of different significance, or where the word misspelled is merely surplusage,³ and where, from the whole con-

indictment that the city of St. Louis is within the state of Missouri, the words of the third count, "at the city of St. Louis," show that the offence was committed in the State of Missouri. *State v. Vincent*, 91 Mo. 662.

An indictment for larceny as follows: "The grand jury of the county of Decatur, in the name and by the authority of the state of Iowa, accuse the defendant, D. P. Lillard, of the crime of larceny, committed as follows: The said defendant, D. P. Lillard, on the 9th day of September, 1879, in the county aforesaid, one mare," etc. *Held*, to sufficiently charge that the crime was committed in Iowa. *State v. Lillard*, 59 Iowa 479.

An indictment for violation of Gen. Sts. § 29, ch. 119, in relation to the enlistment of men, alleged that "Perry Cook, of Fairfax, in the county of Franklin, on the 26th of July, 1864, at Fairfax aforesaid, with force and arms, without due authority from this state or the United States, did enlist, recruit and employ one Edward Orton, of Fairfax aforesaid, a person in this state," etc. *Held*, that the fact was sufficiently established that the enlistment was in this state. *State v. Cook*, 38 Vt. 437.

A complaint made "in behalf of the commonwealth," and alleging an offence in a particular city and county (corresponding in name to a city and county of the commonwealth) against a statute, the title and date of which are stated and rightly described a statute passed by the legislature of the commonwealth, sufficiently shows that the offence was committed within the commonwealth, without any caption, or venue in the margin. *Com. v. Quin*, 71 Mass. 5 Gray, 478.

1. *Pond v. State*, 55 Ala. 196; *Miller v. State*, 107 Ind. 152; *State v. Hedge*, 6 Ind. 330; *State v. Adams*, 78 Me. 486; *Perdue v. Com.*, 98 Pa. St. 311; *State v. Wimberly*, 3 McC. (S. Car.) L. 190; *Dawson v. State*, 33 Tex. 491; *State v. Halida*, 28 W. Va. 499.

The awkward use of words and clumsy construction of sentences in an indictment will not render it bad in law, provided the offence is charged in plain and intelligible words. *Dawson v. State*, 33 Tex. 491.

Ungrammatical Language.—A judgment will not be reversed for defects of grammar or rhetoric in an indictment, if a definite statement of a positive offence can be eliminated therefrom. *Perdue v. Com.*, 96 Pa. St. 311.

A complaint properly setting out the offence of using a net of the kind forbidden by section 3 is valid, although it alleges the forfeiture in the future tense. *State v. Adams*, 78 Me. 486.

There is no rule of construction which requires that a pronoun shall relate to the last noun mentioned for its antecedent; but the construction will be governed by the sense and meaning intended to be conveyed. *Miller v. State*, 107 Ind. 152.

2. *Ward v. State*, 50 Ala. 120.

3. *State v. Hedge*, 6 Ind. 330; *State v. Hornsby*, 8 Robt. (La.) 554; s. c., 41 Am. Dec. 305; *State v. Moller*, 1 Dev. (N. Car.) 263; *May v. State*, 14 Ohio 461; s. c., 45 Am. Dec. 548; *State v. Coleman*, 8 S. C. 237; *Koontz v. State*, 41 Tex. 570; *State v. Earp*, 41 Tex. 487; *Somerville v. State*, 6 Tex. App. 433; *Witten v. State*, 4 Tex. App. 70.

Bad Spelling.—The rule that an indictment is not vitiated by bad spelling applied where an indictment charged that the murder was committed in the year one thousand "eiget" hundred and seventy-six. *Somerville v. State*, 6 Tex. App. 433.

Errors in spelling, such as eigh for eight in laying the time of the act charged, and statue for statute in the conclusion; also the omission of "last" between "year" and "aforesaid" in designating the time, were *held* not to vitiate. *State v. Coleman*, 8 S. C. 237.

An objection that the name of the month in an indictment was written

text of the words, the meaning can be determined with certainty by a person with ordinary intelligence.¹

(2) *Omission or Addition of Letters*.—It is a general rule that the omission or addition of letters to a word will not affect the validity of an indictment where such omitting or adding letters does not make it another word;² and the same is true of the use of the wrong word where such use does not tend to mislead and injure the defendant; thus it has been held that, under the gaming act prohibiting gaming "on the premises" of any person, an indictment charging a person with permitting gaming to be carried on in his "house," is good.³

(3) *Caption, etc.*—The general rule that neither bad spelling nor bad writing vitiates an indictment where the meaning thereof can be clearly made out by a man of ordinary intelligence, applies to the caption of an indictment as well as to the other parts thereof.⁴

(4) *Description of the Offence, etc.*—Where the misspelling of

"February" instead of "Februry," held to be hypercritical. Neither bad spelling nor bad writing vitiates an indictment. *Witten v. State*, 4 Tex. App. 70.

Where an indictment alleged that an offence was committed "on the first day of August, in the year one thousand eight hundred and fifty too," it was held that "too" must be construed to mean "two." *State v. Hedge*, 6 Ind. 330.

1. *Grant v. State*, 55 Ala. 201; *State v. Fitzgerald*, 20 Mo. App. 408; *Brumley v. State*, 11 Tex. App. 114; *Hutto v. State*, 7 Tex. App. 44; *State v. Halida*, 28 W. Va. 499; *Com. v. Riley, Thach. Cr. Cas. (Mass.)* 67.

In an indictment for theft of cattle of one Pettis, the fact that in one place the name was written "pittis," held to be no ground for arrest of judgment. *Hutto v. State*, 7 Tex. App. 44.

An indictment for unlawfully selling "spirituous liquors," held not vitiated by bad spelling, *idem sonans*. *Brumley v. State*, 11 Tex. App. 114.

The omission of the final *e* in the word "Keene," in an indictment, is not a fatal variance. *Com. v. Riley, Thach. Cr. Cas. (Mass.)* 67.

A literal variance in the spelling of a word is not alone fatal, when the omission or addition of a letter does not make it a different word; and the diversity in the spelling of a name is not material where it is *idem sonans*. *State v. Fitzgerald*, 20 Mo. App. 408.

The fact that in an indictment for the theft of cattle the name of the month is

misspelled, is no ground for arrest of judgment. *Hutto v. State*, 7 Tex. App. 44.

2. *Rex v. Beech*, 1 Leach. (4th ed.) 134; s. c., 1 Doug. 194; Loft 785; 1 T. R. 237; *sub nom.* *Rex v. Beach*, Cowp. 229. See *State v. Sterns*, 28 Kan. 154; *State v. Bucknam*, (Me.) 2 New. Eng. Rep. 697; *State v. Libby*, 78 Me. 546; *Bossert v. State*, Wright (Ohio) 113.

3. *Covey v. State*, 4 Port. (Ala.) 186. See *May v. State*, 14 Ohio 461; s. c., 45 Am. Dec. 548; *Com. v. Arnold*, 21 Mass. (4 Pick.) 251; *Comer v. State*, 26 Tex. App. 509.

Omission of one letter in an indictment does not amount to variance between the indictment and the written instrument which purports to be therein set forth *in hæc verba*, where the sound, the sense, and the grammatical construction of the sentence still remain the same. *May v. State*, 14 Ohio 461; s. c., 45 Am. Dec. 548.

4. See *State v. Given*, 32 La. An. 782; *State v. Karn*, 16 La. An. 183; *Keller v. State*, 25 Tex. App. 329.

"Cash" for "Case."—An information for larceny, ending with these words, "contrary to the form of the statute in such 'cash' may be provided." Held, not to be fatally defective. *State v. Given*, 32 La. An. 782.

Fourman for Foreman.—An error in an indictment in spelling the word "foreman" "fourman" is not important, as the pronunciation of the same is not thereby changed. *State v. Karn*, 16 La. An. 183.

"Inhabittance" for "Inhabitants."—

a word in the description of the offence is immaterial, it will not affect the validity of the indictment.¹

h. ABBREVIATING.—An indictment or information should not only be in the English language, but should be made in ordinary language. Abbreviations of words, such as are employed by men of science and in the arts, will not answer unless there is also a full explanation of their meaning in ordinary language;² but abbreviations of the proper names of persons described in an indictment are permissible.³

i. CHARACTERS; SIGNS.—As a general rule, the use of signs peculiar to any art or science will vitiate an indictment, while the insertion of those which are in everyday use, and well understood by the people generally, will not have that effect.⁴

j. NUMERALS.—The use of Arabic numerals and other well understood abbreviations in an indictment does not render it defective.⁵

An information or indictment wherein the word "inhabitants" is spelled "inhabitanee" is sufficient. *Keller v. State*, 25 Tex. App. 329.

1. See *Pierce v. State*, 75 Ind. 199; *State v. Carville (Me.)*, 11 Atl. Rep. 601; *State v. White*, 15 S. C. 381; *State v. Myers*, 85 Tenn. 203; *Stinson v. State*, 5 Tex. App. 31; *State v. Lockwood*, 58 Vt. 378. Compare *Anon. 2 Hayw. (N. Car.) L.* 140.

"Raysor" for "razor" is an immaterial misspelling. *State v. White*, 15 (S. C.) 381.

"Rill" for "kill."—The fact that in an indictment for theft of cattle the word "rill" is used for "kill," is no ground for arrest of judgment. *Irvin v. State*, 7 Tex. App. 109.

"Incestuous" for "incestuous."—An indictment is not bad because "incestuous" is spelled "incestuous." *State v. Carville (Me.)*, 11 Atl. 601.

"Stael" for "steal."—A transposition of the letters "e" and "a" in the word "steal" so as to make it "stael," does not render a count defective. *State v. Lockwood*, 58 Vt. 378.

"Seventy Years of Corn."—The rule that an information or indictment is not vitiated by inaccurate orthography applied to a charge that the accused stole "seventy years of corn." *Stinson v. State*, 5 Tex. App. 31.

"Mair" for "mare."—In an indictment for horse stealing, the name of the animal stolen was spelled "mair." *Held*, that a motion to quash for this reason was properly overruled. *State v. Myers*, 85 Tenn. 203.

When Fatal.—The misspelling of the word "breast," in an indictment for

murder by a wound inflicted there, is fatal on a motion in arrest. *Anon. 2 Hayw. (N. C.)* 140.

2. Except in those cases where they are in universal use, such as the initials A. D. to indicate the year of Our Lord and Arabic figures and Roman letters. *United States v. Reichert*, 32 Fed. Rep. 142.

Thus in an indictment charging a conspiracy to procure the allowance of a false and fraudulent claim for compensation for a survey of land claimed to have been made by defendant, a description of the property alleged to have been surveyed, and for which the fraudulent claim is charged to have been presented, should be made in ordinary language. *United States v. Reichert*, 32 Fed. Rep. 142.

3. *State v. Kean*, 10 N. H. 347; s. c., 34 Am. Dec. 162.

4. Signs for Degrees and Minutes of Longitude.—Thus it has been held, in the case of *State v. Town of Jericho*, 40 Vt. 121, s. c., 94 Am. Dec. 387, that an indictment in which the usual mathematical signs (° ') are used in place of the words "degrees" and "minutes," is bad on demurrer; such symbols not being a part of the English language within the statute, which requires all pleadings to be drawn in the English language.

"&" for "and."—It has been held that the use of the character "&" in an indictment is to be deemed equivalent to the word "and." See *Pickens v. State*, 58 Ala. 364; *Brown v. State*, 16 Tex. App. 245.

5. *State v. Reed*, 35 Me. 489; s. c., 58 Am. Dec. 727; *Com. v. Hagarman*, 92

k. ILLEGIBILITY; INTERLINEATIONS AND ALTERATIONS.—Bad and illegible writing will not render an indictment void.¹ Where the words of an indictment are not clearly written, and there is some doubt as to what they are, it is a question for the court to decide upon an inspection of the writing.²

Interlineations will not vitiate an indictment where they are conveniently legible, and the absence of anything appearing upon the face of the indictment, or being shown extrinsically tending to prove that the interlineations were made subsequently to its execution, it will be presumed that they were made before not after execution.³

The words interlined in an indictment or information will be read so as to make sense, without regard to the place of the caret.⁴

Erasures and interlineations in an indictment, though without any note or certificate to show when or by whom they were made, afford no ground for arresting judgment;⁵ but no alteration can be made, in a material respect, in an indictment after it is found, by the court, and such an alteration of one count, is fatal to the whole indictment, though the other counts remain unaltered.⁶

2. Directness; Argumentativeness; Conclusions.—An indictment or information should contain direct and unequivocal averments of such facts (not being mere evidence) as lead immediately and of necessity to a single and inevitable conclusion, but the omission to draw that conclusion expressly will not vitiate the proceedings.⁷

Mass. (10 Allen) 401; Com. v. Kingman, 80 Mass. (14 Gray) 85; Kelly v. State, 11 Miss. (3 Smed. & M.) 518. See State v. Raiford, 7 Port. (Ala.) 101; State v. Haddock, 2 Hawks (N. C.) 461; Barnes v. State, 5 Yerg. (Tenn.) 186; State v. Hodgeden, 3 Vt. 481.

There are cases, however, in which they have been regarded as insufficient at common law, though they have sometimes been held valid under statutory provisions. See State v. Lane, 4 Ired. (N. C.) 114; State v. Dickens, 1 Hayw. (Tenn.) 406; Finch v. State, 6 Blackf. (Ind.) 533.

1. See Pierce v. State, 75 Ind. 199; Com. v. Riggs, 80 Mass. (14 Gray) 376; s. c., 77 Am. Dec. 333.

Characters Standing for Malice.—Where the objection to an indictment for assault with intent to kill was that the letters and character used to form the word probably intended to be "malice," did not spell and constitute such word, *held*, on examination of the original indictment, that as the word evidently stood for "malice" it ought to

be so read and construed. Pierce v. State, 75 Ind. 199.

2. Com. v. Davis, 77 Mass. (11 Gray) 457; Com. v. Riggs, 80 Mass. (14 Gray) 376; s. c., 77 Am. Dec. 333.

3. See Moorman v. Barton, 16 Ind. 208; French v. State, 12 Ind. 670; s. c., 74 Am. Dec. 229; Stoner v. Ellis, 6 Ind. 152.

4. State v. Daniels, 44 N. H. 383, citing State v. Copp, 15 N. H. 212, and State v. Bailey, 31 N. H. 521.

5. Com. v. Fagan, 81 Mass. (15 Gray) 194.

A letter added to a word in an indictment in pencil mark before the indictment is found by the grand jury, does not vitiate the indictment. May v. State, 14 Ohio 461; s. c., 45 Am. Dec. 548; Dodd v. State, 10 Tex. App. 370.

6. Calvin v. State, 25 Tex. 789.

7. Evans v. People, 12 Mich. 27; State v. Haven, 59 Vt. 399. See State v. Perry, 2 Bail. (S. C.) 17; Lasindo v. State, 2 Tex. App. 59.

Argumentativeness.—A count in an indictment, under Vt. Rev. Laws,

3. Surplusage.—*a. GENERAL MATTERS.*—(1) *Effect Generally.*—Surplusage is any allegation without which the indictment would be adequate in law; the unnecessary averments of an indictment, where uncontradictory, will not vitiate a complaint or indictment, and need not be proved,¹ and “all things may go on as though they were not in the record.”²

(2) *Unnecessary or Redundant Words.*—Surplusage in the phraseology used in the indictment to designate the offence does not vitiate the indictment if the necessary facts to constitute the offence are alleged,³ because in an indictment at common law every superfluous fact and circumstance and unnecessary ingredient of the offence may be rejected.⁴

(3) *Defective and Unnecessary Allegations.*—It is a well estab-

lished principle, § 4160, is bad for argumentativeness, in which it is alleged that the treasurer of a railroad company did sign, with intent that same be issued and used, a certain false certificate of ownership of 1,000 shares of its capital stock, falsely certifying that a person was then and there owner of 1,000 shares, and that he did not own or have standing in his name, and was not entitled to, any share or shares of the capital stock of said company. *State v. Haven*, 59 Vt. 399.

An information which charges that the accused was “guilty of the offence of keeping” (a disorderly house) instead of “did keep,” etc., is bad; because it alleged a conclusion, rather than the facts from which the conclusion may be drawn. *Lacindo v. State*, 2 Tex. App. 59.

An indictment which charged the defendant with having “taken upon himself” to do the thing charged was held bad, upon motion in arrest of judgment, as not containing a direct allegation of the offence. *State v. Perry*, 2 Bail. (S. C.) 17.

1. *Feigel v. State*, 85 Ind. 580; *Olive v. Com.*, 5 Bush. (Ky.) 376; *Com. v. Rowell*, 146 Mass. 128; *People v. Lohman*, 2 Barb. (N. Y.) 216; *State v. Welch*, 37 Wis. 196; *United States v. Howard*, 3 Sumn. (C. C.) 12.

2. See *Lodano v. State*, 25 Ala. 64; *Rose v. State*, Minor (Ala.) 28; *State v. Stedman*, 7 Port. (Ala.) 495; *State v. Hutzell*, 53 Ind. 160; *Warren v. State*, 1 G. Greene (Iowa) 106; *Olive v. Com.*, 5 Bush. (Ky.) 376; *Com. v. Parmenter*, 121 Mass. 354; *State v. Munch*, 22 Minn. 67; *Com. v. Kneeland*, 37 Mass. (20 Pick.) 206; *Dick v. State*, 30 Miss. 631; *State v. Webster*, 39 N. H. 96; *People v. Lohman*, 2 Barb. (N. Y.) 216; *People v. White*, 22 Wend.

(N. Y.) 167; *Smith v. State*, 8 Ohio 294; *Pennsylvania v. Bell*, Addis. (Pa.) 156; *State v. Harden*, 1 Brev. (S. C.) 47; *State v. Coppenburg*, 2 Strobb. (S. C.) 273; *State v. Pratt*, 44 Tex. 93; *State v. Killough*, 32 Tex. 74; *Wilson v. State*, 25 Tex. 169; *State v. Elliott*, 14 Tex. 423; *Com. v. Bennet*, 2 Va. Cas. 235; *Com. v. Scott*, 10 Gratt. (Va.) 749; *State v. Welch*, 37 Wis. 196; *U. S. v. Dickinson*, 1 Hempst. (C. C.) 1; *U. S. v. Burroughs*, 3 McL. (C. C.) 405; *Reg. v. Jennings*, Dears. & B. (C. C.) 447; s. c., 7 Cox (C. C.) 397; *Rex v. May*, 1 Doug. 193; s. c. 1 T. R. 37n; *Rex v. Sadi*, 1 Leach (4th ed.) 468; *Reg. v. Turner*, 2 Moo. & R. 214.

Aggravating Matter.—An indictment will not be ill because it alleges something by way of showing the offence to be more enormous than it would otherwise appear; and such matter need not be proved. See *State v. Fleetwood*, 16 Mo. 448; *State v. Cozens*, 6 Ired. (N. C.) L. 82; *State v. Cheatwood*, 2 Hill (S. C.) 459; *Rex v. Foot*, 2 Show. 455. See also *Olive v. Com.*, 5 Bush. (Ky.) 376; *State v. Brown*, 8 Humph. (Tenn.) 89; *Young v. State*, 44 Tex. 98; *Johnson v. State*, 1 Tex. App. 130; *Attorney General v. Macpherson*, L. R. 3 P. C. 268, 281; s. c. *sub nom. Reg. v. Macpherson*, 11 Cox (C. C.) 604.

Thus it has been held that an indictment for selling intoxicating liquors without a licence, which avers that it was the “second glass” sold by the defendant, may be wholly unnoticed in the proof. *State v. Staples*, 45 Me. 320. See *Eagan v. State*, 53 Ind. 162; *Butnam’s Case*, 8 Me. 113; *Hodgman v. People*, 4 Den. (N. Y.) 235; *U. S. v. Dickinson*, 1 Hempst. (C. C.) 1.

3. *State v. Munch*, 22 Minn. 67.

4. *Lodano v. State*, 25 Ala. 64; *State*

lished principle of law that defective and unnecessary allegations

v. Stedman, 7. Port. (Ala.) 495; *Rose v. State*, Minor (Ala.) 28; *Anderson v. State*, 5 Ark. 444; *People v. Flores*, 64 Cal. 426; *State v. Corrigan*, 24 Conn. 286; *Southworth v. State*, 5 Conn. 325; *Zarresseller v. People*, 17 Ill. 101; *Richardson v. State*, 66 Md. 205; *State v. Johnson*, 37 Minn. 493; *State v. Schloss*, 93 Mo. 361; *State v. Beason*, 40 N. H. 367; *State v. Webster*, 39 N. H. 96; *State v. Bailey*, 31 N. H. (11 Fost.) 521; *State v. Kean*, 10 N. H. 347; s. c., 34 Am. Dec. 162; *State v. Cheatwood*, 2 Hill (S. C.) 459; *State v. Bellville*, 7 Baxt. (Tenn.) 548; *State v. Amidon*, 58 Vt. 524; *State v. Soragan*, 40 Vt. 450.

The useless repetition of words in an indictment does not violate it, but the superadded words may be rejected as surplusage. *Lodano v. State*, 25 Ala. 64.

Unnecessary allegations in the conclusion of an indictment do not vitiate it, but may be rejected as surplusage. *Richardson v. State*, 66 Md. 205.

An information is not bad because of the insertion therein of a useless word which has no meaning and which neither alters the sense nor can prejudice the defendant. *People v. Flores*, 64 Cal. 426.

All particulars and circumstances beyond those which are necessary to constitute the crime imputed may be rejected as surplusage. *State v. Amidon*, 58 Vt. 524.

All unnecessary words in an indictment may, upon trial or arrest of judgment, be regarded as surplusage, if the indictment will be good after striking them out. *State v. Webster*, 39 N. H. 96.

Disregard of the requirement of Tenn. Code, § 5114, that the offence be stated "without prolixity or repetition," is not fatal to the indictment if, on rejection of surplus words, the offence is sufficiently charged. *State v. Bellville*, 7 Baxter (Tenn.) 548.

Where an indictment charged the defendant with perjury committed in testifying in a certain suit "between one John Bailey and the trustees of Colebrook Academy, a corporation duly established by law in this state, in a plea of the case in which said John Bailey was plaintiff and the trustees of the Colebath Academy aforesaid was defendant," it was held

that the word Colebath might be rejected as surplusage. *State v. Bailey*, 35 N. H. 521.

Putting the date when and the place where found at the end of an indictment, after the words "against the peace and dignity of the State of Minnesota," does not vitiate it; such date and place are no part of the indictment. *State v. Johnson*, 37 Minn. 493.

Unnecessary Address of Complaint.—In a complaint addressed to "James Read, Esq., recorder of the city of Burlington, within and for the county of Chittenden" the words "within and for the county of Chittenden" may be treated as surplusage, there being a previous perfect description of the office. *State v. Soragan*, 40 Vt. 450.

If a protestando in pleading be inconsistent or repugnant, it will be rejected as surplusage, its design being merely to preserve the rights of the party in some other suit or proceeding. *State v. Beason*, 40 N. H. 367.

If what properly belongs to the caption be inserted in the body of an indictment it may be rejected as surplusage. *Rose v. State*, Minor (Ala.) 28.

Contra Formam Statuti.—If an information conclude *contra formam statuti* and the offence charged is not within any statute, those words may be rejected as surplusage. *Southworth v. State*, 5 Conn. 325.

Shooting at Occupied House—Averments.—The words "with intent in so doing to kill and murder one L. C.," in an indictment under La. Acts 1870, No. 8, for shooting at a house occupied by persons lawfully therein, do not charge a distinct offence, but may be rejected as surplusage. *State v. Minau*, 37 La. An. 526.

Attempt to Deceive by False Pretences.—An indictment charged the prisoner with attempting, by false pretences made to J. B. and others, to defraud the said J. B. and others of certain goods, the property of the said J. B. and others. On the trial it was proved that the false pretence set forth in the indictment to J. B. only, with the intent to defraud J. B. and others, his partners, of property belonging to their firm. Held, that there was no variance between the indictment and proof, as the words "and others" in the allegation that the false pretence was made to

or recitals cannot affect the validity of the indictment;¹ such matter may be stricken out and yet leave the offence fully described.²

(4) *Descriptive Matters; Time of Offence.*—In criminal prosecutions, no allegation, whether necessary or unnecessary, which is descriptive of the identity of that which is legally essential to the charge in the indictment, can be rejected as surplusage.³

b. PARTICULAR INSTANCES AND OFFENCES.—(1) *Describing Person; Ownership; Intent.*—Any unnecessary allegations describing the person, ownership or intent may be rejected as surplusage.⁴

(2) *Describing Particular Offences and Things; Time.*—The fact that an indictment goes farther than an information and charges the specific acts done and describes the manner by which they were done, all of which descriptions are legitimate matters of evi-

“J. B. and others” might be rejected as surplusage. *Reg. v. Kealey*, 20 L. J., M. C. 57; s. c., 2 Den. C. C. 69; 15 Jur. 230; 5 Cox C. C. 193; 1 Eng. L. and Eq. Rep. 585.

1. See *State v. Freeman*, 8 Iowa 428; *State v. Mayberry*, 48 Me. 218; *State v. Smith*, 32 Me. 369; s. c., 54 Am. Dec. 578; *State v. Noble*, 15 Me. 476; *State v. Coppenburg*, 2 Strob. (S. Sar.) 273; *State v. Brown*, 8 Humph. (Tenn.) 89; *State v. Elliott*, 14 Tex. 423; *Peterson v. State*, 25 Tex. App. 70.

—**Inconsistency in Material Allegations.**

—It is only an inconsistency in the material allegations that will vitiate an indictment; and where the defective averment may, without detriment to the indictment, be wholly omitted, it may be considered as surplusage. *State v. Freeman*, 8 Iowa 428; s. c., 74 Am. Dec. 318.

It is a general rule in criminal prosecutions as well as civil actions that an unnecessary averment may be rejected, where enough remains to show that an offence has been committed. *The State v. Noble*, 15 Me. 476.

An immaterial averment in an indictment, not contradicting any other averment, not descriptive of the identity of the charge, or of anything essential to it, nor tending to show that no offence has been committed, may be rejected as surplusage. *State v. Mayberry*, 48 Me. 218.

2. *State v. Smith*, 32 Me. 369; s. c., 54 Am. Dec. 578.

3. *Com. v. Garland*, 3 Met. (Ky.) 478. See *People v. Myers*, 20 Cal. 76; *State v. Noble*, 15 Me. 476; *Com. v.*

Atwood, 11 Mass. 93; *Dick v. State*, 30 Miss. 631; *United States v. Brown*, 3 McL. (C. C.) 233; *United States v. Howard*, 3 Sumn. (C. C.) 12.

That cannot be regarded as surplusage which is connected with the offence. *U. S. v. Brown*, 3 McL. (C. C.) 233.

It seems, after conviction, that a substantive charge, defectively set forth in an indictment, may be rejected as surplusage. *Com. v. Tuck*, 37 Mass. (20 Pick.) 356.

All facts and circumstances in an indictment at once immaterial and foreign to the offence charged, are surplusage and may be rejected; but an averment in itself immaterial but descriptive of the identity of that which constitutes the charge, must be proved as laid. *Dick v. State*, 30 Miss. 631.

Where the allegation contains matter of description, if the proof given be different from the statement, the descriptive words cannot be rejected as surplusage, and the variance is fatal. Thus, no conviction can take place where the indictment charges the taking and conversion of a pine log, marked with a mark particularly described, and the proof has reference exclusively to a pine log marked with a manifestly different mark. *State v. Noble*, 15 Me. 476.

4. See *Eastman v. Com.*, 70 Mass. (4 Gray) 416; *State v. Keen*, 95 N. C. 646; *State v. Lord*, 16 N. H. 357; *Pomeroy v. Com.*, 2 Va. Cas. 342; *United States v. Burroughs*, 3 McL. (C. C.) 405; *United States v. Johns*, 1 Wash. (C. C.) 363.

A carrier of the mail may be con-

dence on trial, does not vitiate the indictment;¹ and it has been held that where an indictment or information sufficiently charges one offence and insufficiently charges another, the latter will be

victed of an offence punishable generally, under the law, though not as carrier; and if he is charged in the indictment as carrier, the word "carrier" will be considered as descriptive of his person, and as surplusage. *U. S. v. Burroughs*, 3 McL. (C. C.) 405.

Burning Gin House—Unnecessary Descriptive Words.—The statutory offence of wilful burning of a gin house is a misdemeanor; and an averment in the indictment that it was done feloniously, the necessary descriptive terms being employed, will be treated as mere surplusage. *State v. Keen*, 95 N. C. 646.

In an indictment for stealing a bank bill of a denomination and value described, "of the goods and chattels of" a person named, the words "of the goods and chattels" may be rejected as surplusage, and the indictment remain sufficient. *Eastman v. Com.*, 70 Mass. (4 Gray) 416.

In an indictment for stealing bank notes, "purporting on their faces to be, and being, bank notes of, and issued by, banks chartered," etc., the latter part of the allegation may be rejected as surplusage; and it is unnecessary, in such case, to give proof of the charters of those banks. *Pomeroy v. Com.*, 2 Va. Cas. 342.

Casting Away a Ship.—In an indictment for casting away and destroying a vessel, of which the defendant was owner, on the high seas, the words, "with intent to gain corrupt advantage to himself," are mere surplusage, and need not be proved. It is necessary to state that the intent was to prejudice the underwriters. *U. S. v. Johns*, 1 Wash. (C. C.) 363.

1. *State v. Killough*, 32 Tex. 74. See *State v. Corrigan*, 24 Conn. 286; *Gunyon v. State*, 68 Ind. 79; *State v. Wilder*, 7 Blackf. (Ind.) 582; *State v. Ansaleme*, 15 Iowa 44; *State v. Crittenden*, 38 La. An. 448; *Com. v. Deleham* (Mass.), 19 N. E. 221; *Com. v. Hunt*, 21 Mass. (4 Pick.) 252; *Com. v. Balkom*, 20 Mass. (3 Pick.) 281; *People v. Rounds* (Mich.), 35 N. W. 77; *Green v. State*, 23 Miss. 509; *State v. Morrison*, 2 Ired. (N. Car.) L. 8; *Burchard v. State*, 2 Oreg.

78; *Rivers v. State*, 10 Tex. App. 177.

Where an indictment charges one offence with sufficient particularity, it may be sustained as to that, and a general allegation of divers other offences committed on other days be disregarded as surplusage. *Burchard v. State*, 2 Oreg. 78.

Where an indictment is demurred to for an insufficient description of the offence charged, the part objected to being surplusage, and the offence elsewhere sufficiently described, the defect is not fatal. *State v. Ansaleme*, 15 Iowa 44.

An indictment charged a rescue, and also an assault and battery, and the defendant was convicted generally. *Held*, that if the averments as to the rescue were uncertain or bad, they might be rejected as superfluous and immaterial, and the court might proceed to pass judgment upon the verdict as for an assault and battery. *State v. Morrison*, 2 Ired. (N. Car.) L. 9.

In an information charging the defendant with obstructing and resisting an officer while attempting to arrest him for being drunk and disturbing the peace, the words "being drunk" may be treated as surplusage, and the indictment is a substantial compliance with How. Stat., § 9257. *People v. Rounds* (Mich.), 35 N. W. 77.

In an indictment against a justice of the peace for failing to return to the clerk's office, etc., a certificate of the solemnization of a marriage, etc., it was *held* that an averment as to a licence having issued was unnecessary, and should be rejected as surplusage. *State v. Wilder*, 7 Blackf. (Ind.) 582.

Where a complaint for selling spirituous liquors alleged that the defendant, "by himself or by his agent," did sell, etc., it was *held* that the words "by himself or his agent" were redundant, and did not vitiate. *State v. Corrigan*, 24 Conn. 286.

In an indictment charging an innholder with suffering persons "to play at cards and other unlawful games," the words "unlawful games" may be rejected as surplusage. *Com. v. Balkom*, 20 Mass. (3 Pick.) 281.

rejected as surplusage, the information being good as to the offence sufficiently charged.¹

There are cases, however, where matters of description must be properly alleged; thus the description of the termini between which the letter was intended to be sent by post, can not be rejected as surplusage, but must be proved as late.²

4. Variance—*a. NECESSITY OF PROVING OFFENCE AS LAID*—(1) *Generally*—*All Averments*.—It is a general rule of long standing that the *allegata* in an indictment and the *probata* must strictly correspond;³ but it is not necessary that all the averments should be proved as laid in order to warrant a conviction; it is enough if so much of the charge is proved as constitutes an offence punishable by law.⁴

In an indictment charging that the defendant "n and upon one Peddy Harvey did make an assault, and her, the said Peddy Hunt, then and there did beat, wound and ill-treat, with an intent her, the said Peddy Harvey, etc., to ravish;" the clause "and her, the said Peddy Hunt, then and there," etc., may be rejected as surplusage. *Com. v. Hunt*, 21 Mass. (4 Pick.) 252.

Where a count in an indictment charges that the prisoner, a slave, "with force and arms in the county aforesaid, in and upon one A (then and there being a free white woman), feloniously did make an assault on her, the said A, then and there feloniously did attempt to ravish, etc., by force and against her will and in said attempt did forcibly choke and throw down the said A," is not bad for uncertainty, the last allegation being but a minute description of the manner of the assault may be rejected as surplusage. *Green v. State*, 23 Miss. 509.

Wilfully Wounding.—In an information charging that a defendant "did wilfully wound a hog, the same being the property of him, the said S H, contrary," etc., the name of S H nowhere else appearing in the information, the words "him the said" may be rejected as surplusage. *Rivers v. State*, 10 Tex. App. 177.

If an indictment for shooting with intent to murder charges an assault, such charge may be rejected as surplusage. *State v. Crittenden*, 38 La. An. 448.

An indictment for assault and battery upon a police officer, and for knowingly and wilfully obstructing and hindering him in the discharge of his duty, is not affected by an allegation that the assault was made with a dangerous weapon, that being merely

descriptive matter which may be rejected as surplusage. *Com. v. Delehan* (Mass.), 19 N. E. Rep. 221.

1. *Smith v. State*, 85 Ind. 553.

Where an indictment for aiding in the escape of a prisoner in custody on a charge of felony set forth the indictment against the prisoner, and also the substance of the charge against him, *held* that, as it was not necessary to set forth said indictment, the question whether it was good or bad was immaterial. *Gunyon v. State*, 68 Ind. 79.

2. *United States v. Foye*, 1 Curt. (C. C.) 304.

3. *Clark v. State*, 37 Ga. 191; *McGuire v. State*, 21 Miss. (13 Smed & M.) 257; *State v. Rushing*, 2 N. & M. (S. C.) 550.

The refusal of the court to instruct the jury "that it was incumbent on the state to prove all the material facts constituting the offence as charged in the indictment, otherwise the jury must acquit the prisoner," was *held* an error. *McGuire v. State*, 21 Miss. (13 Smed. & M.) 275.

It is incumbent on the state to prove every accusation it makes; the testimony must convince the understanding beyond a reasonable doubt. *Clark v. State*, 37 Ga. 191.

4. *Swinney v. State*, 16 Miss. (8 Smed. & M.) 576.

Variance is sometimes avoided by rejecting as surplusage any allegation to which the proof does not conform. See *Gabe v. State*, 6 Ark. (1 Eng.) 540; *State v. Scurry*, 3 Rich. (S. C.) 68; *State v. Brown*, 8 Humph. (Tenn.) 89; *Peter v. State*, 5 Humph. (Tenn.) 436; *Reg. v. Jennings, Dears. & B.* 447; 7 Cox (C. C.) 397.

However, if that which is necessary

(2) *Omitted and Unnecessary Averments.*—What is not charged in the indictment is not materially to be proved or considered;¹ and a failure to prove an unnecessary averment in an indictment will, as a rule, not be fatal.² However, it has been said that where an indictment states an allegation which is not important or foreign to the cause, it must be proved.³

(3) *Descriptive Matters.*—As a general rule, all descriptive averments in an indictment must be proved as laid.⁴ An allegation in the indictment which describes, defines and qualifies a matter legally to be charged as a descriptive averment, it is required to be

in allegation is made unnecessarily minute in description, the proof must sustain the description as well as the main part of the indictment, because the one is essential to the identity of the other. See *State v. Jackson*, 30 Me. 29; *State v. Noble*, 15 Me. 476; *Dick v. State*, 30 Miss. 631; *Warrington v. State*, 1 Tex. App. 168; *U. S. v. Brown*, 3 McL. (C. C.) 233; *U. S. v. Keen*, 1 McL. (C. C.) 429; *U. S. v. Howard*, 3 Sumn. (C. C.) 12.

Descriptive Allegation.—JUDGE STORY says that "No allegation, whether it be necessary or unnecessary, whether it be more or less the part which is descriptive of the identity of that which is illegally essential to the charge in the indictment, can ever be rejected as surplusage." *United States v. Howard*, 3 Sumn. C. C. 12-15. See *Graves v. State*, 9 Ala. 447; *Dudney v. State*, 22 Ark. 251; *Com. v. Garland*, 3 Met. (Ky.) 478; *Com. v. Magowan*, 1 Met. (Ky.) 368; *People v. Marion*, 28 Mich. 255; *State v. Smith*, 31 Mo. 120; *Hill v. State*, 41 Tex. 253; *Rex v. Copewell*, 5 Car. & P. 549; *Rex v. Owen*, 1 Moody 118; *Rex v. Ford*, 4 Nev. & M. 451; *Rex v. Schoole*, Peake 112; *Rex v. Lee*, 1 Leach (4th ed.) 416.

Adjective Description.—Where the indictment contains the name of a thing necessarily alleged, to which is prefixed an unnecessary adjective or descriptive phrase, such word or phrase cannot be rejected, and if the proof fails to sustain the allegation, the variance will be fatal. See *Barclay v. State*, 55 Ga. 179; *Conway v. State*, 4 Ind. 94; *Turner v. State*, 3 Heisk. (Tenn.) 452; *Rangall v. State*, 1 Tex. App. 461; *Com. v. Butcher*, 4 Gratt. (Va.) 544; *Rex v. St. Weonards*, 6 Car. & P. 582. However, such a variance may be cured by statute, as is the case in Ohio. See *Goodall v. State*, 22 Ohio St. 203.

1. *Cowen v. People*, 14 Ill. 348; *State v. Copp*, 15 N. H. 212.

If an averment may be entirely omitted without affecting the charge against the prisoner, and without detriment to the indictment, it may be disregarded in evidence. *State v. Copp*, 15 N. H. 212.

2. *U. S. v. Vickery*, 1 Har. & J. (Md.) 427.

3. *U. S. v. Porter*, 3 Day (Conn.) 283. See *Murphy v. State*, 28 Miss. 637.

When a matter which is not an ingredient in the offence charged, is alleged, it must be proved; but the same strictness is not required in proof of such an averment as is requisite in the establishment of the *corpus delicti*, except the subject of the averment be a record or a written agreement. *Murphy v. State*, 28 Miss. 637.

4. *Lindsay v. State*, 19 Ala. 560; *Tucker v. State*, 16 Ala. 670; *Carter v. State*, 53 Ga. 326; *Robb v. State*, 52 Ind. 216; *Groves v. State*, 6 Blackf. (Ind.) 489; *Merriman v. State*, 6 Blackf. (Ind.) 449; *Com. v. Rowell*, 146 Mass. 128; *Com. v. McLaughlin*, 105 Mass. 460; *Com. v. Hearsay*, 1 Mass. 143; *Com. v. Dole*, 84 Mass. (2 Allen) 165; *Com. v. Davidson*, 55 Mass. (1 Cush.) 33; *State v. Hadley*, 54 N. H. 224; *State v. Copp*, 15 N. H. 212; *State v. Bailey*, 31 N. H. (11 Post.) 521; *State v. Groves*, Busbee (N. C.) 402; *Pickens v. State*, 6 Ohio 274; *Williams v. State*, 7 Humph. (Tenn.) 47; *Com. v. Hickman*, 2 Va. Cas. 323; *Com. v. Booth*, 6 Rand. (Va.) 669; *U. S. v. Lakeman*, 2 Mass. (C. C.) 229; *Smith v. People*, 1 Park. C. C. 317; *Rex v. Plestow*, 1 Camp. 494; *Rex v. Cooke*, 7 S. & P. 559; *Reg. v. Roe*, 11 Cox C. C., 554; *Rex v. Tanner*, 1 Esp. 304; *Rex v. Eden*, 1 Esp. 97; *Rex v. Leech*, 2 Man. & R. 119; *Rex v. Hawkins*, Peake 8.

The name of a person, a corporation

proved as laid.¹ However, if an averment can be entirely omitted without affecting the charge against the prisoner, and without detriment to the indictment, it is thought that it may be disregarded in variance.²

(4) *Unnecessary Particularity*.—Where an indictment contains a necessary allegation which cannot be rejected, and the pleader makes it unnecessarily minute in way of description, the proof must satisfy the description as well as the main part of the indictment.³

(5) *Description of Written Instrument*.—Where an instrument

or firm must be proved as laid. *Thompson v. State*, 48 Ala. 165; *Davenport v. State*, 38 Ga. 184; *Durham v. People*, 5 Ill. (4 Scam.) 172; *Zellers v. State*, 7 Ind. 659; *Com. v. Terry*, 114 Mass. 263; *Com. v. Hall*, 97 Mass. 570; *Com. v. Pope*, 66 Mass. (12 Cush.) 272; *State v. Wolff*, 46 Mo. 584; *Hess v. State*, 5 Ohio 3; *Dawson v. State*, 33 Tex. 491; *Mathews v. State*, 33 Tex. 102; *Martin v. State*, 16 Tex. 240; *Vaughan v. Com.*, 2 Va. Cas. 273; *Reg. v. Carter*, 6 Mod. 168; *Rex v. Lockup*, cited 1 T. R. 240; *Reg. v. Gregory*, 8 Q. B. 508.

And the name of an instrument must be proved as laid, any variance being fatal, such as "Wm." for "William." 1 *Chitty Cr. L.* 235; 3 *Stark. Ev., App.*, p. 859. However, it seems to be held in this country that a mere abbreviation will not work a variance. See *State v. Jay*, 34 N. J. L. (5 Vr.) 368; *Burress v. Com.*, 27 Gratt. (Va.) 934.

Sex, color and name of animal where alleged in the indictment must be proven as alleged. *People v. Soto*, 49 Cal. 67; *Baldwin v. People*, 2 Ill. (1 Scam.) 304; *State v. Turner*, 66 N. C. 618; *State v. Royster*, 65 N. C. 539; *Shubrick v. State*, 2 S. C. 21; *State v. Dunnivant*, 3 Brev. (S. C.) 9; *Wiley v. State*, 3 Cold. (Tenn.) 362; *Gibbs v. State*, 34 Tex. 134; *Gholston v. State*, 33 Tex. 342; *Jordt v. State*, 31 Tex. 571; *Banks v. State*, 28 Tex. 644; *Reg. v. Strange*, 1 Cox C. C. 58.

1. *State v. Langley*, 34 N. H. 529.

2. *State v. Bailey*, 31 N. H. (11 Fost.) 521.

3. *U. S. v. Porter*, 3 Day (Conn.) 283; *State v. Newland*, 7 Iowa 242; s. c., 71 Am. Dec. 444; *Com. v. Magowan*, 1 Met. (Ky.) 368; s. c., 71 Am. Dec. 480; *Clark v. Com.*, 16 B. Mon. (Ky.) 206; *State v. Jackson*, 30 Me. 29; 6 Me. 476; *Com. v. Falvey*, 108 Mass. 304; *Com. v. Smith*, 6 Serg. & R. (Pa.) 568; *Withers v. State*, 21 Tex. App. 210; *U.*

S. v. Brown, 3 McL. (C. C.) 233; *Dorsett's Case*, 5 City Hall Rec. (N. Y.) 77; *Reg. v. Bond*, 1 Den. C. C. 517; s. c., 14 Jur. 399; *Minton's Case*, 2 East P. C. 1021; *Johnston's Cas.* 2 East P. C. 786; *Wardlee's Case*, 2 East P. C. 785; *Pye's Case*, 2 East P. C. 785; *Jenk's Case*, 2 East P. C. 514; *White's Case*, 1 Leach Cas. 252; *Durore's Case*, 1 Leach Cas. 351; *Rex v. Deeley*, 1 Mo. C. C. 303; *Clark's Case*, Russ. & Ry. 358; *Craven's Case*, Russ. & Ry. 14; *Rex v. Wallace*, 2 Stark. Ev. 623; *Rex v. Hucks*, 1 Stark. 521; *Roscoe's Cr. Ev.* 101.

Particulars descriptive of property stolen, inserted in an indictment for larceny, must be strictly proved, even though such as need not have been inserted. *State v. Jackson*, 30 Me. (17 Shep.) 29.

Embezzlement of Bank Notes.—In an indictment for embezzling bank notes, the bank is stated to be a chartered bank, or if the act is laid with intent to defraud such bank, it will be incumbent on the state to prove the existence of the corporation. *State v. Newland*, 7 Iowa 242; s. c., 71 Am. Dec. 444; *Com. v. Smith*, 6 Serg. & R. (Pa.) 568. But if the indictment is for embezzling two bank notes of equal value it will be supported by proof of the embezzlement of one only. *Tyer's Case*, Russ. & Ry. 402; *Furneaux's Case*, Russ. & Ry. 335; *Carson's Case*, Russ. & Ry. 303.

Where a bank note is described as of a particular denomination or value with addition of the name of the officer who signed it, the proof must correspond to the allegation. *Craven's Case*, Russ. & Ry. 14.

Brand, Name, Color, Sex, etc., of an Animal.—Where the brand, name, color or sex of an animal is set out in an indictment, the proof must correspond therewith or the variance will be fatal. *People v. Soto*, 49 Cal. 67; *Barclay v. State*, 55 Ga. 179; *Baldwin v. People*, 2

is described by name in an indictment, the instrument set out in the indictment or produced in evidence must correspond therewith.³

(6) *Description of Particular Offence; Intent.*—Where particular offences are set out and described in an indictment they must be proved as alleged.⁴ Where the intent is the gist of the offence it must be proven as laid in the indictment.⁵

Ill. (1 Scam.) 304; *Conway v. State*, 4 Ind. 94; *State v. Jackson*, 30 Me. 29; *State v. Turner*, 66 N. C. 618; *State v. Royster*, 65 N. C. 539; *Shubrick v. State*, 2 S. C. 21; *State v. Dunnavant*, 3 Brev. (S. C.) 9; *Wiley v. State*, 3 Coldw. (Tenn.) 362; *Turner v. State*, 3 Heisk. (Tenn.) 452; *Gibbs v. State*, 34 Tex. 134; *Gholston v. State*, 33 Tex. 342; *Jordt v. State*, 31 Tex. 571; *Banks v. State*, 28 Tex. 644; *Coleman v. State*, 21 Tex. App. 520; *Reg. v. Strange*, 1 Cox C. C. 58; *Rex v. Deeley*, 1 Mo. C. C. 303; 1 *Greenl. Ev.*, § 65 (14th ed.); 1 *Stark. Ev.* 374.

Time.—When time is of the essence of the offence it must be proved as alleged in the indictment. See *Com. v. Varney*, 64 Mass. (10 Cush.) 402; *Miller v. State*, 33 Miss. 356; s. c., 69 Am. Dec. 351; *Rex v. Hucks*, 1 *Stark. Ev.* 521.

The indictment in this case having alleged the brand, age and color of the horse involved, such allegations became material because descriptive of the identity of the animal, and it devolves upon the state to establish the allegations by proof. *Coleman v. State*, 21 Tex. App. 520.

Acts constituting offence must be proved as alleged in indictment, although they are therein described with more minuteness than is necessary. *Com. v. Magowan*, 1 Met. (Ky.) 368; s. c., 71 Am. Dec. 480.

Indictment for Keeping Gaming Table.—Had the indictment alleged simply that the gaming table was exhibited in Denton county, it would have been sufficient. Having, however, unnecessarily charged that the table was exhibited in the "City of Denton," the state was bound to prove the allegation as laid. *Withers v. State*, 21 Tex. App. 210.

3. *State v. Farrand*, 8 N. J. L. (3 Halst.) 333.

It is not necessary to prove sums of money, as laid in an indictment, unless they form part of the description of a written instrument, or the exact sum be of the essence of the offence. *Parsons v. State*, 2 Ind. 490.

4. See *Stratton v. State*, 13 Ark. 688; *State v. Metsch*, 37 Kan. 222; *State v. Copp*, 15 N. H. 212; *Bell v. State*, 1 Swan (Tenn.) 42; *Reg. v. Phillpot*, 17 Jur. 399; s. c., 20 Eng. L. & Eq. 591; 22 L. J. (N. S.) M. C. 113.

Deceit.—The verdict or conviction for deceit cannot be based on any other pretences than those set out in the information. *State v. Metsch*, 37 Kan. 222.

In an indictment for disturbing a religious congregation, assembled for worship in a church or other place, the mode or manner of disturbance must be proved as alleged. *Stratton v. State*, 13 Ark. 688.

In a prosecution for the utterance of obscene language in public, it is not necessary that the words be proven precisely as alleged in the indictment, the gist of the offence being the outrage upon the public. *Bell v. State*, 1 Swan (Tenn.) 42.

Resisting an Officer.—In an indictment for resisting a deputy sheriff in the discharge of his duty, an averment that the sheriff was "legally appointed and duly qualified," is descriptive, and must be proved. *State v. Copp*, 15 N. H. 212.

In such case, the whole averment of an assault upon a deputy sheriff cannot be omitted without affecting the charge against the prisoner. *State v. Copp*, 15 N. H. 212.

Neglect to Provide for Children.—The prisoner was indicted for neglecting to provide her infant children with necessary or proper food or clothing, whereby they were "greatly injured and weakened." *Held*, that this averment as to the injury was material and necessary to be proved. *Reg. v. Phillpot*; s. c., 20 Eng. L. and Eq. 591. *Held*, also, that in order to constitute a misdemeanor at common law, an actual injury to the health of the children must be shown, and proof that they must have suffered to some extent was not sufficient. *Reg. v. Phillpot*; s. c., 20 Eng. L. & Eq. 591; 17 Jur. 399; 22 L. J., M. C. 113.

5. See *McCutcheon v. People*, 69 Ill.

(7) *Property; Ownership; Value.*—It is necessary to set out the property taken and the ownership thereof in cases of larceny.¹ The ownership must be proved as laid² in the indictment, even in those cases where needlessly alleged.³

In those cases where the punishment for the offence is, by law, greater or less, according as the value of the thing taken or injured is above or below a particular sum, the indictment must set out the value of the thing to the end that it may be determined to what class it belongs.⁴ But in the proof the exact sum thus set down need not be established, because any value calling for the same punishment as that in the indictment will be sufficient.⁵

(8) *Place; Time.*—The time and venue must always be laid in an

601; *State v. White*, 41 Iowa 316; *Garcia v. State*, 26 Tex. 209.

An essential ingredient of theft is the taking without the owner's consent, and, unless the want of consent is proved, an indictment therefor is not sustained. *Garcia v. State*, 26 Tex. 209.

An indictment for an assault with intent to commit murder will not sustain a conviction for an assault to commit manslaughter, although defendant might thereunder be convicted of an assault. *State v. White*, 41 Iowa 316. See also *McCutcheon v. People*, 69 Ill. 601.

1. *State v. Moore*, 14 N. H. 451; *Johnson v. People*, 4 Den. (N. Y.) 364; *Simpson v. State*, 10 Tex. App. 681; *Jones v. Com.*, 17 Gratt. (Va.) 563. See tit. LARCENY.

It is unnecessary to prove the whole of the property stated in an indictment if, by the rejection of the part not proved, the offence would be complete. *State v. Moore*, 14 N. H. 451.

On a prosecution for larceny in stealing bank bills of another state, the prosecutor must show the existence of the banks and the genuineness of the bills. *Johnson v. People*, 4 Denio (N. Y.) 364.

Where an indictment charged the theft of the U. S. silver certificates of a specified value, held that proof must be made that the certificates were issued by authority from the United States and of their value as alleged. *Simpson v. State*, 10 Tex. App. 681.

In order to convict a person for larceny there must be satisfactory proof at the trial that the property stolen was the property of the person stated in the indictment. *Jones v. Com.*, 17 Gratt. (Va.) 563.

2. See *Graham v. State*, 40 Ala. 659; *Phereby v. State*, 16 Ala. 774; *People*

v. Hughes, 41 Cal. 234; *State v. Taylor*, 15 Kan. 420; *Hensley v. Com.*, 1 Bush (Ky.) 11; *Unger v. State*, 42 Miss. 642; *McGary v. People*, 45 N. Y. 153; *State v. McMillan*, 68 N. Car. 440; *State v. Godet*, 7 Ired. 210; *Jones v. Com.*, 17 Gratt. (Va.) 563; *Reg. v. Dent*, 2 Cox C. C. 354.

3. See *Mobley v. State*, 46 Miss. 501; *John v. State*, 24 Miss. 569; *Mulrooney v. State*, 26 Ohio St. 326; *Rose v. State*, 1 Tex. App. 400. Compare *United States v. Howard*, 3 Sumn. C. C. 12.

4. See *DuBois v. State*, 50 Ala. 139; *Williams v. State*, 44 Ala. 396; *Sheppard v. State*, 42 Ala. 531; *State v. Garner*, 8 Port. (Ala.) 447; *Collins v. People*, 39 Ill. 233; *Clark v. People*, 2 Ill. (1 Scam.) 117; *Ritchey v. State*, 7 Blackf. (Ind.) 168; *State v. Stingley*, 10 Iowa 488; *People v. Higbie*, 66 Barb. (N. Y.) 131; *Boyle v. State*, 37 Tex. 359; *Radford v. State*, 35 Tex. 15; *Sheppard v. State*, 1 Tex. App. 522.

In an indictment for larceny proof of value is indispensable, and the jury must be instructed accordingly. *Collins v. People*, 39 Ill. 233.

5. See *Webb v. State*, 52 Ala. 422; *DuBois v. State*, 50 Ala. 139; *Mason v. People*, 2 Colo. 373; *McCorkle v. State*, 14 Ind. 39; *Com. v. Garland*, 3 Met. (Ky.) 478; *Com. v. Lawless*, 103 Mass. 425; *Com. v. Burke*, 94 Mass. (12 Allen) 182; *Com. v. McKenney*, 75 Mass. (9 Gray) 114; *State v. Andrews*, 28 Mo. 17; *Williams v. People*, 24 N. Y. 405; *People v. Herrick*, 13 Wend. (N. Y.) 87; *State v. Harris*, 64 N. Car. 127; *State v. Smith*, 75 N. Car. 141. Compare *Reg. v. Jones*, 1 Cox C. C. 105.

Under an indictment for grand larceny it is enough that the jury finds a

indictment and proved as laid,¹ because a defendant cannot be found guilty without proof that the offence was committed in the county in which the indictment was preferred,² even though the place is stated in an indictment as a matter of local description, and not as venue, which must be proven as laid.³

b. SUFFICIENCY OF PROOF.—(1) *Describing Offences Generally.*—The rule of law in criminal cases is that the facts established by the evidence must correspond with those laid in the indictment.⁴

(2) *Place; Venue.*—The prosecution must prove that the offence was committed in the county as laid, or a verdict of guilty is not sustained by the evidence.⁵

larceny of property of the value of five dollars; the state is not bound to prove larceny of the exact sums stated in the indictment. *McCorkle v. State*, 14 Ind. 39.

To support an indictment for stealing one wallet and certain bank bills the precise value of the articles need not be proven; and in order to ascertain that they are of some value an inspection of the articles by the jury is competent. *Com. v. Burke*, 94 Mass. (12 Allen) 182.

1. *Green v. State*, 41 Ala. 419; *Brown v. State*, 27 Ala. 47; *Moody v. State*, 7 Blackf. (Ind.) 324; *Thompson v. State*, 51 Miss. 354; *State v. Northumberland*, 46 N. H. 156; *State v. Cotton*, 24 N. H. 143.

Where the record fails to show that the offence was committed in the county where alleged, the judgment will be reversed. *Thompson v. State*, 51 Miss. 353.

Building a Dam.—In an indictment against one for building a dam at a certain place, and thereby overflowing the highway, the place is not of the gravamen of the complaint, and need not be proved precisely as laid. *State v. Lord*, 16 N. H. 357.

Disturbing Religious Meeting.—In an indictment for disturbing a religious congregation, assembled for worship in a church or other place, the place of assembly is descriptive of the offence, and must be proved as alleged. *Stratton v. State*, 13 Ark. 688.

Termini.—In an indictment against a town for not repairing a highway, the termini need not be mentioned, but if they are set out they must be proved as laid, and not material, or the variance will be fatal. *Harrow v. State*, 1 Greene (Iowa) 439; *State v. Northumberland*, 46 N. H. 156; *Rex v. St. Weo-*

nard's, 6 Car. & P. 582; *Rex v. Great Canfield*, 6 Esp. 136. See *U. S. v. Foye*, 1 Curt. (C. C.) 364.

2. *Brown v. State*, 27 Ala. 47; *Moody v. State*, 7 Blackf. (Ind.) 424; 1 Chitty Cr. L. 557.

3. *State v. Crogan*, 8 Iowa 523.

4. Thus an indictment charging two distinct acts is not sustained by evidence established by one of such acts. *State v. McConkey*, 20 Iowa 574. And it has been held that where the time proposed for consummating the crime is so distant as to leave ample room for repentance before the final destination, mere evidence of meditation of the crime will not support an indictment for an attempt to commit it. *Lovett v. State*, 19 Tex. 174.

However, an indictment for giving "one mortal bruise will be supported by evidence of any deadly wound or bruise." *State v. Crank*, 2 Bailey (S. Car.) 66. And an indictment charging the defendant jointly with other persons with having received stolen property, knowing it to be stolen, is supported by evidence showing that the defendant alone received it. *State v. Smith*, 37 Mo. 58.

A count in an indictment which alleges that there is a public bridge in the highway, and that it is in a ruinous state, is not sustained by evidence that a highway had been laid out across a river, and that a bridge was required; the allegations should be according to the facts. *State v. Canterbury*, 28 N. H. (8 Fost.) 195; *State v. Boscawen*, 28 N. H. (8 Fost.) 195.

5. *Field v. State*, 34 Tex. 39. See *Com. v. Beaman*, 74 Mass. (8 Gray) 497.

An indictment for stealing "one peahen" and "one turkey" in this commonwealth, is not supported by evidence

(3) *Time*.—The time laid in an indictment must be specifically proved as set out in those cases where it is material,¹ otherwise proof that the crime was committed at any time before the finding of the indictment will be sufficient.²

(4) *Describing Person*.—Where a person is described in an indictment the evidence must correspond with such description, or the variance will be fatal;³ but where a person is charged with being a principal, evidence showing him to have been an accessory, or *vice versa*, is sufficient to support the indictment.⁴

of taking them alive in another state and bringing them dead into this state. *Com. v. Beaman*, 74 Mass. (8 Gray) 497.

An indictment for larceny "in a building called and being a shop," is sustained by proof of a larceny in a building kept and used for the sale of goods, and called a "store." *Com. v. Riggs*, 14 Gray (Mass.) 376.

An indictment for obstructing a public landing is not sustained by proof of the obstruction of a public road leading to the landing at a place within one hundred yards of said landing. *State v. Graham*, 15 Rich. (S. Car.) L. 310.

An indictment averred "that at the April term of the court, etc., among the pleas of said term, a certain issue was duly joined," etc. *Held*, that this might be taken as applying to the state of the pleadings at that term, and that a record showing the issue to have been joined at a preceding term, and tried at the April term, supported the averment. *State v. Davidson*, 12 Vt. 300.

1. See *People v. Soto*, 49 Cal. 67; *Baldwin v. People*, 2 Ill. (1 Scam.) 304; *Com. v. McLaughlin*, 65 Mass. (11 Cush.) 598; *State v. Turner*, 66 N. Car. 618; *State v. Royster*, 65 N. Car. 539; *Shubrick v. State*, 2 S. Car. 21; *State v. Dunnivant*, 3 Brev. (S. Car.) 9; *State v. Porter*, 10 Rich. (S. Car.) L. 145; *Wiley v. State*, 3 Cold. (Tenn.) 362; *Gibbs v. State*, 34 Tex. 134; *Gholston v. State*, 33 Tex. 342; *Jordt v. State*, 31 Tex. 571; *Banks v. State*, 28 Tex. 644; *Reg v. Strange*, 1 Cox C. C. 58.

An indictment for hog stealing charged that the offence was committed in January, 1851; the general issue was pleaded; and it appeared from the evidence that the offence was committed in January, 1856. *Held*, that such evidence was receivable, on the pleadings, it not being necessary to prove

the time as laid. *State v. Porter*, 10 Rich. L. (S. Car.) 145.

Since the St. 1843, ch. 1, § 2, an averment of a larceny from a vessel "on the 24th day of July, etc.," is to be deemed an allegation that the offence was committed in the daytime, and is not supported by proof of such a larceny in the night time of that day; but the defendant might be found guilty of a simple larceny. *Com. v. McLaughlin*, 65 Mass. (11 Cush.) 598.

2. *Hopkins v. Com.*, 3 Met. (Mass.) 460; *Hutchinson v. Com.*, 4 Met. (Mass.) 359; *Haggett v. Com.*, 3 Met. (Mass.) 457.

See *Logan v. State*, 24 Ala. 182; *Keater v. People*, 32 Mich. 484; *State v. Davidson*, 12 Vt. 300; *Rex v. Coppard*, 3 Car. & P. 59; *Purcell v. Macnamara*, 9 East 157; s. c., 1 Camp. 199; *Moody & M.* 18.

3. *People v. Schwartz*, 32 Cal. 160; *Hensley v. Com.*, 1 Bush (Ky.) 11; *Pickens v. State*, 6 Ohio 274; *Dick v. State*, 30 Miss. 631.

An averment in an indictment that defendant was a negro, though immaterial, is not sustained by proof that he was a mulatto. *Dick v. State*, 30 Miss. 631.

A conviction on an indictment for stealing Stephen Daniel's pay, on proof of stealing the pay of Phillip Daniel, is erroneous. *Hensley v. Com.*, 1 Bush (Ky.) 11.

An affidavit signed I. P. will not support an allegation in an indictment that an affidavit was made purporting to have been made by I. N. P. *Pickens v. State*, 6 Ohio 274.

If an indictment for arson avers that the company intended to be injured is a corporation, proof of the existence of the corporation *de facto* will support the averment. *People v. Schwartz*, 32 Cal. 160.

4. See *State v. Mairs*, 1 N. J. L. (Coxe) 453.

(5) *Describing Written Instrument*.—All allegations in an indictment descriptive of a written instrument must be proven as laid.¹

(6) *Describing Property*—(a) *Animals*.—Where an indictment relates to animals, their description in the proof should correspond with that set out in the indictment.²

An indictment for stealing any animal should state whether it was alive or dead when stolen, otherwise it will not be supported by evidence that it was dead when stolen, even though in cases where it has the same appellation whether dead or alive.³

(b) *Money*.—Where money described is of a particular quality or kind, the evidence must show it to have been of the quality or kind set forth, or the variance will be fatal.⁴

(c) *Other Property*.—The evidence must establish the theft of, or injury to, the property as laid in the indictment.⁵ Thus, where number is descriptive, it must be proved as laid.⁶

c. WHAT CONSTITUTES A VARIANCE.—A variance is a failure of the proof to correspond with the allegation in an indictment.⁷

1. *Com. v. Brown*, 76 Mass. (10 Gray) 119; *State v. Clark*, 23 N. H. (3 Fost.) 429; *State v. McLeod*, 5 Jones (N. Car.) L. 318.

An indictment for fraudulently altering an assignment of a mortgage, alleged that it was duly executed and recorded. The proof was that it was not recorded. It was held that the allegation was descriptive of the instrument, and that the evidence did not sustain the indictment. *State v. Clark*, 23 N. H. 429.

An allegation in a bill of indictment charging that the defendant stole a *fi. fa.* against him issued from the superior court office, is not sustained by proof that the *fi. fa.* was made out, but retained by the clerk, at the instance of the defendant, until the amount was paid to him. *State v. McLeod*, 5 Jones (N. Car.) L. 318.

It seems that an indictment for fraudulently conveying "a certain parcel of real estate by a certain deed of warranty" is not sustained by proof of a conveyance of all the defendant's "right, title and interest in certain real estate, subject to one mortgage," with covenants of warranty, except against that mortgage. *Com. v. Brown*, 15 Gray (Mass.) 189.

2. *State v. Donnegan*, 34 Mo. 67; *State v. Godet*, 7 Ired. (N. Car.) L. 210; *State v. Kersh*, 1 Strobb. (S. Car.) 352; *Banks v. State*, 28 Tex. 644; *Fein v. Wyoming Ter.*, 1 Wy. Ter. 376.

3. See *Com. v. Beaman*, 74 Mass. (8 Gray) 497.

4. *Watson v. State*, 64 Ga. 61; *Com. v. Cahill*, 94 Mass. (12 Allen) 540.

But it has been held that an indictment for the larceny of treasury notes is sustained by proof of the larceny of greenbacks. *Hickey v. State*, 23 Ind. 21.

Evidence of a larceny of part of the money will warrant a conviction under an indictment alleging the larceny of a quantity of bank bills, amounting in the aggregate to one hundred and fifty dollars. *Com. v. O'Connell*, 12 Allen (Mass.) 451.

Proof that a trunk was taken and carried away from the house, in which there was money, is sufficient to sustain a charge of taking and carrying away money, especially when all the facts show the *quo animo* with which the trunk was taken. *Berry v. State*, 10 Ga. 511.

5. See *Morgan v. State*, 63 Ga. 307; *State v. Emerson*, 53 N. H. 619; *State v. Cockfield*, 15 Rich. (S. Car.) 316; *Com. v. Butcher*, 4 Gratt. (Va.) 544.

Value.—An indictment for larceny of property, alleged to be of a value less than one hundred dollars, is supported by evidence that the property was of any value. *Com. v. McKenney*, 9 Gray (Mass.) 114.

6. *The People v. Coon*, 45 Cal. 672; *State v. Handy*, 20 Me. 81; *Com. v. Lavery*, 101 Mass. 207; *Com. v. Butcher*, 4 Gratt. (Va.) 544. But compare *People v. Wiley*, 3 Hill (N. Y.) 194.

7. See *State v. Wadsworth*, 30 Conn. 57; *House v. Metcalf*, 27 Conn. 638;

(1) *Technical Variance*.—A mere technical variance between the charge in the indictment and the evidence to support it should be disregarded by the court.¹

(2) *Description of Place, Time, etc.*—It is thought that a variance between the allegation and proof of the place of the commission of the offence is not fatal if the offence be proved to have been committed within the jurisdiction of the court.¹ A variance as to the date of the alleged offence upon the affidavit or complaint, and the information based upon it, is fatal upon a motion to quash.³

(3) *Description of Person*—(a) *Generally*.—Where the proof shows the name of a person to be spelled differently from what it is spelled in the indictment, but the pronunciation of the name as spelled in the indictment, is the same as when spelled correctly, it will not be a material variance.⁴

(b) *Corporation; Partnership*.—The description of a corporation or partnership⁵ should be proven as alleged.⁶

(c) *Persons Committing Particular Offences*.—The names of the persons committing particular offences or those aggrieved thereby must be proven as laid in the indictment.⁷

Keiser v. Topping, 72 Ill. 229; Nash v. Towne, 72 U. S. (5 Wall.) 698; bk. 18, L. ed. 527.

1. State v. Williams, 20 Iowa 98; State v. Thompson, 19 Iowa 299.

2. People v. Calder, 30 Mich. 85; People v. Honeyman, 3 Den. (N. Y.) 121; Heikes v. Com., 26 Pa. St. 513.

3. Baumgartner v. State, 23 Tex. App. 335; Huff v. State, 23 Tex. App. 291; Heifer v. State, 16 Tex. App. 573; Cole v. State, 11 Tex. App. 67; Smith v. State, 9 Tex. App. 475; Calvert v. State, 8 Tex. App. 538; Swink v. State, 7 Tex. App. 73; Hawthorn v. State, 6 Tex. App. 562; Williamson v. State, 5 Tex. App. 485; Brewer v. State, 5 Tex. App. 248; Collins v. State, 5 Tex. App. 37; Hoerr v. State, 4 Tex. App. 75.

The offence charged in an indictment was proved to have occurred on a different day from that alleged, but previously to the finding of the indictment and within the statutory limits for prosecuting the offence. *Held*, that this was not a variance of which the defendant could take advantage. McBryde v. State, 34 Ga. 202.

4. Patterson v. People, 12 Hun (N. Y.) 137; State v. Patterson, 2 Ired. (N. Car.) L. 346; State v. Scurry, 3 Rich. L. (S. Car.) 68.

5. Although in an indictment for stealing partnership property it is not averred that the owners are copartners evidence that they are in fact copart-

ners and that the articles belonged to the firm constitutes no variance. Com. v. O'Brien, 94 Mass. (12 Allen) 183.

6. Mathews v. State, 33 Tex. 102. But compare Patterson v. People, 19 N. Y. Sup. Ct. (12 Hun) 137; Whittle v. Frankland, 2 B. & S. 49.

7. See People v. Hughes, 41 Cal. 234; Johnson v. State, 46 Ga. 269; Davenport v. State, 38 Ga. 184; Gahan v. People, 58 Ill. 160; Ross v. State, Ind. 19 N. E. 451; Com. v. Buckley, 145 Mass. 181; State v. Quinlan (Minn.), 41 N. W. 299; State v. Bell, 65 N. Car. 313; State v. Scurry, 3 Rich. L. (S. Car.) 68; Timms v. State, 4 Cold. (Tenn.) 138; Brown v. State, 32 Tex. 124; Goode v. State, 2 Tex. App. 520. Compare State v. Henderson, 68 N. Car. 348.

On trial of an indictment for an assault a variance between the proof and the allegation as to the name of the person assaulted is not fatal although the indictment fails to aver that he was known by more than one name. Johnson v. State, 46 Ga. 269; Gahan v. People, 58 Ill. 160. Compare State v. Henderson, 68 N. Car. 348; State v. Bell, 65 N. Car. 313.

Selling Liquors.—On an indictment for selling liquor to William Langford, Jr., a minor, the variance is not fatal though the evidence shows that the sale was to William H. Langford. Ross v. State (Ind.), 19 N. E. 451.

(4) *Description of Property, Ownership.*—A material variance between the allegation in the indictment and the proof on the trial either as to the property or as to the ownership, will be fatal.¹

(5) *Description of Written Instrument.*—A slight and unsubstantial variance between the description of a written instrument as set out in the indictment and the one produced in evidence is not fatal.²

(6) *Acquittal and Rehearing in Case of Variance.*—A variance between the indictment and the evidence offered on the trial in respect to description of any matter named in the indictment will not be a ground for acquittal, unless material or prejudicial,³ but will be a ground for a rehearing.⁴

5. **Repugnancy.**—*a.* WHAT CONSTITUTES.—Repugnancy consists in two inconsistent allegations in the indictment⁵ which destroy the effect of each other.⁶

b. EFFECT.—At common law, where different clauses of an indictment are repugnant, and there is no means of ascertaining what is meant, the indictment is held bad because of such repugnancy.⁷

Committing Riot.—Defendant was charged in the first count of an indictment with having committed a riot with one Land, and, in the second count, with one Lance; but there was no doubt as to the identity of the codefendant, he having plead guilty without raising any objection to the name by which he was indicted. *Held*, that the variance was immaterial. *Davenport v. State*, 38 Ga. 184.

1. *Turley v. State*, 3 Humph. (Tenn.) 323; *Calvert v. State*, 8 Tex. App. 538; *Reg. v. Lowrie*, L. R., 1 C. C. 61.

What Does Not Constitute a Variance.—The variance is immaterial when an indictment charges the defendant with feloniously stealing certain notes from the person of A, "the same being the property of said A," and the proof shows that the notes stolen from A belonged to him and a copartner. *State v. Cunningham*, 21 Iowa 433. See also *Marcus v. State*, 26 Ind. 101.

Under an indictment for grand larceny for stealing a cow, it is not a material variance that the animal stolen was a heifer, between two and three years old, that had never had a calf. *Parker v. State*, 30 Ala. 365. See also *State v. Horan*, Phil. (N. Car.) L. 571; *Wiley v. State*, 3 Coldw. (Tenn.) 362.

2. See *Gillespie v. State*, 6 Humph. (Tenn.) 164; *U. S. v. Burroughs*, 3 McL. C. C. 405.

3. *Conner v. State*, 25 Ga. 515; s. c.,

71 Am. Dec. 184; *Mulrooney v. State*, 26 Ohio St. 326.

Where a defendant is acquitted because of a variance between the indictment and the proof, it is the duty of the judge (supposing § 242, ch. 52, Digest, to be constitutional) to hold the accused in custody, or under cognizance, to the end that a new indictment may be preferred. *Cameron v. State*, 13 Ark. 712.

4. *State v. Kube*, 20 Wis. 217; s. c., 9 Am. Dec. 390.

5. See *New Lamp Chimney Co. v. Ansonia B. & C. Co.*, 91 U. S. (1 Otto) 663; *Gould Pl.* (5th ed.) 143; *Steph. Pl.* 667.

6. *State v. Pierson*, 44 Ark. 265; *State v. Edwards*, 36 Mo. 394; *State v. Johnson*, 5 Jones (N. C.) L. 221; *Westbrook v. State*, 23 Tex. App. 401; *State v. Haven*, 59 Vt. 399.

What Constitutes Repugnancy.—See *State v. Johnson*, 5 Jones (N. C.) L. 221; *State v. Pierson*, 44 Ark. 265; *State v. Haven*, 59 Vt. 399; *Westbrook v. State*, 23 Tex. App. 401; *State v. Edwards*, 36 Mo. 943.

What Does Not Constitute Repugnancy.—See *State v. Smalls*, 11 S. C. 262; *State v. McKennan*, Harp. (S. C.) 302; *Reg. v. Craddock*, s. c., 20 L. J., M. C. 31.

7. *Henry v. State*, 33 Ala. 389; *State v. Hand*, 6 Ark. 165; s. c., 42 Am. Dec. 689; *State v. Pullens*, 81 Mo. 387; *Jane*

6. Charging or Describing Offence.—*a.* **CERTAINTY AND PARTICULARITY.**—An information or indictment must state in plain and concise language every element of the crime which it is designed to charge with certainty to a common intent.¹ An indictment ought to be certain to every intent and without any intend-

v. State, 3 Mo. 61; *State v. Hardwick*, 2 Mo. 226; *United States v. Dow*, Taney C. C. 45; *Rex v. Gilchrist*, 2 Leach (4th ed.) 657, 660; 1 Chitt. Cr. L. 231; 2 Hawk. P. C., ch. 25, § 26.

An indictment setting forth an alleged forged note according to its tenor is sufficient, though the statement of the purport is repugnant. *State v. Pullens*, 81 Mo. 387.

Repugnancy between different counts of an indictment is not a fault. *State v. Mallon*, 75 Mo. 355.

An indictment which at common law would be bad for repugnancy may be good under the Missouri statute, if there is sufficient in it to indicate the crime and person charged. *State v. Chamberlin*, 89 Mo. 129.

Repugnancy as to immaterial points and unnecessary matters is a fault in form only. See *Dakins Case*, 2 Saund. 291; *Skinner v. Andrews*, 1 Saund. 169; *Hayman v. Rogers*, 1 Str. 232; *Green v. Rennett*, 1 T. R. 657; *Rex v. Aylett*, 1 T. R. 70, 71. If it does not contradict material allegations, it will not in general vitiate an indictment. See 2 Bouv. L. Dict. (15th ed.) 578; *Gould's Pl.* (5th ed.), § 173.

Rejecting Surplusage.—See 1 Chitt Cr. L. 231; *State v. Flint*, 62 Mo. 393; *State v. Beasom*, 40 N. H. 367; *Rex v. Stevens*, 5 East 244, 254; *Gilber Cr. Pl.* 131, 132; *Co. Litt.* 303b.

1. *Sterne v. State*, 20 Ala. 43; *Scales v. State*, 47 Ark. 476; s. c., 58 Am. Rep. 768; *Glass v. State*, 45 Ark. 173; *State v. Witt*, 39 Ark. 216; *People v. Bogart*, 36 Cal. 245; *People v. Saviers*, 14 Cal. 29; *People v. Aro*, 6 Cal. 207; s. c., 65 Am. Dec. 503; *State v. Holmes*, 28 Conn. 230; *State v. Miller*, 24 Conn. 521; *Rawson v. State*, 19 Conn. 292; *Whiting v. State*, 14 Conn. 487; s. c., 36 Am. Dec. 499; *Keech v. State*, 15 Fla. 591; *Kersh v. State*, 24 Ga. 191; *Wingard v. State*, 13 Ga. 396; *Stephen v. State*, 11 Ga. 225; *Baysinger v. People*, 115 Ill. 419; *Plummer v. People*, 74 Ill. 361; *Warriner v. People*, 74 Ill. 346; *Cross v. People*, 47 Ill. 152; s. c., 95 Am. Dec. 474; *Thomas v. State*, 103 Ind. 419; *State v. Anderson*, 103 Ind. 170; *Keller v. State*, 51 Ind. 111;

McLaughlin v. State, 45 Ind. 338; *Vogel v. State*, 31 Ind. 64; *Dukes v. State*, 11 Ind. 557; s. c., 71 Am. Dec. 370; *Markle v. State*, 3 Ind. 535; *State v. McCormack*, 2 Ind. 305; *State v. Watrous*, 13 Iowa 489; *State v. McGaffin*, 38 Kan. 315; *Com. v. Perrigo*, 3 Met. (Ky.) 5; *Com. v. Magowan*, 1 Met. (Ky.) 368; s. c., 71 Am. Dec. 480; *State v. Mayberry*, 48 Me. 218; *State v. Thurstin*, 35 Me. 205; s. c., 58 Am. Dec. 695; *State v. Nelson*, 29 Me. 329; *State v. Godfrey*, 24 Me. 232; s. c., 41 Am. Dec. 382; *Mincher v. State*, 66 Md. 227; *Cearfoss v. State*, 42 Md. 403; *Harne v. State*, 39 Md. 552; *State v. Nutwell*, 1 Gill (Md.) 54; *Com. v. Terry*, 114 Mass. 263; *Com. v. Webster*, 59 Mass. (5 Cush.) 295; s. c., 52 Am. Dec. 711; *Com. v. Hunt*, 45 Mass. (4 Metc.) 111; s. c., 34 Am. Dec. 346; *People v. McLean* (Mich.), 36 N. W. Rep. 231; *State v. Buster*, 90 Mo. 514; *State v. Fancher*, 71 Mo. 460; *State v. Meek*, 70 Mo. 355; s. c., 35 Am. Rep. 427; *State v. Rochford*, 52 Mo. 199; *State v. Clevenger*, 20 Mo. App. 626; *State v. Dowers*, 45 N. H. 543; *State v. Parker*, 43 N. H. 83; *State v. Gary*, 36 N. H. 359; *State v. Schmitt*, 49 N. J. L. (20 Vr.) 579; *Mowery v. Camden*, 49 N. J. L. (20 Vr.) 106; *People v. Dumar*, 106 N. Y. 502; *State v. Brown*, 1 Dev. (N. C.) L. 137; s. c., 17 Am. Dec. 562; *State v. Ballard*, 2 Murph. (N. C.) 186; *Dillingham v. State*, 5 Ohio St. 280; *State v. Dougherty*, 4 Oreg. 200; *Com. v. Clark*, 2 Ashm. (Pa.) 105; *Sherban v. Com.*, 8 Watts (Pa.) 212; s. c., 34 Am. Dec. 460; *State v. Crank*, 2 Bail. (S. C.) 66; s. c., 23 Am. Dec. 117; *State v. Wimberly*, 3 McCord (S. C.) 190; *State v. Henderson*, 1 Rich. (S. C.) 179; *State v. Wilson*, 2 Rep. Const. Ct. Treadway (S. C.) 495; *Kit v. State*, 11 Humph. (Tenn.) 167; *Foster v. State*, 6 Lea (Tenn.) 213; *Pearce v. State*, 1 Sneed (Tenn.) 63; s. c., 60 Am. Dec. 135; *Horan v. State*, 24 Tex. 161; *Brown v. State*, 26 Tex. App. 540; *McConnell v. State*, 22 Tex. App. 354; s. c., 58 Am. Rep. 647; *State v. Amidon*, 58 Vt. 524; *State v. Davis*, 52 Vt. 376; *State v. Bacon*, 7 Vt. 222; *Fink v. Milwaukee*, 17 Wis. 26; *U. S.*

ment to the contrary.¹ The indictment must be explicit and leave nothing to inference, for nothing can be done by intendment.² All the material facts which must be proved in order to support a conviction must be alleged.³

v. Cruikshank, 92 U. S. (2 Otto) 542; U. S. *v. Mills*, 32 U. S. (7 Pet.) 138; U. S. *v. Morrissey*, 32 Fed. Rep. 147.

Where the words used in an indictment to describe an offence are commonly used in a sense which does not necessarily import an offence, and they are used without any qualification, the indictment will be bad, though the same words, in a more strict and technical sense, may describe a criminal act. *State v. Parker*, 43 N. H. 83.

Same—Counts.—A second or subsequent count in an indictment should contain a statement of all the necessary facts and allegations to charge the offence. A reference to a former count for the purpose of supplying a material statement is not sufficient. *Keech v. State*, 15 Fla. 591. But compare *State v. Nelson*, 29 Md. 329.

An information which is so uncertain that upon a plea of guilty the court cannot know what punishment it may affix, is bad on motion in arrest of judgment. *Vogel v. State*, 31 Ind. 64.

Imperfect averment in indictment of facts, constituting description of the offence, is not aided by the introductory matter therein, nor by the qualifying epithets attached to the facts, nor by the alleged injurious consequences of such facts. *Com. v. Hunt*, 45 Mass. (4 Metc.) 111; s. c., 38 Am. Dec. 346.

Same—Night Walking.—It is sufficient in an indictment to charge the offence of night walking in general terms, as in the case of common bar-rators, common scolds, and the like, without specifying the acts which constitute it. *State v. Dowers*, 45 N. H. 343.

Same—Charging Crime by Its Technical Name.—It is sufficient if the indictment merely charges the commission of the crime by its technical name. *State v. Murray*, 41 Iowa 580. It is only where the act charged in an indictment is not, in itself, unlawful, but becomes so by other facts connected with it, that the facts in which the illegality consists must be set out. *Cearfoss v. State*, 42 Md. 403.

Setting Out Acts.—Where the offence charged is complicated, consisting of a repetition of acts, or where it includes a continuation of acts, it is not necessary to set them out in the indictment. *Sterne v. State*, 20 Ala. 43.

Facts not vital to the accusation, and constituting merely matter of description, may be stated in an indictment as unknown to the grand jury, if such is the case. *People v. Bogart*, 36 Cal. 245.

Matters of inducement need not be set out in an indictment with that degree of minuteness and particularity which is requisite in setting out the material allegations, which constitute or give character to the offence charged. *State v. Mayberry*, 48 Me. 218.

Power of Legislature.—The legislature has not the power to dispense with such allegations in indictments as are essential to reasonable particularity and certainty in the description of offences. *McLaughlin v. State*, 45 Ind. 338.

1. *State v. Hand*, 6 Ark. 165; s. c., 42 Am. Dec. 689.

Degree of Certainty.—A count in an indictment which is sufficiently certain to inform the accused of the offence with which he is charged, and of the party upon whom it was committed, is sufficient. *Harne v. State*, 39 Md. 552.

In all cases the offence must be set forth with clearness and reasonable certainty, in order to apprise the accused of the nature of the accusation against him, so that he may prepare his defence and plead the judgment in bar of a subsequent prosecution for the same offence. *State v. Witt*, 39 Ark. 216; *Glass v. State*, 45 Ark. 173; *Scales v. State*, 47 Ark. 476; s. c., 58 Am. Rep. 768; and see U. S. *v. Mills*, 32 U. S. (7 Pet.) 138.

The rule requiring certainty in indictments is limited by the possibilities of the case, and where the offence is such that the manner of its commission would naturally be unknown to the victim himself and to the grand jury, as in case of swindling by three-card monte, it may be alleged that certain particulars are unknown to the grand jury. *State v. Gray*, 29 Minn. 142.

2. *Phipps v. State*, 22 Md. 380; s. c., 85 Am. Dec. 654; *State v. Seay*, 3 Stew. (Ala.) 123; s. c., 20 Am. Dec. 66; *State v. Thurstin*, 35 Me. 205; 58 Am. Dec. 695; *Com. v. Dean*, 109 Mass. 349; *Smith v. State*, 21 Neb. 552; U. S. *v. Morrissey*, 32 Fed. Rep. 147.

3. *State v. Verrill*, 54 Me. 408; *State v. Philbrick*, 31 Me. 401; *Com. v.*

b. NOMINATION OF OFFENCE; GRADES AND DEGREES.—(1) *General Matters.*—Offences not described and defined by the statute or code are left to their common law definition.¹ Where one is charged with a common law offence, the averment that it was done *contra pacem* does not dispense with the necessity of setting out in proper terms the circumstances necessary to constitute the common law offence.² And it is no valid objection that the indictment charges the offence at common law, while the punishment is inflicted by statute.³

An indictment includes not only the particular grade of the offence specifically charging it, but also all inferior grades of the same offence.⁴ Where an indictment on which a defendant is found guilty constitutes a specific indictable offence, it is not material that the defendant is acquitted on another part of the charge.⁵

Where an offence is by law made more highly punishable, if committed upon a person of a particular class than if committed upon a person of another class, an indictment may be maintained, although it does not specify to which of the classes the injured person belongs.⁶

(2) *Averment as to Preliminary Examination.*—It is not necessary that an indictment for a criminal offence should set forth the fact of a preliminary examination of the accused.⁷

Rowel, 146 Mass. 128; U. S. v. Hess, 124 U. S. 483.

1. State v. Toogood, 7 Iowa 252.

2. State v. Hodges, 55 Md. 127.

Indictment Defective in Substance.—When the court cannot pronounce the proper sentence of the law upon a verdict finding the accused guilty, the indictment is defective in substance. In such a case, where the verdict is "guilty," the party is remanded for another indictment. It is different where the verdict is "not guilty." Hurt v. State, 25 Miss. 378; s. c., 59 Am. Dec. 225.

An indictment which correctly describes an offence in the statement of facts, but in the charging part designates it by another name, is nevertheless good, and will sustain a conviction for the offence defined. Thus, where an offence is designated in an indictment as manslaughter, but the statement of facts defines the crime of murder, the defendant may be put upon his trial for the latter offence. State v. Davis, 41 Iowa 311.

3. McCann v. State, 21 Miss. (13 Smed. & M.) 471.

4. Benham v. State, 1 Iowa 542; State v. Burk, 89 Mo. 635; State v. Webster, 30 N. H. 96; Smith v. State, 35 Tex. 500.

5. Durham v. State, 1 Blackf. (Ind.) 33.

An indictment, bad for the main offence charged, will not support a conviction for a lesser offence which, if it were good, would necessarily be included. Territory v. Dooley, 4 Mont. 295.

An indictment which directly charges the offence, and sets forth the particular acts which constitute it, is not demurrable because the offence is styled "malicious mischief" instead of "wilful trespass." Com. v. Smith, 6 Bush (Ky.) 263.

6. However upon a conviction under such an indictment the milder punishment only can be awarded. State v. Fielding, 32 Me. 585.

7. Washburn v. People, 10 Mich. 372; Com. v. Miller, 2 Va. Cas. 310.

It is not competent to charge in an information an offence for which no preliminary examination has been had or waived, and to determine whether such an examination was had as to any specific offence charged in the information, recourse can be had only to the examinations returned and filed by the magistrate. Turner v. People, 33 Mich. 363.

An indictment describing not another and a different offence from that on which the defendant was bound over by

c. PRIOR CONVICTION OR ACQUITTAL—(1) *Necessity of Alleging*.—It is not necessary to state in an information for the first offence, that it is such, because this will be presumed in the absence of any allegation of a different import,¹ and it has been held that the indictment need not state that the crime charged was the first or second offence, even in those cases where the punishment for the first offence is different from that for the second;² but the better opinion seems to be that the second offence should be charged as such in order to justify the greater statutory punishment therefor,³ because by the rules of criminal pleading an indictment is required to contain an averment of every fact essential to the punishment to be inflicted.⁴

(2) *Form and Sufficiency of Allegations*.—An indictment for a second or subsequent offence must contain allegations sufficient to show the time, court or county in which the former judgment was rendered,⁵ and that the court before which the conviction for the first offence took place had jurisdiction therein.⁶ The minuteness

the committing magistrate, but only a particular form of the same offence, is not irregular. *Com. v. Leisenring*, 11 Phila. (Pa.) 389.

Indictment for Perjury.—The indictment must distinctly aver that the defendant was sworn. *U. S. v. McConaughy*, 33 Fed. Rep. 168.

1. *Kilbourn v. State*, 9 Conn. 560; *Com. v. Kelly*, 13 Phila. (Pa.) 560.

2. *State v. Smith*, 8 Rich. (S. Car.) 460. See *State v. Hudson*, 32 La. An. 1052.

3. A previous conviction for the same offence should not be charged in the indictment. After verdict there may be an order to show cause why the increased punishment, under La. Rev. Stat., § 974, should not be inflicted. *State v. Hudson*, 32 La. An. 1052.

An indictment for illegal cohabitation, not specifying whether it is for the first or second offence, will warrant a conviction for the first offence. *State v. Burgett*, 22 Ark. 323.

3. *Larney v. Cleveland*, 34 Ohio St. 599; *Rauch v. Com.*, 78 Pa. St. 490. See *Walters v. State*, 5 Iowa 507; *Garvey v. Com.*, 74 Mass. (8 Gray) 382; *Plumbly v. Com.*, 43 Mass. (2 Metc.) 413; *Wilde v. Com.*, 43 Mass. (2 Metc.) 408; *State v. Regan*, 65 Me. 127; *Smith v. Com.*, 14 Serg. & R. (Pa.) 69; *Long v. State*, 36 Tex. 6; *Com. v. Welsh*, 2 Va. Cas. 57; *Rand v. Com.*, 9 Gratt. (Va.) 738; *Reg. v. Page*, 9 Car. & P. 756; *Rex v. Allen*, Russ. & Ry. 513; *Reg. v. Willis*, L. R., 1 C. C. 365; s. c., 12 Cox C. C. 192. Compare *State v. Smith*, 8 Rich. (S. Car.) 460; *State v. Freeman*, 27 Vt. 523.

After the examination provided for in Cal. Code, section 809, the district attorney may proceed by indictment or information at his option; and in either case the fact of a previous conviction for a similar offence may be set forth by the government, if, to such charge to a previous conviction, defendant pleads not guilty, the issue must be tried by a jury; if he pleads guilty no such trial is required, under the law as amended April 9th, 1880. *People v. Carlton*, 57 Cal. 559.

4. *State v. Startup*, 39 N. J. L. (10 Vr.) 423, 432; *Hobbs v. State*, 44 Tex. 353. See *Browning v. State*, 2 Tex. App. 47; *Nelson v. State*, 2 Tex. App. 227; *Rex v. Monteth*, 2 Leach (4th ed.) 702; 1 East, P. C. 420.

5. *State v. Small*, N. H.; 14 Atl. Rep. 727.

6. See *People v. Cook*, 2 Park. (N. Y.) C. C. 12. See *Evans v. Com.*, 44 Mass. (3 Metc.) 453; *Wilde v. Com.*, 43 Mass. (2 Metc.) 408; *State v. Duclos*, 35 Mo. 237.

Where an indictment, at the May term of 1864, charged the offence to have been committed on the 24th of May, 1860, but stated that the defendant was indicted at the May term, in 1860, of the same court, for the same offence, and that, at the May term, 1864, that indictment was quashed, it was held that the latter allegation was made with sufficient certainty and precision to prevent the bar of the statute of limitation of three years, and that defendant was not prejudiced by the omission to state the proceedings upon the former indictment, and that a motion to quash

with which the allegation should be made depends upon the statutory terms under which the indictment is drawn.¹

was properly overruled. *State v. Duclos*, 35 Mo. 237.

Whether or not, since the repeal of the Cal. Code, section 969, a former conviction may be alleged, the allegation thereof is not a distinct charge of another triable offence which makes the information objectionable. *People v. Boyle*, 64 Cal. 163.

Under Me. Rev. Stat., ch. 27, §§ 55, 58, an averment in an indictment against two defendants that they had before been convicted of a similar offence, is supported by proof of their conviction severally, and parol evidence of identity of a defendant with one formerly convicted under another name is also admissible. *State v. Dolan*, 69 Me. 573.

Charging the Offence Generally.—Under Bill of Rights N. H., art. 15, requiring offences charged to be "fully and plainly, substantially and formally described" to the accused; and Gen. Laws, ch. 109, § 23, providing that a claimant on indictment for a subsequent offence under that chapter need not particularly set forth the record of a former conviction but only allege briefly that the accused has been convicted of some violation of said chapter, it is enough to set out the court, time, offence and fact of conviction on a plea of guilty. *State v. Adams* (N. H.), 13 Atl. Rep. 785.

Alleging Jurisdictional Matters.—While it is necessary that the indictment for a second conviction should show jurisdiction of the court in which the first indictment is, where such court is one limited jurisdiction, yet this may be done by general words without setting out the facts on which the jurisdiction depends. *People v. Golden*, 3 Park. (N. Y.) C. C. 330. See *People v. Powers*, 6 N. Y. 50; *Ex parte Hogan*, 55 How. (N. Y.) Pr. 458; *Ex parte Travis*, 55 How. (N. Y.) Pr. 347; *People v. Neilson*, 16 Hun (N. Y.) 214; *Gibson v. People*, 5 Hun (N. Y.) 542.

But it is thought that where the court in which the first conviction is had is one of general jurisdiction, the averment of jurisdiction need not be made. *Stroup v. Com.*, 1 Rob. (Va.) 754. See *State v. Marion*, 15 La. An. 495; *State v. Wentworth*, 37 N. H. 196; *State v. Gary*, 36 N. H. 359; *State v. Haddock*, 2 Hawks (N. Car.) 461; *State v. Wasden*,

Taylor (N. Car.) T. R. 163; *Fitzgerald v. State*, 4 Wis. 395; *State v. McCarty*, 2 Chand. (Wis.) 199; s. c., 54 Am. Dec. 150.

1. *Wilde v. Com.*, 43 Mass. (2 Metc.) 408; *State v. Bean*, 36 N. H. 122; 1 Bish. C. C. (7th ed.) 962.

Alleging Conviction.—Where the statute authorizes and requires punishment on the second conviction for an offence, if the indictment sets out the former conviction, that will be sufficient without alleging that sentence was rendered thereon. *Stevens v. People*, 1 Hill (N. Y.) 261; compare *Smith v. Com.*, 14 Serg. & R. (Pa.) 69. The averment of conviction will be required to be more or less broad according to the terms of the statute under which the indictment is found. See *State v. Volmar*, 6 Kan. 379; *Johnson v. People*, 55 N. Y. 512; *Wood v. People*, 53 N. Y. 511; *Gibson v. People*, 5 Hun (N. Y.) 542.

Particular Offences—Sale of Intoxicating Liquors.—A former conviction for illegally keeping beer for sale need not be alleged to have occurred within one year before indictment for the subsequent offence. *State v. Adams*, 64 N. H. 440. See also *State v. Wyman*, 80 Me. 117; *State v. Devine* (Me.), 13 Atl. 128.

Same—Drunkenness.—The clause of Mass. St. 1830, ch. 221, § 2, providing that it shall not be necessary, in complaints under it for drunkenness, to allege the two previous convictions of a like offence within the next preceding twelve months, upon which the extent of the punishment depends, is void, as being in conflict with Mass. Declaration of Rights, art. 12, requiring crimes or offences to be fully and plainly, etc., described to the party accused thereof. *Com. v. Harrington*, 130 Mass. 35.

Same—Larceny.—An information for receiving stolen property need not allege that this was other than the first conviction for a like offence, that the stealing of such property was not simple larceny, or that the defendant had made no restitution. *People v. Caulkins* (Mich.), 35 N. W. 90. See also *People v. Golden*, 3 Parker, C. R. (N. Y.) 330; *Regina v. Clark*, 17 Jur. 582; *Dougherty v. State*, 20 Ind. 442.

Same—Petit Larceny.—Where a good count for petit larceny also rehearsed

d. NECESSARY AND SUFFICIENT AVERMENTS AS TO VARIOUS PARTICULAR OFFENCES.—An indictment for any of the specific offences should set forth the particular acts constituting the offence.¹

e. OFFENCES AGAINST CITY ORDINANCES.—City ordinances and other like by-laws are enforced by similar proceedings before a court sitting within the bounds of the municipal corporation.² City ordinances and by-laws being private and not public laws, courts will not take judicial notice of them, but they must be pleaded in the indictment, and proven on the hearing.³ In a complaint for the violation of a city ordinance, it is not necessary to set out the whole ordinance with its title, but only the section or sections, or the substance of the section or sections which are alleged to have been violated,⁴ "and such further matter as will enable the court to see that it proceeded from a body having the power by the act of incorporation to make by-laws."⁵

the former conviction of defendant for a similar offence,—*held*, that the count was not thereby vitiated. *Myers v. State*, 92 Ind. 390.

It is not essential to the jurisdiction of the court of special sessions in a case of petit larceny, that the information or warrant should state that the crime charged was a first offence. *People v. Cook*, 45 Hun 34; s. c., 9 N. Y. S. Rep. 412. See also *People v. Powers*, 6 N. Y. 50; *State v. Loehr*, 93 Mo. 103.

1. For full particulars as to the requisites of an indictment for the various specific offences, see those offences separately where discussed in this series.

2. See *State v. Wells*, 46 Iowa 662; *People v. James*, 16 Hun (N. Y.) 426; *State v. Threadgill*, 76 N. Car. 17; *State v. White*, 76 N. Car. 15.

3. See *Stevens v. Chicago*, 48 Ill. 498; *Green v. Indianapolis*, 25 Ind. 490; *Lavisa v. Chicago R. Co.*, 1 McGloin (La. App.) 299; *Winona v. Burke*, 23 Minn. 254; *Porter v. Waring*, 69 N. Y. 250; *People v. Special Sessions*, 12 Hun (N. Y.) 65, 66; *State v. Coragan*, 40 Vt. 450. Compare *Huntington v. Peas*, 56 Ind. 305; *Lewiston v. Fairfield*, 47 Me. 481; *Fink v. Milwaukee*, 17 Wis. 26.

The fact that under the charter of the city of Joliet, an offence was prohibited by ordinance, and that the accused could have been prosecuted for a violation of the ordinance forms no defence to a prosecution under the state laws. *Fant v. People*, 45 Ill. 259.

4. *Schott v. People*, 89 Ill. 195; *Green v. Indianapolis*, 25 Ind. 490;

People v. Special Sessions, 12 Hun (N. Y.) 65; *Co. of Feltnakers v. Davis*, 1 B. & P. 98.

An indictment under a city ordinance, which provides that any person "refusing or neglecting to pay licence tax, etc., for the space of five days, etc., shall be subject to criminal prosecution," is fatally defective, if it fails to allege that the defendant neglected or refused to pay the tax, etc., for the space of five days. *State v. Strauss*, 77 N. Car. 500.

5. See *Miller v. Anheuser*, 2 Mo. App. 168; *Co. of Feltnakers v. Davis*, 1 B. & P. 98. Compare *Frankfort v. Aughe*, 114 Ind. 77.

A complaint for a violation of a city ordinance is not in the nature of an information at common law, and the same clearness will not be required which is sufficient if it set out with clearness the offence charged and the substance of the part of the ordinance which has been violated with reference to the whole date and section. *Keeler v. Milledge*, 24 N. J. L. (4 Zab.) 142.

A complaint under a city ordinance will be quashed, although it pursue the very language of the ordinance, if it do not allege such an illegal act as the ordinance was intended to prohibit. *State v. Goulding*, 44 N. H. 284.

Under a city ordinance which prohibits permitting any cattle to go at large or "stop to feed" on any highway, a complaint which avers that the defendant suffered two cows "to stop and feed" on certain highways, is bad even after verdict, the object of the or-

7. Charging Statutory Offences—*a. GENERAL PRINCIPLES*—(1) *Reciting Title, Particular Statute or Section*.—An indictment need not recite the statute on which it is founded;¹ but where it professes to do so, a material variance will be fatal, for if the statute does not support the verdict, it must fail;² but an indictment under a statute will not be invalidated because it misstates the date of the statute, such date being immaterial for the offence while the statute was in force.³

But in an action for a penalty it is insufficient at common law to refer to the statute imposing it without specifically pleading the section.⁴

(2) *Common Law Offences and Forms of Pleading*.—Where a statute adopts a common law offence without further defining it, all the common law requirements to constitute the offence should be set out in the indictment.⁵

But where a statute denounces an offence bearing close rela-

tionance being to prevent grazing. *Com. v. Bean*, 14 Gray (Mass.) 52.

1. *U. S. v. Rhodes*, 1 Abb. (C. C.) 28; *Butler v. State*, 3 Me. C. (S. C.) 385.

2. *Com. v. Unknown*, 72 Mass. (6 Gray) 489; *Butler v. State*, 3 McCr. (S. C.) 383; See *Murray v. Fitzpatrick*, 3 Cal. (N. Y.) 38; *Say v. Stephens*, Cro. Car. 135; *Vanderplunken v. Griffith*, Cro. Eliz. 256; 1 Chitt. (6th Am. ed. Am. L.) 246; 6 Dane's Abr. 530, 588, 601.

The Minn. statute as to pleading a private statute in an indictment by reference to its title and date of passage, does not apply to a case where, at common law, such statute need not have been pleaded. *State v. Loomis*, 27 Minn. 521.

A complaint charged "an offence against the provisions of chapter ninety-four of the general statutes." The general statutes had been repealed by the revised laws, which, however, contained a provision, making the act set forth in the complaint an offence. *Held*, that the words "chapter ninety-four" and "general" did not vitiate the complaint, but might be treated as surplusage. *State v. Dewey*, 55 Vt. 550.

3. *People v. Reed*, 47 Barb. (N. Y.) 235; *Compare Com. v. Washburn*, 128 Mass. 421.

4. *People v. Martin*, 52 Cal. 201; *Briscoe v. Hinman*, Deady (U. S. D. C.) 588; *U. S. v. Babson*, 1 Ware (U. S. D. C.) 452; *Sears v. U. S.*, 1 Gall. C. C. 257; *Cross v. U. S.*, 1 Gall. C. C. 30, 31; *Jones v. Vanzandt*, 2 McL. C. C. 630; 5 How. 229; *Fish v. Man-*

ning, 31 Fed. 340; *Brown v. Church*, 5 Fed. 41; *Brown v. Pond*, 5 Fed. 31, 41.

5. *State v. Stedman*, 7 Port. (Ala.) 495; *State v. Absence*, 4 Port. (Ala.) 397; *State v. Flint*, 33 La. An. 1288; *U. S. v. Crosby*, 1 Hughes C. C. 448. See also *Roberts v. State*, 21 Ark. 183.

Misdemeanor.—When what was a misdemeanor only at common law is made punishable as a felony by statute, or where the statute declares a common law offence, committed under peculiar circumstances and with a peculiar intent, not necessarily included in the original offence, punishable in a different manner from what it would be without such circumstances and intent an indictment for the statute offence, bad as such for insufficient or defective description will not be good at common law. *State v. Card*, 34 N. H. 516.

Miss. Code, 1880, § 3099 that an act criminal both by statute and by common law may be set out in an indictment in either the statutory or common law form, does not apply where the act is a misdemeanor by common law and a felony by statute. *Wile v. State*, 60 Miss. 260.

The rule that an indictment, under a statute which creates an offence or increases its punishment, must aver the circumstances which constitute the offence or add to the penalties thereof, does not apply to a statute which neither creates an offence nor enhances its penalties, but merely divides a common law offence into degrees and affixes to each degree its appropriate punishment. *Davis v. State*, 39 Md. 355.

tion to a common law offence, such offence may be charged in the language of the statute.¹

Where the legislature changes the common law so as to make a single count necessary to charge and admit proof of any number of offences, the accused is entitled to a specification of the offence for which a conviction is claimed.²

(3) *Describing or Defining Offence ; Use of Statutory Language.*—An indictment based on a statute must contain forms of expression and descriptive words contained therein, to bring the offence precisely within the definition; a less degree of precision is required where descriptive words are not used, and where words of equivalent import may make the charge, and their use will be sufficient.³ An indictment for a statutory crime charging the facts constituting the crime in the words of the statute, or in words of equivalent import or more extensive significance, which necessarily include the words of the statute, is sufficient; ⁴

1. State v. Philbin, 38 La. An. 964.
2. State v. Rowe, 43 Vt. 265. See also U. S. v. Souders, 2 Abb.(C.C.) 456.

3. State v. Emerich, 87 Mo. 110.

4. White v. State, 44 Ala. 409; Crawford v. State, 44 Ala. 382; Murrell v. State 44 Ala. 367; Mason v. State, 42 Ala. 543; People v. Burke, 34 Cal. 661; Lodado v. State, 26 Ala. 64; Ben v. State, 22 Ala. 9; s. c., 58 Am. Dec. 234; Clark v. State, 19 Ala. 552; Batre v. State, 18 Ala. 119; State v. Bullock, 13 Ala. 413; State v. Click, 2 Ala. 26; State v. Duncan, 9 Port. (Ala.) 260; State v. Stedman, 7 Port. (Ala.) 495; State v. Brown, 4 Port. (Ala.) 410; Wood v. State, 47 Ark. 488; Scales v. State, 47 Ark. 476; s. c., 58 Am. Rep. 768; Fortenbury v. State, 47 Ark. 189; Glass v. State, 45 Ark. 173; State v. Murphy, 43 Ark. 178; State v. Witt, 39 Ark. 216; State v. Moser, 33 Ark. 140; State v. Collins, 19 Ark. 587; Lemon v. State, 19 Ark. 171; Medlock v. State, 18 Ark. 363; Moffatt v. State, 11 Ark. (6 Eng.) 169; People v. Donaldson, 70 Cal. 116; People v. Murray, 67 Cal. 103; People v. Lewis, 61 Cal. 366; People v. Williams, 59 Cal. 397; People v. Phipps, 39 Cal. 326; People v. White, 34 Cal. 183; People v. Martin, 32 Cal. 91; People v. Saviers, 14 Cal. 29; People v. Rodriguez, 10 Cal. 50; People v. Thompson, 4 Cal. 238; Cohen v. People, 7 Colo. 274; State v. Cady, 47 Conn. 44; State v. Jackson, 39 Conn. 229; State v. Bierce, 27 Conn. 319; State v. Carrigan, 24 Conn. 289; Barth v. State, 18 Conn. 439; Whiting v. State, 14 Conn. 487; s. c., 36 Am. Dec. 499; Tilly v.

State, 21 Fla. 242; Hines v. State, 26 Ga. 614; Shar v. State, 17 Ga. 290; Hester v. State, 17 Ga. 130; Ricks v. State, 16 Ga. 600; Sweeney v. State, 16 Ga. 467; Cook v. State, 11 Ga. 53; s. c., 56 Am. Dec. 410; Camp v. State, 3 Kelly (Ga.) 417; State v. Calvin, R. M. Charlt. (Ga.) 151; Seacord v. People, 121 Ill. 623; Baysinger v. People, 115 Ill. 419; Cole v. People, 84 Ill. 216; McCutcheon v. People, 69 Ill. 601; Mohler v. People, 24 Ill. 26; Chambers v. People, 5 Ill. (4 Scam.) 351; Benham v. State, (Ind.) 18 N. E. 454; Trout v. State, 111 Ind. 499; Ritter v. State, 111 Ind. 324; Eastman v. State, 109 Ind. 278; Skaggs v. State, 108 Ind. 53; Franklin v. State, 108 Ind. 47; s. c., 58 Am. Rep. 400; Henning v. State, 106 Ind. 386; s. c., 55 Am. Rep. 756; Riggs v. State, 104 Ind. 261; State v. Anderson, 103 Ind. 170; State v. Miller, 98 Ind. 70; Troops v. State, 92 Ind. 13; Howard v. State, 87 Ind. 68; Malone v. State, 14 Ind. 219; State v. Noel, 5 Blackf. (Ind.) 548; State v. Bougher, 3 Blackf. (Ind.) 307; State v. Smith, 46 Iowa 670; State v. Baldy, 17 Iowa 59; State v. Hessenkamp, 17 Iowa 25; State v. Middleton, 11 Iowa 246; Devine v. State, 4 Iowa 443; Romp v. State, 3 G. Greene (Iowa) 276; Fouts v. State, 4 G. Greene (Iowa) 500; Buckley v. State, 2 G. Greene (Iowa) 162; United States v. Dickey, 1 Morris (Iowa) 412; State v. McGaffin, 36 Kan. 315; State v. Beverlin, 30 Kan. 613; State v. Foster, 30 Kan. 366; State v. Barnett, 3 Kan. 250; Conner v. Com., 13 Bush. (Ky.) 714; Com. v. Turner, 8 Bush. (Ky.) 1; Com. v. Tanner, 5

and where the general terms used in the statute in creating an offence are succeeded by words more precise and definite, the rule

Bush (Ky.) 316; State *v.* Eames, 39 La. An. 986; 3 So. Rep. 93; State *v.* Tisdale, 39 La. An. 476; State *v.* Philbin, 38 La. An. 964; State *v.* Williams, 34 La. An. 87; State *v.* Butman, 15 La. An. 166; State *v.* Keogh, 13 La. An. 243; State *v.* Robbins, 66 Me. 324; Mincher *v.* State, 66 Md. 227; Parkinson *v.* State, 14 Md. 184; s. c., 74 Am. Dec. 522; Com. *v.* Brown, 141 Mass. 78; Com. *v.* Hobbs, 140 Mass. 443; Com. *v.* Parker, 117 Mass. 112; Com. *v.* Snow, 111 Mass. 411; People *v.* McLean (Mich.), 36 N. W. 231; State *v.* Shenton, 22 Minn. 311; State *v.* Comfort, 22 Minn. 271; Riley *v.* State, 43 Miss. 397; Williams *v.* State, 42 Miss. 328; Sarah *v.* State, 28 Miss. 267; s. c., 61 Am. Dec. 544; Vaughn *v.* State, 4 Mo. 530; State *v.* Ellis, 4 Mo. 474; State *v.* Crooker, 95 Mo. 389; State *v.* Johnson, 93 Mo. 317; State *v.* Rucker, 93 Mo. 88; State *v.* Bayne, 88 Mo. 604; State *v.* Ware, 62 Mo. 597; State *v.* Fleetwood, 16 Mo. 448; State *v.* Hereford, 13 Mo. 3; State *v.* Lackland, 12 Mo. 278; Simmons *v.* State, 12 Mo. 268; s. c., 59 Am. Dec. 131; State *v.* Helm, 6 Mo. 263; State *v.* Mitchell, 6 Mo. 147; State *v.* West, 21 Mo. App. 309; State *v.* Hedrick, 20 Mo. App. 629; State *v.* Beckman, 57 N. H. 174; State *v.* Kennison, 55 N. H. 242; State *v.* Rust, 35 N. H. 438; State *v.* Card, 34 N. H. 510; State *v.* Abbott, 31 N. H. 434; State *v.* Halsted, 39 N. J. L. (10 Vr.) 402; State *v.* Thatcher, 35 N. J. L. (6 Vr.) 445; State *v.* Hickman, 8 N. J. L. (3 Halst.) 299; People *v.* West, 106 N. Y. 293; s. c., 50 Am. Rep. 452; Tully *v.* People, 67 N. Y. 15; Frazer *v.* People, 54 Barb. (N. Y.) 306; State *v.* Sloan, 67 N. Car. 357; State *v.* Drake, 64 N. Car. 589; Hess *v.* State, 5 Ohio 5; s. c., 22 Am. Dec. 767; Ellars *v.* State, 25 Ohio St. 385; Poage *v.* State, 3 Ohio St. 229; State *v.* Ah Sam, 14 Oreg. 347; Williams *v.* Com., 91 Pa. St. 493; Hamilton *v.* Com., 3 P. & W. (Pa.) 142; Com. *v.* Moant, 14 Phila. (Pa.) 366; Updegraff *v.* Com., 6 Serg. & R. (Pa.) 5; State *v.* Kane, 15 R. I. 541; State *v.* O'Bannon, 1 Bail. (S. Car.) L. 144; State *v.* Vill, 2 Brev. (S. Car.) 262; State *v.* Cheatwood, 2 Hill (S. Car.) L. 459; State *v.* Foster, 3 McCord (S. Car.) 441; State *v.* Smart, 4 Rich. (S. Car.) L. 356; s. c., 55 Am. Dec. 683; State *v.* La Creux, 1 Mc-

Mull. (S. Car.) L. 488; State *v.* Casados, 1 Nott & Mc. C. (S. Car.) L. 91; State *v.* Thomas, 3 Strobb. (S. Car.) L. 269; State *v.* Williams, 2 Strobb. (S. Car.) L. 474; Harrison *v.* State, 2 Coldw. (Tenn.) 232; State *v.* Pennington, 3 Head (Tenn.) 119; Budd *v.* State, 3 Humph. (Tenn.) 483; s. c., 39 Am. Dec. 189; Peek *v.* State, 2 Humph. (Tenn.) 78; State *v.* Ladd, 2 Swan (Tenn.) 226; McFain *v.* State, 41 Tex. 385; State *v.* Randle, 41 Tex. 292; Portwood *v.* State, 29 Tex. 47; s. c., 94 Am. Dec. 258; State *v.* Campbell, 29 Tex. 44; Smith *v.* State, 24 Tex. 612; Exp. Bergen, 14 Tex. App. 52; Jones *v.* State, 12 Tex. App. 424; Robinson *v.* State, 11 Tex. App. 403; s. c., 40 Am. Rep. 790; State *v.* Miller, 60 Vt. 90; 12 Atl. Rep. 526; State *v.* Cook, 38 Vt. 437; State *v.* Little, 1 Vt. 331; Helfrick *v.* Com., 29 Gratt. (Va.) 844; Howel *v.* Com., 5 Gratt. (Va.) 664; State *v.* Charlton, 11 W. Va. 332; State *v.* Riffe, 10 W. Va. 794; Jones *v.* State, 51 Miss. 718; s. c., 24 Am. Rep. 658; U. S. *v.* Gooding, 25 U. S. (12 Wheat.) 460; bk. 6, L. ed. 693; U. S. *v.* Wilson, 1 Bald. (C. C.) 78; U. S. *v.* Henry, 3 Ben. (C. C.) 29; U. S. *v.* Bachelder, 2 Gall. (C. C.) 15; U. S. *v.* Lancaster, 2 McL. (C. C.) 431; U. S. *v.* Hearing, 11 Sawy. (C. C.) 514; Dewees' Case, Chase Dec. 531; U. S. *v.* Wilson, 29 Fed. Rep. 287.

So many of the words used in the statute to describe an offence as necessary shall be used to state it in the indictment. State *v.* Ellis, 4 Mo. 474; Vaughn *v.* State, 4 Mo. 530.

Under the Texas Penal Code, as amended, it is no longer required that the offence should be "expressly defined." Robinson *v.* State, 11 Tex. App. 403; s. c., 40 Am. Rep. 790; see State *v.* Randle, 41 Tex. 292.

It seems that where the statute names particular acts as constituting the offence, the charge may follow the statute; but where the statute is general, the particular acts may properly be set out to show that they constitute in fact and in law the offence generally described. Malone *v.* State, 14 Ind. 219.

The general rule that an indictment for a statutory offence is sufficient if it charges the crime in statutory language, does not mean that it is sufficient to copy the statute into the indictment

The indictment must make a specific application of the general terms of the statute to the case in hand, and charge a particular person with a particular offence within those terms, and go into detail far enough to render the particular instance of offending certain. *State v. Crooker*, 95 Mo. 389.

An indictment so far lacking adherence to statutory terms that the court cannot see on which of two statutes it was drawn is bad. *State v. Pratt*, 54 Vt. 484.

A criterion of the sufficiency of an indictment for a statutory offence is that the averments should make it certain that the act charged is the act forbidden by the statute, and also exclude any assumption that the indictment may have been proved and the defendant may still be innocent. This is all that is required. (25 Tex. 420; 10 Ark. 607; 18 Ark. 195; 19 Ark. 405; 4 Met. (Mass.) 357; 2 Gray (Mass.) 356; 4 Port. (Ala.) 395; 6 R. I. 76, 83.) *State v. Melville*, 11 R. I. 417.

The rule adopted in the high court of errors and appeals in Mississippi is, that indictments, especially upon highly penal statutes, must state all the circumstances which constitute the definition of the offence in the act; hence, if malice is the gist of the felony, it must be averred in the indictment, and this is the case whether the offence exist at common law or be one of statutory creation. *Sarah v. State*, 28 Miss. 267; s. c., 61 Am. Dec. 544.

When Not Sufficient.—Stating an offence in the words of the statute is not sufficient, unless every fact necessary to constitute the offence is charged or necessarily implied by following the words of the statute. *Com. v. Stout*, 7 B. Mon. (Ky.) 247; *Anthony v. State*, 29 Ala. 27; *State v. Raines*, 3 McCord (S. Car.) 533.

The principal exception to this rule is where the words of the statute may, by their generality, embrace cases falling within its literal terms, which are not within its meaning. *Hines v. State*, 26 Ga. 614; *Parkinson v. State*, 14 Md. 184; *State v. Bierce*, 27 Conn. 329.

The rule that an indictment should be so specific as to protect the defendant from another prosecution for the same act, applies to statutory offences; and it may not always be sufficient to follow the word of the statute, as here, for maliciously injuring "live stock." *State v. Hill*, 79 N. Car. 656.

When a statute, in defining a crime, refers by name to another well known crime, and makes such named crime a constituent of the defined crime, in an indictment for the latter it is not sufficient to use the mere statutory language, but the particulars constituting the named crime must be shown. *Titus v. State*, 49 N. J. L. (20 Vr.) 36.

The very words of the statute need not be scrupulously employed, if a recital is not professed to be given; but, if other words are employed, they must exactly agree in sense with the words of the act of assembly. *State v. Vill*, 2 Brev. (S. Car.) 262.

Statutory Appellation of Crimes.—If the acts constituting an offence are sufficiently stated to give explicit information of the offence as defined by statute, the failure to insert the statutory appellation of the crime in accordance with the prescribed form does not vitiate the indictment. *People v. Phipps*, 39 Cal. 326; *State v. Rigg*, 10 Nev. 284.

If a crime, such as sodomy, for instance, is made such *eo nomine*, it need not in an indictment be defined. *Ex parte Bergen*, 14 Tex. App. 52.

Failure to Follow Statute—Charging Indictable Offence.—If an indictment does not substantially follow the language of the statute on which it is founded, it does not clearly charge an indictable offence, and is consequently not cured by that section of the statute of Iowa which provides that "no indictment shall be quashed if an indictable offence is clearly charged therein." *State v. Morse*, 1 Greene (Iowa) 503.

Matter stated by way of aggravation will not vitiate an indictment which substantially follows the words of the statute. *State v. Fleetwood*, 16 Mo. 448.

In indictments for misdemeanors created by positive law, the offence may be charged either in the words of the statute, or there may be such a particular statement of facts as will bring the accused within its operation. *State v. Thatcher*, 35 N. J. L. (6 Vr.) 445. See *Whiting v. State*, 14 Com. 487; s. c., 36 Am. Dec. 499.

Unlawfully.—If the statute under which the indictment is framed does not use the word "unlawfully" in designating the offence, the indictment need not use it. *State v. Murphy*, 43 Ark. 178.

An information for a statutory misdemeanor is not governed by the rules

is that an indictment must charge an offence in the particular words used.¹ The rule that charging a statutory offence in the words of the statute is sufficient is inapplicable, where the statute does not use sufficient words to describe the offence.² And where that statute simply designates the offence, and does not describe or name its constituent elements, it is not sufficient to charge the offence merely in the language of the statute, the facts and circumstances constituting it must be averred.³ Where the subject of the indictment cannot be brought within the meaning of the statute without the aid of extrinsic evidence, it is necessary, besides charging the offence in the words of the statute, to aver such facts and circumstances as may be required to bring the matter within the meaning of it.⁴ Where a statute creates an

that apply to an indictment for a common law offence, as respects the certainty and particularity with which it must be framed; much less strictness is tolerated. *State v. Corrigan*, 24 Conn. 289; *Barth v. State*, 18 Conn. 439.

Statutory Conclusions.—Where a statute describes a particular act or acts as a crime of a particular grade, it is not necessary in an indictment on the statute to state, after charging the acts, the legal conclusion that they amount to the crime of the grade declared. *Guest v. State*, 19 Ark. 405.

1. *Bush v. State*, 18 Ala. 415; *State v. Raiford*, 7 Port. (Ala.) 101; *State v. Plunket*, 2 Stew. (Ala.) 111.

2. *Titus v. State*, 49 N. J. L. (20 Vr.) 36; *Harrington v. State*, 54 Miss. 490. *Danner v. State*, 54 Ala. 127; s.c., 25 Am. Rep. 662. And see *Mason v. State*, 42 Ala. 543; *Johnson v. State*, 32 Ala. 581; *Bush v. State*, 18 Ala. 415; *State v. Campbell*, 29 Tex. 44; s.c., 94 Am. Dec. 252.

3. *Anthony v. State*, 49 Ala. 27; *Wood v. State*, 47 Ark. 488; *State v. Graham*, 38 Ark. 519; *Stevens v. State*, 18 Fla. 903; *Sloan v. State*, 42 Ind. 570; *Reddan v. State*, 4 Greene (Iowa) 137; *State v. Foster*, 30 Kan. 365; *State v. Casey*, 45 Me. 435; *State v. McKenzie*, 42 Me. 392; *State v. Pugh*, 15 Mo. 509; *People v. Allen*, 5 Den. (N. Y.) 76; *Phelps v. People*, 72 N. Y. 334; *Wood v. People*, 53 N. Y. 511; *State v. Rose*, 90 N. Car. 712; *Poage v. State*, 3 Ohio St. 229; *State v. Perham*, 4 Oreg. 188; *State v. Shuler*, 19 S. Car. 140; *Portwood v. State*, 29 Tex. 47; s.c., 94 Am. Dec. 258; *Cross v. State*, 17 Tex. App. 476; *Rodriguez v. State*, 12 Tex. App. 552; *Hoskey v. State*, 9 Tex. App. 202; *Com. v. Hampton's Case*, 3 Gratt. (Va.) 590;

United States v. Hess, 124 U. S. 483; bk. 31, L. ed. 516. Authorities cited in *State v. Cutler v. American F. P. Mfg. Co.*, 50 N. J. L. 127.

Where the clause of a statute which describes and prohibits an offence, contains no words of general prohibition, such circumstances as are necessary to show that the prohibited offence has been committed, must be alleged in the information. *State v. Miller*, 24 Conn. 522.

The rule that every circumstance necessary to an exact description of the offence as defined by the statute creating it must be critically set forth, is limited to entire and distinct offences created and defined by the statute. In such cases the indictment or information must fully and particularly describe the offence in all its essential elements, or it is not described at all. See *Cohen v. People*, 7 Colo. 274; *Murphy v. People*, 19 Ill. App. 125; *Pierce v. State*, 63 Md. 592; *State v. Bryant*, 58 N. H. 79; *State v. Rose*, 90 N. Car. 712; *State v. Merritt*, 89 N. Car. 506; *State v. Shuler*, 19 S. Car. 140; *Rather v. State*, 15 Tex. App. 556; *State v. Clancy*, 56 Vt. 698; *U. S. v. Staton*, 2 Flip. (S. Car.) 319. And a conclusion "contrary to the form of the statute," etc., will not aid a defect in this respect. *Stevens v. State*, 18 Fla. 903; *Woolsey v. State*, 14 Tex. App. 57.

4. See *Bryan v. State*, 45 Ala. 86; *State v. Graham*, 38 Ark. 519; *State v. Jackson*, 39 Conn. 229; *Schmidt v. State*, 78 Ind. 41; *Com. v. Cook*, 13 B. Mon. (Ky.) 149; *State v. McKenzie*, 42 Me. 392; *State v. Philbrick*, 31 Me. 401; *State v. Clevenger*, 20 Mo. App. 626; *State v. Gove*, 34 N. H. 510; *State v. Thatcher*, 35 N. J. L. (6 Vr.)

offence unknown to the common law, and describes its ingredients, an indictment under it substantially conforming to the description thus given, is sufficient.¹

Where the statute creates a new offence unknown to the common law, the indictment must set forth all the constituent facts and circumstances necessary to bring the accused within the statutory provisions.² But every indictment founded upon statute must identify and charge the specific offence, showing by averment, not by inference merely, what statute has been violated.³ Where the language of a statute creating an offence is not to be taken in the broad meaning of the word used, but it is to be limited by construction to a special subject or matter, an indictment thereunder should not follow the language of the

445; *State v. Packard*, 4 Oreg. 157; *Com. v. Clark*, 6 Gratt. (Va.) 675; *Daniel v. State*, 3 Heisk. (Tenn.) 257; *State v. Campbell*, 29 Tex. 44; s. c., 94 Am. Dec. 251; *State v. Williams*, 14 Tex. 98; *State v. West*, 10 Tex. 553; *Cross v. State*, 17 Tex. App. 476; *Com. v. Hampton's Case*, 3 Gratt. (Va.) 590; *Bonneville v. State*, 53 Wis. 680, 686.

Particularity.—There are cases where more particularity is required than alleging the offence in the precise words of the statute, either from the obvious intention of the legislature, or from the application of known process of law. *Portwood v. State*, 29 Tex. 47; s. c., 94 Am. Dec. 258; *State v. Campbell*, 29 Tex. 44; s. c., 94 Am. Dec. 251; *Moffatt v. State*, 11 Ark. 169; *U. S. v. Gooding*, 25 U. S. (12 Wheat.) 460.

It is a settled principle that indictments under statutes, particularly of the highest penal character, must state all the circumstances which constitute the offence in the act, so as to bring the defendant judicially within it, and must be certain and clear to every intent, and pursue the precise technical language employed in the statute in describing the offence. *Ike v. State*, 23 Miss. 525.

1. *Bryan v. State*, 45 Ala. 86; *Lodano v. State*, 25 Ala. 64; *Skains v. State*, 21 Ala. 218; *Hall v. State*, 3 Cold. (Tenn.) 125; *Harrison v. State*, 2 Cold. (Tenn.) 232; *State v. West*, 10 Tex. 553. See *Pierce v. State*, 63 Md. 592.

An indictment charging an offence created by statute, in the terms of the statute, if there are allegations additional which show an offence not within the statute, is bad on demurrer. *State v. Mahan*, 2 Ala. 340.

Where an offence is created by stat-

ute (as private banking), and this offence consists of different acts (as issuing bills, discounting notes, etc.), the same statute making also each of those acts a distinct offence, in a prosecution for the first-mentioned offence, the act or acts relied on should be accurately described in the indictment. *State v. Williams*, 14 Tex. 98.

An indictment under a statute creating the offence must follow the words of the statute, but need not do so where the statute only prescribes the penalty for an offence previously recognized by law, without increasing such offence. *Wall v. State*, 18 Tex. 682; s. c., 70 Am. Dec. 302.

2. *State v. Gabriel*, 88 Mo. 631. *Eubanks v. State*, 17 Ala. 181; *State v. Casey*, 45 Me. 435.

When the offence is prohibited in general terms in one section of the statute, and in another section, entirely distinct, the acts are specified of which the offence consists, it is not necessary that anything but the general description should be set out in an indictment. *State v. Casey*, 45 Me. 435.

Though it is proper to use in an indictment the words of the statute, it is sufficient if the indictment be such that the prisoner cannot be guilty of the offence therein charged without being guilty of the statute offence. *Com. v. Young's Case*, 15 Gratt. (Va.) 664.

3. *Com. v. Macuboy*, 3 Dana (Ky.) 70.

Every indictment must bring defendant within all the descriptions mentioned in the body of the act, unless they are such as carry with them the bare denial of a matter the affirmation whereof is a proper and natural plea for defendant. *State v. Nicholson*, 67 Md. 1.

statute simply in charging the crime, but should limit the case allege facts which bring it within the construction placed upon the statute.¹

No general rule, as to the necessity of charging the offence in the language of the statute, applicable to every class of statutes, has been or can be declared, but each class is left to be decided on its own peculiar circumstances.²

8. Negations of Defence ; Statutory Exceptions and Provisions—

a. NEGATIVE AVERMENTS GENERALLY.—An indictment need not negative facts which are matters of defence,³ and where alleged need not be proved.⁴ It is not necessary that the indictment should negative every conceivable fact which might change the character of the offence,⁵ it being a general rule that negative averments are not required unless an exception is made in the enacting clause.⁶

1. *Bates v. State*, 31 Ind. 72; *Koster v. People*, 8 Mich. 431.

2. *Moffatt v. State*, 11 Ark. 169.

The sufficiency of an indictment for a statutory offence depends (under Iowa Rev., § 4650) on its stating with reasonable clearness facts constituting the offence, and not on its giving an appropriate name. If the facts amounting to an offence are alleged, the indictment may be sustained, although an incorrect name is given to the offence; the name may be disregarded as surplusage. *State v. Shaw*, 35 Iowa 575.

3. *People v. West*, 44 Hun (N. Y.) 162. See *Com. v. Hart*, 94 Mass. (11 Cush.) 130; *State v. Blaisdell*, 33 N. H. 388; *State v. Fuller*, 33 N. H. 259; *Fleming v. People*, 27 N. Y. 329; *Thompson v. State*, 54 Miss. 740; *State v. Abbey*, 29 Vt. 60; s. c., 67 Am. Dec. 754; *U. S. v. Cook*, 83 U. S. (17 Wall.) 168.

4. Where the subject matter of a negative averment in an indictment relates to the respondent personally, or lies peculiarly within his knowledge, the averment will be taken as true unless disproved by him. *State v. McGlynn*, 34 N. H. 422; *State v. Keggon*, 55 N. H. 19.

The court infer that what is not charged in the indictment does not exist; and it is the business of the pleader to exclude these conclusions in favor of the defendant by proper averments. *Mears v. Com.*, 2 Grant's Cas. (Pa.) 385.

5. *State v. Shoemaker*, 4 Ind. 100; *U. S. v. Demarchi*, 5 Blatchf. (C. C.) 84.

6. *Brittin v. State*, 10 Ark. 299; *State v. Miller*, 24 Conn. 522; *Cook v. State*,

26 Ga. 593; *Metzker v. People*, 14 Ill. 101; *State v. Stapp*, 29 Iowa 551; *State v. Beneke*, 9 Iowa 203; *Com. v. Young*, 7 B. Mon. (Ky.) 1; *Com. v. McClanahan*, 2 Met. (Ky.) 8; *State v. Boyington*, 56 Me. 512; *Hinckley v. Penobscot*, 42 Me. 89; *State v. Gurney*, 37 Me. 149; s. c., 58 Am. Dec. 782; *State v. Godfrey*, 24 Me. 232; s. c., 41 Am. Dec. 382; *Com. v. Tuttle*, 66 Mass. (12 Cush.) 502; *Com. v. Hart*, 65 Mass. (11 Cush.) 130; *Com. v. Fitchburg R. Co.*, 92 Mass. (10 Allen) 189; *State v. Cox*, 32 Mo. 566; *State v. Sutton*, 24 Mo. 377; *Kline v. State*, 44 Miss. 317; *State v. McGlynn*, 34 N. H. 422; *State v. Shaw*, 35 N. H. 217; *State v. Duggan*, 15 R. I. 403; 3 N. Eng. 138; *State v. Rush*, 13 R. I. 198; *State v. O'Donnell*, 10 R. I. 472; *State v. Reynolds*, 2 Nott & McC. (S. Car.) 365; *State v. Abbott*, 31 N. H. (11 Fost.) 434; *Worley v. State*, 11 Humph. (Tenn.) 172; *Jenkins v. State*, 36 Tex. 638; *Com. v. Foster*, 5 Gratt. (Va.) 695; *United States v. Schimer*, 5 Biss. (C. C.) 195; *Steel v. Smith*, 1 B. & Ald. 94; *Vavasour v. Ormrod*, 6 B. & C. 430; *Jones v. Axen*, 1 Ld. Ray. 119.

The mere fact that the exception or provision is in the same section with the clause on which the indictment is founded, does not require such exception or provision to be negated. *Clark v. State*, 19 Ala. 552; *State v. Powers*, 25 Conn. 48; *State v. Miller*, 24 Conn. 322; *Wells v. Iggulden*, 3 B. & C. 186.

An exception in the subsequent section need not be negated. *Metzker v. People*, 14 Ill. 101; *Bouser v. State*, Smith (Ind.) 408; *State v. Gurney*, 37

b. NECESSITY OF NEGATING EXCEPTIONS OR PROVISIONS.—Where a proviso to a statute makes the existence of a certain fact necessary to a conviction, the indictment must allege the existence of that fact.¹

Where the definition of a criminal offence contains provisos or exceptions closely connected with the enacting clause, or in the same clause that creates the offence, an indictment for such offence must show, by a negative; averment, that the defendant is not within such provisos or exceptions, but if contained in a distinct or subsequent clause or statute, it is a matter of defence, and need not be negated in the indictment.²

(1) *When Negative Averments Are Not Necessary.*—A particular qualification need never be averred, but must be relied on as

Me. 149; s. c., 58 Am. Dec. 782; Rawlins v. State, 2 Md. 201; State v. Shaw, 35 N. H. 217; State v. Wade, 34 N. H. 495; Com. v. Hill, 5 Gratt. (Va.) 682; Colson v. State, 7 Blackf. (Ind.) 590; Rex v. Pemberton, 2 Burr. 1035.

1. Smith v. State, 81 Ala. 74; State v. Miller, 24 Conn. 522; Hill v. State, 53 Ga. 472; Russell v. State, 50 Ind. 174; State v. Stapp, 29 Iowa 551; State v. Beneke, 9 Iowa 203; Com. v. Hatton, 15 B. Mon. (Ky.) 537; State v. Boyington, 56 Me. 512; State v. Godfrey, 24 Me. 232; Kline v. State, 44 Miss. 317; State v. Craft, 1 Miss. (Walk.) 409; State v. Abbey, 29 Vt. 60; s. c., 67 Am. Dec. 751; Com. v. Hampton, 3 Gratt. (Va.) 590; Byrne v. State, 12 Wis. 519; United States v. Insand, 1 Wood. (C. C.) 581; Rex v. Mallinson, 2 Burr. 679.

A negative which is descriptive of the offence must be alleged in the indictment. State v. Keen, 34 Me. 500; Thompson v. State, 54 Miss. 740; State v. Wade, 34 N. H. 495; State v. Abbey, 29 Vt. 60; s. c., 67 Am. Dec. 754.

And it is immaterial whether such exception is embraced in the enacting, or in a subsequent clause of the statute. State v. Miller, 24 Conn. 523.

They should be negated when they are descriptive of the offence or define it; but where they afford matter of excuse merely, they are to be relied upon in defence. The position of the exceptions in the enacting clause or elsewhere, does not affect the question. State v. Abbey, 29 Vt. 60; s. c., 67 Am. Dec. 754.

2. Carson v. State, 69 Ala. 235; Wilson v. State, 33 Ark. 557; s. c., 34 Am. Rep. 52; Matthews v. State, 24 Ark. 484; Brittin v. State, 10 Ark. (5 Eng.)

299; Territory v. Scott, 2 Dak. 212; Hill v. State, 53 Ga. 472; Elkins v. State, 13 Ga. 435; Metzker v. People, 14 Ill. 101; Russell v. State, 50 Ind. 174; Colson v. State, 7 Blackf. (Ind.) 590; State v. Stapp, 29 Iowa 551; State v. Beneke, 9 Iowa 203; Romp v. State, 3 Greene (Iowa) 276; Com. v. McClanahan, 2 Met. (Ky.) 8; Barber v. State, 50 Md. 161; State v. Boyington, 56 Me. 512; Hinckley v. Penobscot, 42 Me. 89; State v. Gurney, 37 Me. 149; State v. Keen, 34 Me. 500; State v. Godfrey, 24 Me. 232; People v. Telford, 56 Mich. 541; Kline v. State, 44 Miss. 317; State v. Cox, 32 Mo. 566; State v. Shiflett, 20 Mo. 415; s. c., 64 Am. Dec. 193; State v. Elam, 21 Mo. App. 290; State v. Wade, 34 N. H. 495; State v. Abbott, 31 N. H. (11 Fost.) 434; Jefferson v. People, 101 N. Y. 19; Bouser v. State, 1 Smith (Ind.) 408; State v. Bloodworth, 94 N. Car. 918; State v. Lanier, 88 N. Car. 658; State v. Heaton, 81 N. Car. 542; Stanglein v. State, 17 Ohio St. 453; Reynolds v. State, 2 Nott & McC. (S. Car.) 365; State v. Barker, 18 Vt. 195; Com. v. Hill, 5 Gratt. (Va.) 682; Jensen v. State, 60 Wis. 577; Byrne v. State, 12 Wis. 519; United States v. Nelson, 29 Fed. Rep. 202; State v. Abbey, 29 Vt. 60; s. c., 67 Am. Dec. 554. See Bone v. State, 18 Ark. 109; Beasley v. People, 89 Ill. 571; State v. McGlynn, 34 N. H. 422; State v. Abbey, 29 Vt. 60; s. c., 67 Am. Dec. 754; State v. Palmer, 18 Vt. 570.

If the language of the section defining the offence is so entirely separable from the exception that the ingredients constituting the offence may be accurately and clearly defined without any reference to the exception, the indictment may omit such reference. The matter contained in the exception is that of

a matter of defence,¹ in the progress of the trial,² and where a proviso to a statute attaches a qualification or limitation by which particular cases are excepted from a portion of the enactment, it is not necessary that an indictment under the statute should negative the proviso;³ neither need an indictment negative such exceptions in a penal statute as are by incorporation or reference made part of the definition of the offence in the enacting clause.⁴

An exception in the proviso following words of general prohibiting and furnishing matter of excuse to the party need not be negated in the indictment, but is matter of defence;⁵ and

defence, and must be shown by the accused. *Territory v. Burns*, 6 Mont. 72; *State v. O'Brien*, 74 Mo. 549; *State v. Shiflett*, 20 Mo. 415; s. c., 64 Am. Dec. 190; *State v. Elam*, 21 Mo. App. 290; *State v. Ah Chew*, 16 Nev. 50; s. c., 49 Am. Rep. 488; *State v. Rush*, 13 R. I. 198; *Mosely v. State*, 18 Tex. App. 311; *United States v. Cook*, 84 U. S. (17 Wall.) 168; bk. 15, L. ed.

1. Where the defendant in an indictment relies on an exception in the statutory provision, not in the enacting clause, as matter of defence, he must show it to exempt himself. *State v. Sutton*, 24 Mo. 377.

2. *People v. Nugent*, 4 Cal. 341.

3. *Smith v. State*, 81 Ala. 74.

4. *Matthews v. State*, 24 Ark. 484; *Territory v. Scott*, 2 Dak. 212; *State v. Williams*, 20 Iowa 98; *State v. Godfrey*, 24 Me. 232; s. c., 41 Am. Dec. 382; *State v. Price*, 12 Gill & J. (Md.) 260; s. c., 37 Am. Dec. 81; *State v. Rush*, 13 R. I. 198; *Mosely v. State*, 18 Tex. App. 311; *Smith v. State*, 5 Tex. App. 318; *Logan v. State*, 5 Tex. App. 306; *Woodward v. State*, 5 Tex. App. 296; *Blasdell v. State*, 5 Tex. App. 263; *Nelson v. United States*, 30 Fed. Rep. 112.

Where in one section of a statute an offence is clearly defined, an exception contained in another section need not be negated in an indictment preferred under the first section. *Territory v. State*, 2 Dak. 212.

Where the enacting clause of a penal act contains an exception, it is not indispensable that an indictment framed under it should set forth an express negation of it. *State v. Price*, 12 Gill & J. (Md.) 260; s. c., 37 Am. Dec. 81.

"Wilfully, unlawfully and Maliciously."—An averment that in an indictment an offence was committed wilfully, unlawfully and maliciously is sufficient without negating a proviso contained in another section of the statute prohibiting the offence. *Wor-*

ley v. State, 11 Humph. (Tenn.) 172.

Where the statute definition of an offence is so wholly separable from the exceptions that it may be charged without reference to them, they need not be negated. *Mosely v. State*, 18 Tex. App. 311.

Where different grades of the same general offence are defined in the statute, certain special circumstances being included as essential elements in the definition of the higher grade, and excluded by the negative words in the definition of the lower grade, and information charging the lower grade of the offence need not negative the presence of such circumstances. *State v. Kane*, 63 Wis. 260.

Special circumstances being included as essential elements in the definition of the higher grade, and excluded by negative words in the definition of the lower grade, an information or indictment charging the lower grade of the offence need not negative the presence of such circumstances. Charging the lower grade, and omitting such elements of the higher, is a full and complete allegation of the lower grade, without alleging specifically that they are omitted by the use of such negative words as the statute uses only for the purpose of creating it. *State v. Kane*, 63 Wis. 260; and see *Larned v. Com.*, 12 Met. 240; *Curran's Case*, 7 Gratt. (Va.) 619; *State v. Kroscher*, 24 Wis. 66; *Bell v. State*, 20 Wis. 599; *State v. Campbell*, 29 Tex. 44; s. c., 94 Am. Dec. 256, note.

5. *Carson v. State*, 69 Ala. 235; *Wilson v. State*, 33 Ark. 557; s. c., 34 Am. Rep. 52; *Cook v. State*, 26 Ga. 593; *State v. Powers*, 25 Conn. 48; *State v. Miller*, 24 Conn. 522; *State v. Stapp*, 29 Iowa 551; *State v. Gurney*, 37 Me. 149; s. c., 58 Am. Dec. 782; *State v. Godfrey*, 24 Me. (11 Shep.) 232; s. c., 41 Am. Dec. 382; *State v. O'Brien*, 74 Mo. 549; *State v. Cox*, 32

the rule that the indictment must negative exceptions in statutes does not apply to a case where the charge is preferred *ex natura rei* conclusively imports a negative of the exceptions.¹

(2) *Statutory Penalty*.—It has been said that an indictment to recover a statutory penalty need not allege that a fact did not exist, which, by a proviso appended to the statute, would discharge the defendant from liability;² and, on the other hand, it has been held that in any prosecutions for penalty given by statute, if it contains a negative matter, the negative must be alleged and proven unless such matter be particularly within the knowledge of the other party.³

(3) *Misdemeanors*.—In misdemeanors, where the facts laid in the indictment appear to be unlawful, it is unnecessary to allege the act to have been unlawfully done.⁴ But it has been said that in an indictment for misdemeanor, it is necessary to lay the charge in the words of the statute describing the offence, unless it appears that these words include cases not intended by the legislature to be embraced within the laws.⁵

c. SUFFICIENCY OF NEGATIVE AVERMENTS.—As a general rule, any words which include the exception with certainty are sufficient.⁶ The precise words of the statute need not be used, it being sufficient if the words used clearly accomplish the purpose,⁷ and the averment negating an exception may, by reference to the statute specifying the averment, be sufficient.⁸

9. *Averment as to Time*.—a. NECESSITY AND SUFFICIENCY IN GENERAL.—Time is a material fact, and must be distinctly averred in every indictment⁹ where the indictment may be barred by lapse of time, or the time is an essential ingredient of the offence;¹⁰ but it has been held that where time is not of the

Mo. 568; *State v. Shiflett*, 20 Mo. 415; s. c., 64 Am. Dec. 193, note; *State v. Godfrey*, 24 Me. 232; s. c., 41 Am. Dec. 382.

1. *State v. Price*, 12 Gill & J. (Md.) 260; s. c., 37 Am. Dec. 81.

2. *Com. v. Fitchburg B. Co.*, 92 Mass. (10 Allen) 189.

3. *Hopper v. State*, 19 Ark. 143. See *Elkins v. State*, 13 Ga. 435; *Howe v. State*, 10 Ind. 423; *Kinser v. State*, 9 Ind. 543; *Brutton v. State*, 4 Ind. 601; *Com. v. Maxwell*, 19 Mass. (2 Pick.) 139; *State v. Barker*, 18 Vt. 195.

4. The averment is in no case necessary unless it be part of the description of the offence as described by statute. *Capps v. State*, 4 Iowa 502.

5. In that event the indictment must show the case to be one not thus included. *United States v. Pond*, 2 Curt. C. C. 265.

And if the defendant insists upon the insufficiency of such indictment, it

devolves on him to show that from the obvious intention of the legislature, or the known principles of law, the case falls within the exceptions to such general rule. *State v. Abbott*, 31 N. H. 434.

6. *State v. Keen*, 34 Me. 500; *Com. v. Harrison*, 77 Mass. (11 Gray) 310; *Com. v. Conant*, 72 Mass. (6 Gray) 482.

7. *State v. Keen*, 34 Me. 500.

8. *State v. Walsh*, 14 R. I. 507; *Whiting v. The State*, 14 Conn. 487.

9. *State v. Bacon*, 7 Vt. 222.

10. *Roberts v. State*, 19 Ala. 526; *Nicholson v. State*, 18 Ala. 529; s. c., 54 Am. Dec. 168; *Conner v. State*, 25 Ga. 21; s. c., 71 Am. Dec. 184; *Wingard v. State*, 13 Ga. 396; *Cook v. State*, 11 Ga. 53; s. c., 56 Am. Dec. 410; *Hubbard v. State*, 7 Ind. 160; *State v. Barnett*, 3 Kan. 250; s. c., 87 Am. Dec. 471; *State v. Caverly*, 51 N. H. 446; *State v. Dayton*, 23 N. J. L. (3 Zab.) 49; s. c., 53 Am. Dec. 270; *State v.*

essence of the offence, or a necessary ingredient in the description if it, it is not necessary to be alleged specifically,¹ but may be laid on any day previous to the finding indictment during the period of time the offence may be prosecuted.²

b. ALLEGING PARTICULAR DAY.—The day and year upon which it is claimed that the offence was committed should be stated in the indictment with certainty and precision.³ And the

Sam, 2 Dev. (N. Car.) 567; State v. Beaton, 79 Me. 314; State v. Hanson, 39 Me. 337; State v. Thurstin, 35 Me. 205; s. c., 58 Am. Dec. 694; State v. Baker, 34 Me. 52; Com. v. McLoon, 71 Mass. (5 Gray) 91; s. c., 66 Am. Dec. 354; Con. v. Hutton, 71 Mass. (5 Gray) 89; s. c., 66 Am. Dec. 352; Miazza v. State, 36 Miss. 616; State v. Hardwick, 2 Mo. 226; Erwen v. State, 13 Mo. 306; State v. G. S., 1 Tyl. Vt. 295; State v. LaBore, 26 Vt. 765; Jane v. State, 3 Mo. 61; Mau-zau-mau-ne-kah v. U. S., 1 Pin. (Wis.) 124; s. c., 39 Am. Dec. 279.

A statute allowing a more general statement of time in an indictment does not dispense with a statement of time. King v. State, 3 Heisk. (Tenn.) 148.

It has been said that a statute which provides that it shall not be necessary for an indictment to allege when the offence was committed, but that the proof shall show it was committed within the jurisdiction of the court, applies to presentments as well as indictments. State v. Shull, 3 Head (Tenn.) 42.

Under the Alabama code the indictment need not state the time of the commission of the offence. McGurre v. State, 37 Ala. 162.

1. State v. Sam, 2 Dev. (N. Car.) 567; Miazza v. State, 36 Miss. 616.

2. Miazza v. State, 36 Miss. 616.

3. See Roberts v. State, 19 Ala. 526; State v. Beckwith, 1 Stew. (Ala.) 318; s. c., 18 Am. Dec. 46; State v. Offutt, 4 Blackf. (Ind.) 355; State v. Fenlason, 78 Me. 495; State v. Hanson, 39 Me. 337; State v. Baker, 34 Me. 52; Erwen v. State, 13 Mo. 306; State v. Blaisdel, 49 N. H. 81; State v. Orrell, 1 Dev. (N. Car.) 139; s. c., 17 Am. Dec. 563; State v. Roach, 2 Hayw. (N. Car.) 352; s. c., 2 Am. Dec. 626; State v. Sexton, 3 Hawks (N. Car.) 184; s. c., 14 Am. Dec. 584; State v. Brown, 24 (S. Car.) 224; State v. Johnson, 32 Tex. 96; Mau-zau-mau-ne-kah v. U. S., 1 Pin. (Wis.) 124; s. c., 39 Am. Dec. 279; U. S. v. Bowman, 2 Wash. (C. C.) 328;

Anon. Lofft. 228; Rex v. Holland, 5 T. R. 607; Rex v. Mason, 2 Show. 126.

But unless time is of the essence of the offence, the day on which the offence was committed need not be alleged, nor proved as alleged. State v. Swain, 97 N. Car. 462.

Where the day does not enter into the offence, an indictment merely stating the year, if prior to the finding and within the statute of limitations, is sufficient. State v. Davis, 6 Baxt. (Tenn.) 605; State v. Gibbs, 6 Baxt. (Tenn.) 238.

An averment laying the crime on the "first March," instead of the "first day of March," is sufficient. Simmons v. Com., 1 Rawle (Pa.) 142; State v. Hoover, 31 Ark. 676; People v. Kelly, 6 Cal. 210; People v. Littlefield, 5 Cal. 355; Jones v. Com., 1 Bush (Ky.) 34; s. c., 89 Am. Dec. 605; State v. Wilcoxon, 38 Mo. 370; State v. Sam, 2 Dev. (N. Car.) 567; State v. Caudle, 63 N. Car. 30; State v. Shull, 3 Head (Tenn.) 42.

Repugnancy or uncertainty as to the time stated renders an indictment bad at common law. See Com. v. Adams, 70 Mass. (4 Gray) 27; Jane v. State, 3 Mo. 61; State v. Hardwick, 2 Mo. 226; New York v. Mason, 4 E. D. Smith (N. Y.) 142; State v. Hendrix, Const. (N. Car.) 369.

"On or Before."—Where the indictment alleges that the offence was committed "on or before" a day named, it is at common law insufficient. (Clark v. State, 34 Ind. 456; State v. O'Keefe, 41 Vt. 691; United States v. Crittenden, Hemp. C. C. 61; United States v. Winslow, 3 Sawy. C. C. 337), but in some of the states such an allegation is rendered invalid by force of statutes. People v. Aro, 6 Cal. 207; s. c., 65 Am. Dec. 503; Farrell v. State, 45 Ind. 371; Hardebeck v. State, 10 Ind. 459; Hampton v. State, 8 Ind. 336; Cokely v. State, 4 Iowa 477; State v. Hill, 35 Tex. 348; State v. McMickle, 34 Tex. 676; State v. Elliott, 34 Tex. 148.

In Connecticut, however, such an allegation is held to be sufficient even with-

common law rule regarding the setting out of the day as above stated prevails in most of the States; but in some the allegation has been made unnecessary by statute, and in others has been permitted to be less specific.¹ However, it is thought that where the loose forms are permitted, some reasonable allegation of time is yet necessary to the validity of the indictment.²

c. THE HOUR.—It is not usually necessary to allege the hour on which an offence was committed, but an allegation that it was committed at a certain hour of a certain night is supported by proof that it was committed at any hour during the alleged night.³

out the legislative sanction. *State v. Tuller*, 34 Conn. 280; *Rawson v. State*, 19 Conn. 292.

1. See *State v. Stumbo*, 26 Mo. 306; *State v. Magrath*, 19 Mo. 678.

2. See *Jeffries v. State*, 39 Ala. 655; *Bolton v. State*, 5 Coldw. (Tenn.) 650; *King v. State*, 3 Heisk. (Tenn.) 148; *State v. Tandy*, 41 Tex. 291.

Starkie says in his work on Criminal Pleading and Practice (1 Starkie, Cr. L. Pl. 2d ed., 55), that "the indictment will be good if the day and year can be collected from the whole statement, though they be not expressly averred as where the time of the caption of the indictment is stated and the offence is laid to have been committed *primo die* Pasch. ult. (See *Gill v. People*, 5 T. & C. (N. Y.) 308-310; *Jacobs v. Com.*, 5 Serg. & R. (Pa.) 315; *Com. Dig.*, tit. Indictment, g, 2; 2 Hawk. P. C. C. 25, § 78.) So an indictment laying the offence on the Tuesday after the day of Pentecost in such year is good, so if it lay it to have been committed on the 10th of March last, if the year can be ascertained by the style of the session or time the indictment is taken."

Acts on Different Days.—Where the offence consists of acts transpiring on different days, the indictment must allege more days than one. *Com. v. Stafford*, 66 Mass. (12 Cush.) 619; *State v. Sides*, 64 Mo. 383; *State v. Haney*, 67 N. Car. 467; *State v. Baker*, 1 Jones (N. Car.) L. 367; *Lazier v. Com.*, 10 Gratt. (Va.) 708; *Com. v. Ailstock*, 3 Gratt. (Va.) 650; 1 Chit. Cr. L. 222.

"On Divers Days."—The allegation that an offence was committed on a certain day, "and on divers other days and time between that day" and some other day, is not a *continuendo*. *Wells v. Com.*, 78 Mass. (12 Gray) 326.

Between Two Days.—It is thought that an allegation that the offence charged

in the indictment was committed at an indefinite time between two days, which is specified, is inadequate. See *Jeffries v. State*, 39 Ala. 655; *U. S. v. Smith*, 2 Mass. (C. C.) 143; *Rex v. Roberts*, Carth. 226; s. c., — Comb. 193; s. c., — Holt. 363; *Reg. v. Simpson*, 10 Mod. 248; *Rex v. Roberts*, 4 Mod. 101; *Rex v. Chandler*, 1 L. Raym. 581; *Rex v. Roberts*, 1 Show. 389; s. c., 3 Salk. 198.

A continuous offence, such as a continuous asportation of gas carried on for a number of years, may be charged in an indictment as having been committed on a single day, and will be sufficient to support a conviction. See *Com. v. Shaw*, 86 Mass. (4 Allen) 308; s. c., 81 Am. Dec. 706; *Reg. v. Henwood*, 11 Cox 526; *Reg. v. Firth*, L. R., 1 C. C. 172; s. c., 11 Cox 234; *Reg. v. White*, Dears. C. C. 203; s. c., 3 Car. & K. 363; s. c., 22 L. J., N. S., M. C. 123; 17 Jur. 536; *Reg. v. White*, 20 L. & Eq. 585.

3. See *State v. Tazwell*, 30 La. An., pt. 2, 884; *Com. v. Williams*, 56 Mass. (2 Cush.) 582; *State v. Padgett*, 18 S. Car. 317; *Rex v. Clarke*, 1 Bulst. 203.

Under a statute prohibiting "the sale of seed cotton between the time of the setting and rising of the sun," an indictment is sufficient which charges a sale "at nine o'clock in the night." *State v. Padgett*, 18 S. Car. 317.

Since the passing of the statute of 1847, ch. 13, defining "the time of night-time in criminal prosecutions," it is sufficient to allege generally that an offence was committed in the night-time, without designating the particular hour of the night; and by such allegation is to be understood the period of night-time as defined in that statute. *Com. v. Williams*, 56 Mass. (2 Cush.) 582.

Where the time of day is material to ascertain the nature of the

d. THE YEAR.—It has been said that an indictment or complaint which states in words at length the day, month and year of the commission of the offence is sufficient without adding "year of our Lord."¹

e. DEFECTIVE OR OMITTED AVERMENTS—(1) *Omissions of Time Generally.*—It has been held that where the time when an offence was committed is not a constituent of it, the omission to state it in a criminal complaint is a defect of form merely;² but the better opinion seems to be that an indictment in which no time at all is stated as the date of the commission of the offence, will not support a judgment of conviction, notwithstanding the fact that it is not essential that the offence charged be proved to have been committed on the day alleged.³

(2) *Omission of Year.*—An omission to state the year on which an offence was committed has been said not to necessarily render

offence, it must be expressed in the indictment. 2 Hale, P. C. 279.

Lord Hale says in one place (1 Hale, P. C. 549) "that simply to say *in nocte ejusdem diei* is sufficient; but he declares in another place that the allegation should be *tali diei circa horam decimam in nocte ejusdem diei feloncei et burglaright fregit*." 2 Hale, P. C. 279. The latter has become the common law rule. See *Rex v. Waddington*, 2 East, P. C. 513.

1. *Hall v. State*, 3 Kelly (Ga.) 18; *Engleman v. State*, 2 Ind. 91; s. c., 52 Am. Dec. 494; *State v. Bartlett*, 47 Me. 388; *Com. v. Sullivan*, 80 Mass. (14 Gray) 97; *Com. v. Doran*, 80 Mass. (14 Gray) 38; *Wells v. Com.*, 78 Mass. (12 Gray) 326, 328; *Com. v. McLoon*, 71 Mass. (5 Gray) 91; s. c., 66 Am. Dec. 354; *State v. Munch*, 22 Minn. 67. But compare *Whitesides v. People*, 1 Ill. 21.

Time Covered by Indictment.—Under a complaint dated "August 30th, 1865," charging the commission of a continuing offence "on the first day of June, in the year of our Lord one thousand eight hundred and sixty-five, and from that day to the day of the date of this complaint" evidence may be introduced covering the whole time between the first day of June and the date of the complaint. *Com. v. Walton*, 11 Allen 240, distinguishing *Com. v. McLoon*, 71 Mass. (5 Gray) 191; s. c., 66 Am. Dec. 354, that the omission of the words "in the year," or the letters "A. D.," without which the figures "1855" were held insufficient to denote the year, was in the body of the complaint, and the principal case is that in it the complaint contained no allegation of the

time, except "the third day of June instant." *Com. v. Hutton*, 71 Mass. (5 Gray) 89; s. c., 66 Am. Dec. 352, note.

The Abbreviations "A. D."—Expressing the year by the initials A. D. and numeral figures, in an indictment, is sufficient at common law. *State v. Hodgden*, 3 Vt. 481.

"Anno Domini."—An averment in an information that the offence was committed "Anno Domini one thousand eight and seventy-five," held insufficient to denote a date showing that the offence was not barred by limitation. *Blake v. State*, 3 Tex. App. 149.

2. *Kenney v. State*, 5 R. I. 385. See *Com. v. Blake*, 94 Mass. (12 Allen) 188.

3. *State v. Fenlason* (Me.), 3 N. E. Rep. 834; *State v. Day*, 74 Me. 221; *State v. Hanson*, 39 Me. 340; *State v. Thurstin*, 35 Me. 206; s. c., 58 Am. Dec. 695; *State v. Baker*, 34 Me. 52. Compare *State v. Beckwith*, 1 Stew. (Ala.) 318; s. c., 18 Am. Dec. 46; *Com. v. Adams*, 67 Mass. (1 Gray) 481; *State v. Ray*, 1 Rice (S. Car.) L. 1; s. c., 33 Am. Dec. 90; *State v. Roach*, 2 Hayw. (N. Car.) 352; s. c., 2 Am. Dec. 626.

Where the date is omitted in a complaint which alleges that on a certain day "and on divers other days and times between that day and the day of making this complaint" an offence was committed, it is nevertheless good if the time appears by the certificate of its reception and the jurat. *Com. v. Blake*, 94 Mass. (12 Allen) 188.

An impossible or future date in an indictment is fatal. *Hutchinson v. State*, 62 Ind. 556; *State v. Sexton*, 3 Hawks (N. Car.) 184; s. c., 14 Am. Dec. 584.

an indictment invalid;¹ on the other hand, it is held that a complaint which contains no mention of the year in laying the offence is fatally defective, because it should appear affirmatively by the complaint that the act charged was not done so early as to be barred by the statute of limitations.²

(3) *Blank Dates*.—It has been said that, it being material in an indictment that the day be laid when the offence was committed, if the date is left blank, it does not appear whether the indictment is barred by the statute of limitations or not, and that the judgment will be arrested.³

(4) *Defects; Mistakes*.—A complaint defective in allegations of time, place or circumstance will not sustain a prosecution.⁴ Thus a mistake of the day on which a perjury is charged to have been committed is a fatal variance.⁵

f. USE OF FIGURES OR NUMERALS.—The day and year when an offence is charged in an indictment to have been committed should be expressed in the indictment in words at length and not in figures.⁶ Yet the complaint which charges a crime to have been committed, and in stating the time, figures and abbreviations are used instead of words spelled out in full, is not bad.⁷ Where a complaint charges in words at length the time of the commission of an offence, it will not be affected by the addition of figures of the date, and when the complaint is made.⁸ But it has been held that where the time at which an act charged to have been done is stated in figures, though it has in a previous part of the indictment been written out in full, indictment is thereby rendered bad.⁹

g. LIMITATIONS; ALLEGING OFFENCE WITHIN TIME LIMITED.—An indictment must charge an offence, the prosecution of

1. *State v. McDonald*, 106 (Ind.) 233; *State v. Sammons*, 95 Ind. 22; *State v. Stumbo*, 26 Mo. 306. But compare *Whitesides v. People*, 1 Ill. 4.

2. *People v. Gregory*, 30 Mich. 371; See *Com. v. Hutton*, 71 Mass. (5 Gray) 89; s. c., 66 Am. Dec. 352; *Com. v. Griffin*, 57 Mass. (3 Cush.) 523; *Jones v. Com.*, 1 Bush (Ky.) 34; s. c., 89 Am. Dec. 605.

3. *State v. Beckwith*, 1 Stew. (Ala.) 318; s. c., 18 Am. Dec. 46. Compare *Jones v. Com.*, 1 Bush (Ky.) 34; s. c., 89 Am. Dec. 605; *State v. Buck*, 78 Me. 193; *State v. Parker*, 5 Lea (Tenn.) 568; *State v. Thompson*, 26 W. Va. 149.

4. *People v. Minnock*, 51 Mich. 628; See *Hutchinson v. State*, 62 Ind. 556; *State v. Sexton*, 3 Hawks (N.Car.) 184; s. c., 14 Am. Dec. 584.

5. *U. S. v. McNeal*, 1 Gall. (C.C.) 387.

6. *Finch v. State*, 6 Blackf. (Ind.) 533; *State v. Voshall*, 4 Ind. 589; *U.*

S. v. Prescott, 2 Abb. (C. C.) 169.

An indictment or complaint, which states the year of the commission of the offence in figures only, without prefixing the letters "A.D.," is insufficient. *Com. v. McLoon*, 71 Mass. (5 Gray) 91; s. c., 66 Am. Dec. 354.

7. *State v. Raiford*, 7 Port. (Ala.) 101; *Hizer v. State*, 12 Ind. 330; *Hampton v. State*, 8 Ind. 336; *State v. Seamons*, 1 Iowa 418; *State v. Reed*, 35 Me. 489; s. c., 56 Am. Dec. 727; *Com. v. Hagarman*, 92 Mass. (10 Allen) 402; *Cady v. Com.*, 10 Gratt (Va.) 776; *Lazier v. Com.*, 10 Gratt (Va.) 708.

Abbreviations of proper names of persons described in an indictment will not render it bad. *State v. Kean*, 10 N. H. 347; s. c., 34 Am. Dec. 162.

8. *Com. v. Keefe*, 73 Mass. (7 Gray) 332.

9. *Berrian v. State*, 22 N. J. L. (2 Zab.) 9.

which is not barred by the statute of limitations;¹ it seems that beyond this an averment of time does not enter into the nature of the offence, and that the allegation may be as to any day previous to the finding of the bill during the period in which a prosecution may be commenced.²

h. SUNDAY.—It is generally unimportant on what day of the week the wrongful act is done where an offence is committed, and for that reason it need not be alleged; but where an act is prohibited from being done on Sunday, the indictment should aver, in addition to the day of the month and the year, that it was Sunday, and not merely mention a day which is found to be Sunday by consulting the calendar.³

In an indictment for committing an offence on Sunday, though the doing of the act on that day is the gist of the offence, the statement of the day of the month is no more material than in other cases, and hence, if the indictment charges the offence to have been committed on Sunday, though it names a day of the month which does not fall on Sunday, it is good.⁴

i. NECESSITY OF PROOF OF DATE AS LAID.—Time is not an ingredient of a criminal offence in any such sense as to make it necessary to charge it precisely according to the truth; and an information or indictment may state one time and the proof may show a different one, though involving an objectionable variance.⁵

1. *People v. Miller*, 12 Cal. 291; *State v. Rust*, 8 Blackf. (Ind.) 195; *State v. Ingalls*, 59 N. H. 88; *State v. Havey*, 58 N. H. 377; *Shoefercater v. State*, 5 Tex. App. 207; *State v. G. S.*, 1 Tyler (Vt.) 295; s. c., 4 Am. Dec. 724. See also *State v. Norton*, 45 Vt. 258. But compare *Molett v. State*, 33 Ala. 408; *Simpson v. Flamank*, L. R., 1 P. C. 463.

2. *Shelton v. State*, 1 Stew. & P. (Ala.) 208; *Cook v. State*, 11 Ga. 53; s. c., 56 Am. Dec. 410; *State v. Havey*, 58 N. H. 377.

3. See *Robinson v. State*, 38 Ark. 548; *Werner v. State*, 51 Ga. 426; *Shepler v. State* (Ind.), 16 N. E. Rep. 521; *Effinger v. State*, 47 Ind. 235; *Leahr Ritter v. State*, 42 Ind. 383; *State v. Land*, 42 Ind. 311; *Hoover v. State*, 56 Md. 584.

An indictment for hunting on Sunday, which alleges that "on or about the first day of October, A. D. 1871," the defendant, etc., said 1st day of October, 1871, being then and there the first day of the week, commonly called Sunday, is bad for uncertainty as to the time of the offence. *State v. Land*, 42 Ind. 311.

4. *State v. Eskridge*, 1 Swan (Tenn.) 473; *Com. v. Newton*, 25 Mass. (8

Pick.) 234; *Com. v. Roby*, 29 Mass. (12 Pick.) 496; *Com. v. Kingsbury*, 5 Mass. 106; *Com. v. Macomber*, 3 Mass. 254; *Hoover v. State*, 56 Md. 584. Compare *Werner v. State*, 51 Ga. 426.

5. *McDade v. State*, 20 Ala. 81; *Medlock v. State*, 18 Ark. 363; *People v. Sheldon*, 68 Cal. 434; *State v. Munson*, 40 Conn. 475; *McBryde v. State*, 34 Ga. 202; *Chapman v. State*, 18 Ga. 736; *Dacy v. State*, 17 Ga. 439; *Wingard v. State*, 13 Ga. 396; *Cook v. State*, 11 Ga. 53; s. c., 56 Am. Dec. 410; *State v. Curley*, 33 Iowa 359; *State v. Rollet*, 6 Iowa 535; *Emporia v. Volmer*, 12 Kan. 622; *Com. v. Alfred*, 4 Dana (Ky.) 496; *State v. Walters*, 16 La. An. 400; *State v. Gray*, 39 Me. 353; *State v. Baker*, 34 Me. 52; *Com. v. Sego*, 125 Mass. 210; *Com. v. Irvin*, 107 Mass. 401; *Com. v. Dacey*, 107 Mass. 206; *Com. v. Maloney*, 82 Mass. (16 Gray) 20; *Com. v. Dillane*, 67 Mass. (1 Gray) 483; *Com. v. Kelly*, 64 Mass. (10 Cush.) 69; *McCarty v. State*, 37 Miss. 411; *Miazza v. State*, 36 Miss. 613; *Miller v. State*, 33 Miss. 356; s. c., 69 Am. Dec. 355; *Oliver v. State*, 6 Miss. (5 How.) 14; *Turner v. People*, 33 Mich. 363; *People v. Jenness*, 5 Mich. 305; *State v. Rundlett*, 33 N. H. 70; *People v. Hoag*, 2 Park. (N.

To support an allegation in an indictment that an offence was committed on a particular day, it is sufficient to prove its commission some time before the finding of the bill by the grand jury, and within the period of limitation within which the offence may be prosecuted.¹

j. REPETITION; REFERENCE TO COUNTS OR CAPTION.—It has been laid down as a general rule that time and place should not merely be mentioned at the beginning of the indictment, but should be repeated to every issuable and triable fact;² but it has been said that where an indictment contains two counts, one against one person for stealing and the other against another person for receiving the goods, it is not necessary in the second count to state the time where it is stated in the first count, and referred to in the second;³ also that an indictment is good where the day of the commission of the offence is laid by a reference to a preceding count or to the caption.⁴

k. "THEN AND THERE"—(1) *Necessity, and When Proper.*—It has been laid down as a general rule that where any positive fact is averred, it should be stated to have been done "then and there," after the county has been clearly expressed in the body of the indictment; and the allegation of time and place "then and there" should be repeated to every material fact which is issuable and triable.⁵

(2) *Effect of Omission.*—It is maintained by some courts that

Y.) C. C. 9; *State v. Newsom*, 2 Jones (N. Car.) L. 173; *Farrer v. State*, 2 Ohio St. 54; *State v. Porter*, 10 Rich. (S. Car.) 145; *O'Connell v. State*, 18 Tex. 343; *Loftus v. Com.*, 3 Gratt. (Va.) 631; *Johnson v. U.S.*, 3 McL. (C. C.) 89; *Com. v. Braynard*, Thach. Cr. Cas. (Mass.) 146; *Charnock's Case*, Holt 301.

1. *Com. v. Braynard*, Thach. Cr. Cas. (Mass.) 146; *State v. Newsom*, 2 Jones (N. Car.) L. 173. See also *People v. Jenness*, 5 Mich. 305.

2. 1 Chitt. Cr. L. 219, 222; See also *State v. Ross*, 26 Mo. 260; *State v. LaBore*, 26 Vt. 765; *State v. Bacon*, 7 Vt. 219, 222; *State v. Kube*, 20 Wis. 217; s. c., 91 Am. Dec. 390; *Buckler's Case*, 1 Dy. 69a; *Denison v. Richardson*, 14 East 291, 300, 301; *Rex v. Holland*, 5 T. R. 607, 620; *Com. Dig.*, Indictment, g, 2. See *State v. Paine*, 1 Ind. 163.

3. *Redman v. State*, 1 Blackf. (Ind.) 429. An indictment charging keeping and selling liquors at a time and place stated, is not bad for omission to repeat the time in further allegation that defendant thereby maintained a nuisance. *State v. Buck*, 78 Me. 193.

4. See *State v. Hopkins*, 7 Blackf. (Ind.) 494; *Jones v. State*, 68 Md. 613;

Com. v. McKenney, 80 Mass. (14 Gray) 1; *Wills v. State*, 8 Mo. 52; *State v. Haddock*, 2 Hawks (N. Car.) L. 461; *Jacobs v. Com.*, 5 Serg. & R. (Pa.) 315.

An indictment not containing the year, but referring to the caption (which does contain the year), in this manner, "in the year of our Lord aforesaid," was held to be bad, as the caption was no part of the indictment *State v. Hopkins*, 7 Blackf. (Ind.) 494. See also *Com. v. McKenney*, 80 Mass. (14 Gray) 1.

5. *Turpin v. State*, 80 Ind. 148. *State v. Williams*, 4 Ind. 234; s. c., 58 Am. Dec. 627; *State v. Thurstin*, 35 Me. 205; s. c., 58 Am. Dec. 695; *Com. v. Keyon*, 83 Mass. (1 Allen) 6; *Fisk v. State*, 9 Neb. 65; *Heydon's Case*, 4 Coke 41a, 41b; *Buckler's Case*, 1 Dy. 69a; 1 East, P. C. 346; *Godb.* 65, 66; 1 Chitt. Cr. L. 198.

Where time and place have been once alleged in an indictment, the words "then and there" need not be in every subsequent material allegation. *Turpin v. State*, 80 Ind. 148; *Fisk v. State*, 9 Neb. 62; *Com. v. Keyon*, 83 Mass. (1 Allen) 6.

the omission of the words "then and there" in an indictment is immaterial.¹

(3) *Sufficiency and Effect*.—The rule is that where one fact is alleged in the indictment with time and place, the words "then and there" subsequently used as to the occurrence of another fact, refer to the same point of time, and necessarily import that the two were co-existent;² but where an indictment alleges two or three different days, and then charges the offence to have been "then and there" committed, it is bad for want of certainty.³ If the words "then and there" precede every material allegation, it is sufficient and these words may not precede the conclusion drawn from the facts.⁴

l. "ON OR ABOUT."—At common law, an allegation that the offence was committed "on or about" a given day is void for uncertainty, because it does not show that the action is barred by a lapse of time;⁵ but in some states this form is made sufficient by statute.⁶ In some states, however, such allegation is held to be sufficient at common law.⁷

m. ALLEGING COMMISSION OF OFFENCE AFTER STATUTE CREATING IT.—Where time is not the essence of the offence, and there is but one statute applicable to the matter, although that statute be recent, and not to take effect until after a specified time, the indictment need not contain an averment that the offence was committed after the statute went into operation. But where there are two statutes in reference to the same offence, and the one of subsequent date changes the nature of the offence, or its punishment, the indictment must, by proper averment, refer to the statute under which it was found, so that the court may see the exact character of the offence, and the nature and measure of the punishment to be imposed.⁸

1. See *State v. Willis*, 78 Me. 70; *Com. v. Langley*, 80 Mass. (14 Gray) 21; *State v. Marchant*, 15 R. I. 539; *State v. Doyle*, 15 R. I. 527; *State v. Sparrow*, 2 Tayl. (N. Car.) 93.

2. *State v. Hurley*, 71 Me. 354. See *State v. Slack*, 30 Tex. 354; *U. S. v. Dow, Taney* (C. C.) 34.

3. *State v. Hays*, 24 Mo. 358. See *State v. Jackson*, 39 Me. 291; *Jane v. State*, 3 Mo. 61.

4. *State v. Johnson*, 1 Miss. (Walk.) 592. See also *Crichton v. People*, 1 Abb. (N. Y.) App. Dec. 467.

5. *Clark v. State*, 34 Ind. 436; *State v. McMickle*, 34 Tex. 676; *State v. Elliott*, 34 Tex. 148; *State v. O'Keefe*, 41 Vt. 691; *U. S. v. Crittenden*, 1 Hemp. (C. C.) 61; *U. S. v. Winslow*, 3 Sawy. (C. C.) 337.

No distinction is made in this regard between felonies and misdemeanors, or between capital and other cases. *State*

v. McMickle, 34 Tex. 676; *State v. Elliott*, 34 Tex. 148.

6. See *People v. Aro*, 6 Cal. 207; s. c., 65 Am. Dec. 503; *Farrell v. State*, 45 Ind. 371; *Hardebeck v. State*, 10 Ind. 459; *Hampton v. State*, 8 Ind. 336; *Cokely v. State*, 4 Iowa 477; *State v. McMickle*, 34 Tex. 676; *State v. Hill*, 34 Tex. 623; *State v. Elliott*, 34 Tex. 148; *Fish v. Manning*, 31 Fed. Rep. 340.

"Or About" Rejected as Surplusage.—In Kansas, where an offence is charged to have been committed "on or about" a certain day, the words "or about" in the information may be rejected as surplusage. *State v. Harp*, 31 Kan. 496. See also *Hampton v. State*, 8 Ind. 336; *Hardebeck v. State*, 10 Ind. 459.

7. See *State v. Tuller*, 34 Conn. 280; *Rawson v. State*, 19 Conn. 292.

8. See *Lyon v. State*, 61 Ala. 224; *McDowell v. State*, 61 Ala. 172; *Com. v. Hitchings*, 71 Mass. (5 Gray) 482;

n. FUTURE AND IMPOSSIBLE DATES—(1) *Necessity of Alleging Prior Date*.—It has been held to be an indispensable prerequisite to the sufficiency of an information or indictment that it charge the offence to have been committed anterior to the filing of the same, and that complaint cannot be resorted to to supply such an omission;¹ but it is thought that where the commission of the offence is charged to have been on a particular day, which is anterior to the filing of the indictment, there is no necessity for the averment that the offence was committed before the finding of the indictment.²

(2) *Effect of Alleging Future Date*.—It has been held that an indictment is good, although the offence is alleged to have been committed upon an impossible day, because an allegation of the time of the commission of the offence in indictments is, in general, immaterial;³ but the better opinion appears to be that an indictment alleging the offence to have been committed on a future or impossible day, is fatally defective,⁴ and cannot be made good by resorting to the complaint.⁵

o. ALLEGING CONTINUOUS OFFENCES.—It is thought that all continuous offences which, in their nature, are capable of being committed on a single day, may be charged to have been committed on a specified day like offences not continuous.⁶

State *v. Wise*, 66 N. Car. 120; State *v. Chandler*, 2 Hawks (N. Car.) 439; Nichols' Case, 7 Gratt. (Va.) 589.

1. McIntyre *v. State*, 55 Ala. 167; Kennedy *v. State*, 22 Tex. App. 693.

It must also appear from the proof that the offence was committed anterior to the presentment of the indictment. Clement *v. State*, 22 Tex. App. 23.

It is not necessary under the code that the indictment should state that the offence was committed before the finding. McGuire *v. State*, 37 Ala. 161.

2. People *v. LaFuerite*, 6 Cal. 202.

3. Conner *v. State*, 25 Ga. 515; s. c., 71 Am. Dec. 184. See Jones *v. Com.*, 1 Bush (Ky.) 34; s. c., 89 Am. Dec. 605; Stevenson *v. State*, 5 Baxt. (Tenn.) 681; People *v. Littlefield*, 5 Cal. 355.

4. McGehee *v. State*, 26 Ala. 154; People *v. Moody*, 69 Cal. 184; Murphy *v. State*, 106 Ind. 96; s. c., 55 Am. Rep. 722; State *v. Windell*, 60 Ind. 300; State *v. Noland*, 29 Ind. 212; State *v. Patterson* (Ind.), 7 West. Rep. 511; State *v. Conwell*, 80 Me. 80; State *v. Thurstin*, 35 Me. 205; s. c., 58 Am. Dec. 696; Markley *v. State*, 10 Mo. 291; Serpentine *v. State*, 2 Miss. (1 How.) 256; State *v. Pratt*, 14 N. H. 456; State *v. Woodman*, 3 Hawks (N. Car.) 384; State *v. Sexton*, 3 Hawks (N. Car.) 184; s. c.,

14 Am. Dec. 584; Pennsylvania *v. McKee*, Addis (Pa.) 33; State *v. Ray*, Rice's Law (S. Car.) 1; s. c., 33 Am. Dec. 90; State *v. Davidson*, 36 Tex. 325; Joel *v. State*, 28 Tex. 642; Kennedy *v. State*, 22 Tex. App. 693; Lee *v. State*, 22 Tex. App. 547; Goddard *v. State*, 14 Tex. App. 566; Williams *v. State*, 12 Tex. App. 395; Robles *v. State*, 5 Tex. App. 346; Shoefecater *v. State*, 5 Tex. App. 207; State *v. Litch*, 33 Vt. 67.

An indictment, found on the 18th of January, 1843, charged the respondent with the commission of an offence on that day. Held, that as the offence was charged in the past tense, the plain import of the language used was, that it was committed before the indictment was found. State *v. Pratt*, 14 N. H. 456. See also Kennedy *v. State*, 22 Tex. App. 693; Com. *v. Miller*, 79 Ky. 451.

An indictment found in May, 1886, alleging that defendant assaulted deceased Dec. 25th, 1886, of which mortal wound he died Dec. 25th, 1885, being manifestly a clerical error, is not fatally defective. State *v. McDaniel* (Mo.), 14 West. 334. But compare McGehee *v. State*, 26 Ala. 154; Joel *v. State*, 28 Tex. 642.

5. Kennedy *v. State*, 22 Tex. App. 693.

6. In such cases nothing is gained by

p. "ON DIVERS OTHER DAYS."—An indictment alleging one and the same offence to have been committed on different days is bad;¹ but an indictment charging an offence on a certain day and on divers other days is good, the latter words being surplusage.²

1. *continuando*, except to enable the court to pass some special judgment or impose a more aggravated punishment. *Hall v. State*, 53 Ala. 463; *State v. Glaze*, 9 Ala. 283; *State v. Lemay*, 13 Ark. 405; *Baugh v. State*, 14 Ind. 29; *State v. Way*, 5 Neb. 283; *Swancoat v. State*, 4 Tex. App. 105.

A contrary doctrine, it seems, prevails in Massachusetts. See *Com. v. Frates*, 82 Mass. (16 Gray) 236; *Com. v. Langley*, 80 Mass. (14 Gray) 21; *Com. v. Snow*, 80 Mass. (14 Gray) 20; *Wells v. Com.*, 78 Mass. (12 Gray) 326; *Com. v. Hart*, 76 Mass. (10 Gray) 465; *Com. v. Keefe*, 75 Mass. (9 Gray) 290; *Com. v. Gardner*, 73 Mass. (7 Gray) 494.

Cruelty to Animals.—Indictments for cruelty to animals may allege a period of time instead of a single date, the offence involving continuous action. *State v. Bosworth*, 54 Conn. 1.

Frequenting Opium Den.—In an indictment for frequenting an opium den for the purpose of smoking opium, where the offence is in its nature continuing from day to day, or constituted out of a series of minor acts, it is sufficient to charge the act as having been committed upon a particular day. *State v. Ah Sam*, 14 Oreg. 347.

Failure to Support Family.—Where an information under Conn. Gen. Stat., tit. 51, § 75, charged a mispending by the defendant of his earnings, and a neglect to support his family on a certain day named, *held* that the state was not limited to proof of such conduct on a single day, but might show that he had so conducted from the time of the marriage to the institution of the prosecution, about a month; such evidence being admissible, if not as substantive proof of the crime on the particular day, yet at least as proof of the intent of his conduct. *State v. Ransell*, 41 Conn. 433.

Failure to Pay Over Money.—An indictment charging that an officer on a certain day, and for five days thereafter, and ever since then, had refused to pay over certain public money, *held* to charge but one offence. *People v. Otto*, 70 Cal. 523.

The indictment charged in effect that the defendant was the tax collector of

Del Norte county from the first Monday in January, 1883, at twelve o'clock M., to the like day and time on the 5th day of January, 1885; that as tax collector he had, on the 5th day of January, 1885, received and collected certain public moneys; and on that day and for five days thereafter, and ever since then, had wholly and wilfully refused and omitted to pay it over to the county treasurer. *Held*, that the indictment charged but one offence, and was sufficient under § 424 of the Penal Code. *People v. Otto*, 70 Cal. 523.

Intoxicating Liquors.—A complaint charging the unlawful keeping of liquors for sale, with *continuando* between certain dates, must be sustained by proof of acts within the times specified. *Com. v. Purdy* (Mass.), 15 N. E. Rep. 355.

An indictment which avers that the defendant, from a day named "to the day of finding this indictment," was a common seller of intoxicating liquors, states the time with sufficient certainty. *Com. v. Wood*, 70 Mass. (4 Gray) 11. But it has been *held* that an indictment which charges the defendant with being a common seller of spirituous and intoxicating liquors from a day named "to the day of the finding, presentment, and filing of this indictment," is fatally indefinite. *Com. v. Adams*, 70 Mass. (4 Gray) 43. See also *Collins v. State*, 58 Ind. 5.

1. *State v. Hendricks, C. & N. (N. Car.)* 369.

2. *Cook v. State*, 11 Ga. 53, 56; s. c., 56 Am. Dec. 410; *People v. Adams*, 17 Wend. (N. Y.) 475; *Rex v. Redman*, 1 Leach, C. L. 477; *Rex v. Sadi*, 1 Leach, C. L. 468; *United States v. La Coste*, 2 Mason, C. C. 140; 1 Stark. Cr. Pl. 235. See also *Com. v. Sheehan*, 143 Mass. 468; *State v. Kobe*, 26 Minn. 148; *State v. Temple*, 38 Vt. 37.

Averment of the Time of Commission of Offence.—In criminal prosecutions it is essential that the indictment or complaint allege the day, as well as the month and year, on which the offence was committed, and a complaint is fatally defective if it merely avers that the respondent did the acts complained

10. Averments as to Place.¹—The place where an offence is alleged to have been committed must be set out and proved as set out.²

a. PARTICULAR LOCALITY.—The particular locality where an offence is alleged to have been committed should be distinctly and definitely set out.³ Where, under a statute to constitute an act an offence, it must have been done in a public place it is sufficient to allege that it was done in a "public place," without setting out the facts which make the place a public place.⁴

b. OFFENCES COMMITTED ON WATER.—Where an offence is committed upon an inland navigable stream, an allegation that it was committed in a certain county is sustained by proof of its commission on a vessel which passed through that county on a voyage, during which the act took place.⁵ Where an offence is committed on board an inland steamer, and a trial therefore is being had in the county, where is the terminus of the route, the indictment must allege all the facts necessary to give the special statutory jurisdiction.⁶ Where the offence is committed on

of "on Sunday and divers days and times between the twenty-third day of September, A. D. 1885, and the thirtieth day of September, A. D. 1885." *State v. Beaton*, 79 Me. 314.

1. See also VII., 14.

2. See *Clark v. State*, 46 Ala. 307; *People v. Parks*, 44 Ala. 105; *Green v. State*, 41 Ala. 419; *McQuistian v. State*, 25 Ark. 435; *People v. Roach*, 48 Cal. 382; *Carter v. State*, 48 Ga. 43; *Sattler v. People*, 59 Ill. 68, 70; *Jackson v. People*, 40 Ill. 405; *Gastner v. State*, 47 Ind. 144; *Mullinix v. State*, 43 Ind. 511; *Baker v. State*, 34 Ind. 104; *Clem v. State*, 31 Ind. 480; *People v. Gregory*, 30 Mich. 371; *Thompson v. State*, 51 Miss. 353; *State v. Meyer*, 64 Mo. 190; *State v. Chamberlain*, 6 Nev. 257; *Burch v. State*, 43 Tex. 376; *Shadle v. State*, 34 Tex. 572; *Field v. State*, 34 Tex. 39; *Vance v. State*, 32 Tex. 396; *State v. Johnson*, 32 Tex. 96; *Territory v. Freeman*, *MacCahon*, (Kan.) 56; *Anonymous*, 1 Bulst. 205.

3. See *Covy v. State*, 4 Port. (Ala.) 186; *People v. Thompson*, 28 Cal. 214; *Markham v. State*, 25 Ga. 52; *Kleespies v. State*, 106 Ind. 383; *Norris's House v. State*, 3 G. Greene (Iowa) 513; *State v. Hall*, 79 Me. 501; *State v. McLoon*, 78 Me. 420; *Com. v. Intoxicating Liquors*, 146 Mass. 509; *Com. v. Hutton*, 71 Mass. (5 Gray) 89; s. c., 66 Am. Dec. 352; *Com. v. Arnold*, 21 Mass. (4 Pick.) 251; *State v. Wilson*, 67 N. Car. 456; *Bossert v. State*, *Wright* (Ohio) 113; *State v. Price*, 11

N. J. L. (6 Halst.) 203; *Comer v. State*, 26 Tex. App. 509; *Scribner v. State*, 12 Tex. App. 173; *Stephen's Case*, 2 Leigh (Va.) 759; *Reg. v. Orchard*, 8 Car. & P. 565; s. c., 20 Eng. L. & Eq. 598; *Reg. v. Holmes*, 1 Car. & K. 248; s. c., 20 Eng. L. & Eq. 597.

An indictment for playing at a game with cards at a "tavern and inn," and again charging that it was done "in a room not attached to said tavern and inn," is not uncertain. *Comer v. State*, 26 Tex. App. 509. See also *Com. v. Arnold*, 4 Pick. (Mass.) 251. See title GAMING, vol. 8, p. 1059.

In Arson.—In an indictment for burning a barn, the averment "that G P, etc., at the township aforesaid, etc., one barn, of the property of one N R, not parcel of the dwelling house of the said N R, there situate, wilfully and maliciously did burn," is a sufficient averment of the locality of the barn. *State v. Price*, 11 N. J. L. (6 Halst.) 203.

4. *State v. Mathis*, 21 Ind. 277; *Com. v. Newbury*, 19 Mass. (2 Pick.) 51; *Asky v. State*, 15 Tex. App. 558; *Scribner v. State*, 12 Tex. App. 173. *Compare Williams v. State*, 64 Ind. 553.

A public street in a town or city is a public highway, and it is sufficient, in an information or indictment, to describe it as a public street. *State v. Mathis*, 21 Ind. 277.

5. *State v. Tummonds*, 4 Minn. 325. See *State v. Robbins*, 14 Minn. 456.

6. *People v. Dougherty*, 7 Cal. 395.

board of a vessel while on the high seas, or in parts of another country, the facts giving special jurisdiction to the courts of this country must be fully set out and proved.¹

c. REPEATING AND REFERRING TO ALLEGATIONS—(1) *Generally*.—It is sufficient in the counts of an indictment to definitely refer to the venue laid in the caption or introduction to it.²

(2) "*Aforesaid County*."—Where but one county has been named in the commencement or in the first count of an indictment, it is sufficient in the succeeding counts to refer to it as the "county aforesaid";³ but where two or more counties have been previously named in an indictment, "the county aforesaid" is not a sufficient venue.⁴

(3) "*Said County*," *etc.*—Where the venue of an indictment is laid in a certain county of the State, and the offence charged was alleged to have been committed in "said county," naming it, the allegation is sufficient;⁵ and where the caption of an indictment shows the county and State in proper form, the name of the county in the body of the indictment without using "said," *etc.*, will be construed as referring to the county given in the caption.⁶

(4) "*Then and There*."⁷—Where the county is mentioned in the caption, the last of the words "then and there" in the body of the indictment will be understood as referring to that county;⁸ but it is thought that when it is necessary to allege particularly where an offence was committed, the word "there" is not equivalent to "in the county aforesaid," unless used in reference to a place before particularly described.⁹

1. *United States v. Anderson*, 17 Blatchf. C. C. 238.

2. *Redman v. State*, 1 Blackf. (Ind.) 429; *State v. Alsop*, 4 Ind. 481; *State v. Watrus*, 14 Iowa 489; *Strickland v. State*, 7 Tex. App. 34. See *Thayer v. State*, 11 Ind. 287.

3. *Reeves v. State*, 20 Ala. 33; *Thomas v. State*, 71 Ga. 44; *Noe v. People*, 39 Ill. 96; *Philadelphia W. & B. R. Co. v. State*, 20 Md. 157; *State v. Vincent*, 91 Mo. 662; *State v. Ames*, 10 Mo. 743; *State v. Wentworth*, 37 N. H. 196; *State v. Harden*, 1 Brev. (S. Car.) 47; *State v. Shull*, 3 Head (Tenn.) 42; *Barnes v. State*, 5 Yerg. (Tenn.) 186.

4. *State v. McCracken*, 20 Mo. 411; *Bell v. Com.*, 8 Grat. (Va.) 600; *Cain v. State*, 18 Tex. 391.

An indictment after "State of Texas, county of Fayette," and the usual commencement, charged "that James Cain, late of Travis county aforesaid, yeoman, with force and arms, in the county aforesaid; on, *etc.*, did then and there feloniously steal, take and carry away," *etc.* On motion in arrest of judgment,

indictment held bad for uncertainty and repugnancy in stating the venue. *Cain v. State*, 18 Tex. 391.

5. *People v. Sheldon*, 68 Cal. 434; *Long v. State*, 56 Ind. 133; *Everts v. State*, 48 Ind. 422; *State v. Conley*, 39 Me. 78; *Com. v. Edwards*, 70 Mass. (4 Gray) 1; *People v. Breese*, 7 Cow. (N. Y.) 429.

6. *Hanrahan v. People*, 31 Ill. 142; *State v. Baker*, 50 Me. 45.

7. See *ante*, IX., 9, k.

8. *State v. Slocum*, 8 Blackf. (Ind.) 315; *State v. Reid*, 20 Iowa 413; *Kennedy v. Com.*, 3 Bibb. (Ky.) 490; *Jeffries v. Com.*, 94 Mass. (12 Allen) 145; *State v. Goode*, 24 Mo. 361; *State v. Bell*, 3 Ired. (N. Car.) 506; *State v. Stewart*, 26 S. Car. 125.

Assault.—Where an indictment for an assault alleged that the defendant "then and there did," *etc.*, but no place or venue was otherwise laid, except that the county was named in the margin, it was held that the venue was not sufficiently laid. *Kennedy v. Com.*, 3 Bibb. (Ky.) 490.

9. *State v. Johnson*, 12 Minn. 476;

d. ORGANIZATION AND DIVISION OF COUNTIES.—Where an offence is committed in an organized county attached to another county for judicial purposes, the indictment should so allege.¹ Where the locality of the commission of a crime has ceased to be a portion of the county to which it belonged at the time of the commission of such crime, and has been incorporated with another county between the time when the crime was committed and the trial is had, the indictment properly charges its perpetration in the former county, while the trial is in the latter;² and where a new county is established by an act of assembly out of part of an old one, and the act provides that felonies committed in one territory which is not the new county shall be tried in the superior court in the old county, there is no repugnancy in charging the crime to have been committed in those two counties severally, in different counts of the indictment.³

e. OFFENCE ON OR NEAR BOUNDARIES.—While it is necessary that it distinctly appear from the record that the offence was committed in the county,⁴ yet where, upon the trial of an indictment alleging that an offence was committed in a certain county, and the evidence fails to show on which side of a survey and marked boundary line, between that county and another county, the offence was committed, courts have declined to reverse a judgment after verdict on the ground that the venue was not clearly proved as alleged.⁵ It has been provided by statute in some States that where a crime is committed on the border of two counties, or within a given distance of a border line of two

s. c., 93 Am. Dec. 241; *State v. Reid*, 20 Iowa 413.

1. *Miles v. State*, 23 Tex. App. 410. See *Chivarrio v. State*, 15 Tex. App. 330.

2. *Jordan v. State*, 22 Ga. 545.

3. *Holmes v. State*, 20 Ark. 168; *McElroy v. State*, 13 Ark. 708; *State v. Fish*, 4 Ired. (N. Car.) L. 219; *State v. Johnson*, 5 Jones (N. Car.) L. 221.

In North Carolina, by an act of assembly passed in 1842, a part of the county of Burke and a part of the county of Rutherford were constituted a new county by the name of McDowell; and, by a supplemental act, jurisdiction of all criminal offences committed in that part of McDowell taken from Burke was given to the superior court of Burke. *Held*, that an indictment for a criminal offence, alleging it to have been committed in Burke county, could not be supported by evidence showing the offence to have been committed in McDowell, after the establishment of the latter county. *State v. Fish*, 4 Ired. (N. Car.) 219.

The Arkansas act of 20th Decem-

ber, 1854, declaring the citizens living on the east fork of Illinois bayou, in Van Buren county, to be citizens of the county of Pope, with the rights and privileges thereof, did not have the effect to transfer any part of the territory of Van Buren county to Pope county; and so upon the trial of an indictment, alleging the offence to have been committed in Pope county, proof that it was committed on the east fork of Illinois bayou, in Van Buren county, does not sustain the allegation. *Holmes v. State*, 20 Ark. 168.

4. *Hite v. State*, 9 Yerg. (Tenn.) 357. See *Com. v. Inhabitants of North Brookfield*, 25 Mass. (8 Pick.) 463.

Where an indictment alleged the offence to have been committed "on the Penobscot river, between the two towns of E and H, or within the limits aforesaid, or either of them, and within the said county of Penobscot," it was *held* that the description of the place was sufficiently certain. *State v. Roberts*, 26 Me. 263.

5. *State v. Rhoda*, 23 Ark. 156. See also *State v. Godfrey*, 12 Me. 361.

counties, that either shall have jurisdiction to try and punish the accused.¹

f. OFFENCES COMMITTED IN MORE THAN ONE JURISDICTION.—Where an offence is a continuous one, and committed in more than one county, the courts of either county will have jurisdiction to try and punish the accused.²

11. Description of Person ; Misnomer.³

12. Describing Weapon.—It has been said that in case of an assault, "not even the instrument or its name requires mention, unless by reason of something in the statute, or made essential by its particular form."⁴ Thus in an indictment for murder it is sufficient to describe the weapon used as a "certain knife";⁵ and an averment in an indictment for homicide that it was committed "by some means, instrument, weapon, to the grand jury unknown," has been held to be sufficient.⁶

13. Describing Written Instrument.—It has been said that an instrument may be described in an information or indictment according to its legal effect;⁷ on the other hand, it has been held

1. See *State v. Roberts*, 26 Me. 263; *State v. Godfrey*, 12 Me. (3 Fairf.) 361; *Com. v. Gillon*, 84 Mass. (2 Allen) 502; *People v. Davis*, 56 N. Y. 95; *People v. Davis*, 45 Barb. (N. Y.) 494.

2. See *Elsay v. State*, 39 Ala. 664; *People v. Scott*, 74 Cal. 94; *Hurt v. State*, 26 Ind. 106; *State v. Jones*, 38 La. An. 792; *Norris v. State*, 33 Miss. 373.

Although under Penal Code Cal., § 786, providing that "when property taken in one county by burglary, robbery, larceny or embezzlement, has been brought into another, the jurisdiction of the offence is in either county," a criminal may be tried wherever he carries goods obtained by burglary, yet an information charging the offence of burglary to have been committed in San Bernardino county, where the burglar was found with the goods, cannot be supported by evidence of breaking and entering a house in San Diego county, whence the goods were brought to the former jurisdiction. *People v. Scott*, 74 Cal. 94.

3. See title MISNOMER, this series.

4. 2 Bish. Cr. Proc. (3rd ed.), § 64. See *State v. Moore*, 65 Mo. 606; *State v. Roderigas*, 7 Nev. 328; *State v. O'Flaherty*, 7 Nev. 153; *Paine v. State*, 5 Tex. App. 35; *Montgomery v. State*, 4 Tex. App. 140.

5. *State v. McDaniel*, 94 Mo. 301.

In an indictment for an assault with an axe, it will be inferred that it was a deadly weapon, without such allegation.

Dollarhide v. U. S., 1 Morris (Iowa) 233.

An indictment alleging that defendant feloniously assaulted another with a heavy stone, a deadly weapon, and beat him with great force, which was likely to produce death, is sufficient on motion to quash. *State v. Havens*, 95 Mo. 167.

A presentment that the defendant "did carry a belt or pocket pistol or revolver," is bad for uncertainty. *State v. Green*, 3 Heisk. (Tenn.) 131.

The words "with a dangerous weapon" may be omitted where all the ingredients of the crime that are set out necessarily imply the use of such weapon. *State v. Humphries*, 35 La. An. 966.

Producing Abortion.—An indictment which charges that the accused produced an abortion "with an instrument to the grand jurors unknown," is not defective for not describing the instrument. *State v. Wood*, 53 N. H. 484.

6. *People v. Cronin*, 34 Cal. 191.

7. See *Oliver v. State*, 1 Ala. Sel. Cas. 41; s. c., 37 Ala. 134; *Bonnell v. State*, 64 Ind. 498; *Com. v. White*, 145 Mass. 392; *Com. v. Grimes*, 76 Mass. (10 Gray) 470; s. c., 71 Am. Dec. 666; *People v. Girardin*, 1 Mich. 90; *State v. Rucker*, 93 Mo. 88; *State v. Hinckley*, 4 Minn. 345; *State v. Stewart*, 90 Mo. 507; *Larison v. State*, 49 N. J. L. (20 Vr.) 256; *State v. Hickman*, 7 N. J. L. (3 Halst.) 299; *State v. Gustin*, 5

that setting out a writing, according to the purport, is to set it out in its own words, and not according to the effect,¹ and that an information or indictment which sets out the effect only, and not the substance of a material document is defective.² The general rule is that when the tenor of a writing is required to be set out, as in indictments for forgery and libel, the indictment should contain the exact copy thereof;³ but this rule is not violated by the use in the copy of a limited number of abbreviations not contained in the original, provided the words meant are clearly indicated; but this rule will not authorize numerous abbreviations, specially when the meaning of many of these is conjectural.⁴ Where an instrument is set forth in the indictment, a mistake of the pleader in designating its character will not vitiate the indictment.⁵

Where the setting out of an instrument in an indictment can give no information to the court, it is unnecessary to set it out.⁶

14. Describing Property, Ownership and Value.—The rules of law and fairness of the accused require that as definite description as the nature of the property will admit of should be given, and where the grand jury or prosecutor is unable to give a definite description, that fact should be stated.⁷ The necessity for a de-

N. J. L. (2 South.) 749; *State v. Granville*, 45 Ohio St. 264; *Hummel v. State*, 17 Ohio St. 628; *Stewart v. Com.*, 4 Serg. & R. (Pa.) 194; *Baldwin v. State*, 21 Tex. App. 591; *Dignowitty v. State*, 17 Tex. 521; s. c., 67 Am. Dec. 670; *State v. Brown*, 1 William (Vt.) 619; *U. S. v. Keen*, 1 McCl. C. C. 429; *U. S. v. Moller*, 16 Blatchf. C. C. 65; *U. S. v. Thompson*, 29 Fed. Rep. 86; *Reg. v. Coulson*, 19 L. J. R. (N. S.) M. C. 182, s. c., 14 Jur. 557; 1 Eng. L. & Eq. 550.

Where an indictment for obtaining by false pretences the signature of a person to a deed of land did not allege that the grantor in the deed owned or claimed any title to the lands conveyed thereby, and the description of such lands was in the most general terms, as certain lands in the state of Texas and United States of America, and the date of the deed was nowhere averred, so that it would be impossible to identify the instrument; and it did not appear that the deed would tend to the hurt or prejudice of the grantor, and there was no averment that the deed could not be more particularly described, it was *held* that in these particulars the indictment was defective. *Dord v. People*, 9 Barb. (N. Y.) 671.

1. *Downing v. State*, 4 Mo. 572.

2. *U. S. v. Watson*, 17 Fed. Rep. 145. See *Whitney v. State*, 10 Ind. 404.

3. *State v. Jay*, 34 N. J. L. (5 Vr.) 368; *People v. Kingsley*, 2 Cow. (N. Y.) 522; s. c., 14 Am. Dec. 520; *Dyer v. State*, 24 Tex. App. 132.

4. *State v. Jay*, 34 N. J. L. (5 Vr.) 368.

5. *Garmire v. State*, 104 Ind. 444.

6. *Reg. v. Coulson*, 14 Jur. 557; s. c., 19 Law J. Rep. (N. S.) M. C. 182; 1 Eng. L. & Eq. 550.

7. *State v. Tilney*, 38 Kan. 714; *State v. Brown*, 32 La. An. 1020; *Com. v. Strangford*, 112 Mass. 292; *Com. v. Grimes*, 76 Mass. (10 Gray) 470; s. c., 71 Am. Dec. 666; *McVey v. State*, 23 Tex. App. 661; *U. S. v. Clafin*, 13 Blatch. C. C. 178. See *State v. Brown*, 32 La. An. 1020.

Owner Unknown.—An indictment which alleges that the owner is a person whose name is unknown to the grand jurors is valid. *McVey v. State*, 23 Tex. App. 661.

As to the description of bank bills in the indictment, see *State v. Williams*, 19 Ala. 15; s. c., 54 Am. Dec. 184; *Bullock v. State*, 10 Ga. 47; s. c., 54 Am. Dec. 369; *New Hope Del. B. Co. v. Perry*, 11 Ill. 467; s. c., 52 Am. Dec. 443; *Com. v. Grimes*, 10 Gray (Mass.) 470; s. c., 71 Am. Dec. 666; *State v.*

scription of the property in the indictment is for the purpose of individualizing the transaction, and for that reason it must be stated with reasonable certainty what it was that was stolen.¹

A positive averment in an indictment of value is necessary only in those cases where value is an ingredient of the offence, as in grand and petit larceny, and the malicious destruction of property.² The allegation of value in an indictment is not made, like the description of the property and its ownership, for the purpose of identifying the transaction, but to indicate the degree of criminality, and to enable the court to fix the punishment on conviction; for this reason, an allegation of value is only required in those cases where the kind or extent of the punishment depends on the value of the article stolen or destroyed.³

15. Intent ; Knowledge⁴—*a.* NECESSITY AND SUFFICIENCY OF AVERMENTS GENERALLY.—Where the evil intent with which an act is done forms part of, or is a necessary part of, the offence, the intent must be alleged in the indictment and proved, and the intent with which an act was done must be proved to be the same as that charged;⁵ but where the intent with which an act is done

Smart, 4 Rich. (S. Car.) L. 356; 55 Am. Dec. 683.

Simply describing the subject of larceny as so many dollars or so many dollars in money, without further particularization, is bad. See *Crocker v. State*, 47 Ala. 53; *Barton v. State*, 29 Ark. 68; *People v. Ball*, 14 Cal. 101; s. c., 73 Am. Dec. 631; *State v. Tilney*, 38 Kan. 714; *State v. McNulty*, 26 Kan. 533; *State v. Henry*, 24 Kan. 457; *Com. v. Gallagher*, 82 Mass. (16 Gray) 240; *Brown v. People*, 29 Mich. 232; *State v. Hinckley*, 4 Minn. 345; *Merrill v. State*, 45 Miss. 651; *State v. Longbottoms*, 11 Humph. (Tenn.) 39; *Leftwich v. Com.*, 20 Gratt. (Va.) 716. *Compare* *State v. Green*, 27 La. An. 598; *State v. Shonhausen*, 26 La. An. 421; *State v. Carro*, 26 La. An. 377; *State v. Walker*, 24 La. An. 425; *McDavit v. State*, 20 Ohio St. 231.

1. See *Keller v. State*, 51 Ind. 111; *McLaughlin v. State*, 45 Ind. 338; *State v. Watron*, 13 Iowa 489; *Jane v. Com.*, 3 Met. (Ky.) 18; *Com. v. Dean*, 109 Mass. 349; *State v. Rochtorde*, 52 Mo. 99; *State v. Gary*, 26 N. H. 359; *State v. Dougherty*, 4 Ore. 200; *Gallagher v. State*, 26 Wis. 423; *U. S. v. Cruikshank*, 92 U. S. 542; *Rex v. Stevens*, 3 East 132.

However, the pleader is not to be held to such strict rules as will defeat the ends of justice. *Moyer v. Com.*, 7 Barr. (Pa.) 439.

2. *People v. Higbie*, 66 Barb. (N. Y.) 131.

3. See *State v. Daniels*, 32 Mo. 558; *People v. Higbie*, 66 Barb. (N. Y.) 131; *State v. Chaney*, 9 Rich. (S. Car.) L. 439; *State v. Gossett*, 9 Rich. (S. Car.) L. 428; *Johnson v. State*, 29 Tex. 492.

4. As to intent, see 4 Am. & Eng. Ency., C. of L., tit. CRIMINAL LAW, IV., 5, p. 680; XIII., 6, a, (1), p. 710. Also tit. CRIMINAL PROCEDURE III., 2, d, p., 746; XV., 10.

5. *State v. Eldridge*, 12 Ark. (7 Eng.) 608; *Gabe v. State*, 6 Ark. (1 Eng.) 519; *Garmire v. State*, 104 Ind. 444; *State v. Freeman*, 6 Black. (Ind.) 248; *Com. v. Smith*, 143 Mass. 169; *Denny v. Williams*, 87 Mass. (5 Allen) 4; *Com. v. Hersey*, 84 Mass. (2 Allen) 180; *Com. v. Merrill*, 80 Mass. (14 Gray) 415; s. c., 77 Am. Dec. 339; *State v. Ullman*, 5 Minn. 13; *Sarah v. State*, 28 Miss. 267; s. c., 61 Am. Dec. 544; *Morman v. State*, 24 Miss. 54; *State v. Card*, 34 N. H. 510; *State v. Gove*, 34 N. H. 510; *State v. Malloy*, 34 N. J. L. (5 Vr.) 410; *People v. Lehman*, 2 Barb. (N. Y.) 216; *State v. Halder*, 2 McC. (S. Car.) 377; s. c., 13 Am. Dec. 738; *Bartlett v. State*, 21 Tex. App. 500; *Howard v. State*, 8 Tex. App. 447; *Johnson v. State*, 1 Tex. App. 146. See *Com. v. Macuboy*, 3 Dana. (Ky.) 70; *State v. Porter*, 9 La. An. 106; *State v. Read*, 6 La. An. 227; *State v. Stiles*, 5 La. An. 324; *State v. Casey*, 45 Me. 435; *State v. McKenzie*, 42 Me. 392; *Ike v. State*, 23 Miss. 525; *People v. Allen*, 5 Den. (N. Y.) 76; *State v. Raines*, 3 McC. (S. Car.) 533;

forms no part of the offence, it is not necessary to aver it in the indictment.¹

b. PARTICULAR WORDS TO DESCRIBE INTENT; "UNLAWFULLY," ETC.—(1) *Necessity in General.*—The word "unlawfully" is thought to be essential to all indictments for felony, whether at common law or under statute,² and cannot be described or its use supplied by any circumlocution.³ But where the statute under which the indictment is framed does not use the word "unlawfully" in designating the offence, the indictment need not use it.⁴

(2) *Indictment for Misdemeanors.*—It has been said that where an indictment charges as "unlawfully" acts which at common law constitute only a misdemeanor, the word "unlawfully" cannot be rejected as surplusage, but will render the indictment bad;⁵ but the better opinion is thought to be that the use of the word "unlawfully" in an indictment for a misdemeanor neither renders

State *v.* Williams, 14 Tex. 98; Hampton *v.* Case, 3 Gratt. (Va.) 590.

The omission of the positive averment that the prisoner did the act is not supplied by the concluding averment of the *scienter*, and is fatal. State *v.* Halder, 2 M'Cord, (S. C.) 377; s. c., 13 Am. Dec. 738.

1. Harding *v.* People, 10 Colo. 387; State *v.* McCollum, 44 Mo. 343, 345; State *v.* Hackfath, 20 Mo. App. 614; State *v.* Hurds, 19 Neb. 316.

An attempt to commit a crime involves both a guilty intent and an overt act, yet it is not enough to charge an attempt merely, but both the intent and the overt act must be specifically alleged. State *v.* Wilson, 30 Conn. 500.

2. Nevills *v.* State, 7 Coldw. (Tenn.) 78. See Mott *v.* State, 29 Ark. 147; Edwards *v.* State, 12 Ark. 122; Bowler *v.* State, 41 Miss. 570; State *v.* Deffenbacher, 51 Mo. 26; State *v.* Williams, 30 Mo. 364; State *v.* Davis, 29 Mo. 391; State *v.* Gilbert, 24 Mo. 380; State *v.* Maddock, 9 Mo. 739; Jane *v.* State, 3 Mo. 61; State *v.* Roper, 88 N. Car. 656; State *v.* Scott, 72 N. Car. 461; State *v.* Rucker, 68 N. Car. 211; State *v.* Purdie, 67 N. Car. 25; State *v.* Jesse, 2 Dev. & B. (N. Car.) 297; Mears *v.* Com., 2 Grant (Pa.) 385; Presley *v.* Holmes, 33 Tex. 476; Cain *v.* State, 18 Tex. 387; Randall *v.* Com., 24 Gratt. (Va.) 644; State *v.* Brister, 1 Houst. (Del.) C. C. 150. Compare State *v.* Eldridge, 12 Ark. 608; People *v.* Parsons, 6 Cal. 487; People *v.* Olivera, 7 Cal. 403; Jane *v.* Com., 3 Met. (Ky.) 18; Northington *v.* State, 14 Lea (Tenn.) 424.

Act Made Felony by Statute.—To

warrant a conviction and punishment of an offender for an act which is not a felony at common law, but has been made so by statute, the indictment must allege that the accused committed the act charged "feloniously." If this allegation is omitted, no felonious intent is imputed, and the accused can, at most, be convicted of the common law offence constituted by the act proved. Nevills *v.* State, 7 Coldw. (Tenn.) 78.

The word "feloniously" is not necessary to the validity of an indictment if without it the facts charged make out an offence. Northington *v.* State, 14 Lea (Tenn.) 424. See also Jane *v.* Com., 3 Met. (Ky.) 18.

3. State *v.* Rucker, 68 N. Car. 211.

4. State *v.* Murphy, 43 Ark. 178. See Butler *v.* State, 22 Ala. 43; Beasley *v.* State, 18 Ala. 535; State *v.* Absence, 4 Port. (Ala.) 397; People *v.* Olivera, 7 Cal. 403; Miller *v.* People, 2 Scam. (Ill.) 233; Quigley *v.* People, 2 Scam. (Ill.) 301; Jane *v.* Com., 3 Met. (Ky.) 18; Com. *v.* Scannel, 65 Mass. (11 Cush.) 547; State *v.* Crummev, 17 Minn. 72; State *v.* Hogard, 12 Minn. 293; Nevills *v.* State, 7 Coldw. (Tenn.) 78; Jones *v.* State, 3 Heisk. (Tenn.) 445; Riddle *v.* State, 3 Heisk. (Tenn.) 401; Williams *v.* State, 3 Heisk. (Tenn.) 376; Williams *v.* State, 8 Humph. (Tenn.) 585; Peek *v.* State, 2 Humph. (Tenn.) 78.

5. See Black *v.* State, 2 Md. 376; Com. *v.* Newell, 7 Mass. 245; Com. *v.* Macomber, 3 Mass. 254; State *v.* Wheeler, 3 Vt. 344; s. c., 23 Am. Dec. 212; State *v.* Darrah, 1 Houst. (Del.) C. C. 112.

the indictment defective nor changes the grade of the offence.¹

(3) *Sufficiency and Effect Generally*.—An indictment charging an attempt “unlawfully, willingly and maliciously,” to do a criminal act, charges an unlawful intent,² but cannot have the effect of making the act a public offence.³

(4) *Substituted and Equivalent Words*.—The rule that an indictment for a statutory offence is sufficient if it charges an offence in the same words, as the statute cannot avail to extend an indictment, unless the substituted word has the same import as the word for which it was substituted; thus an indictment charging an offence to have been done willingly under a statute punishing it if done wittingly, the words do not convey substantially the same meaning, and the indictment will be bad.⁴

(5) *Indictment Against Accessory*.—The word “unlawfully” is not necessary in an indictment under a statute by which any

1. *Beasley v. State*, 18 Ala. 535; *State v. Sparks*, 78 Ind. 166; *State v. Edwards*, 90 N. Car. 710; 2 Abb. U. S. 369; *United States v. Prescott* 2 Biss. (C. C.) 325; *United States v. Gallagher*, 2 Paine (C. C.) 447. See *Butler v. State*, 22 Ala. 43; *State v. McNally*, 32 Iowa 580; *State v. Knouse*, 29 Iowa 118; *State v. Boyle*, 28 Iowa 522; *Com. v. Squire*, 42 Mass. (1 Metc.) 258; *Wile v. State*, 60 Miss. 260; *Bowler v. State*, 4 Miss. 570; *People v. Lohman*, 2 Barb. (N. Y.) 216; *Lohman v. People*, 1 N. Y. 379; s. c., 49 Am. Dec. 340; *State v. Upchurch*, 9 Ired. (N. Car.) L. 454; *Hackett v. Com.*, 3 Harris. (Pa.) 95; *State v. Wimberly*, 3 McC. (S. Car.) 190; *Peek v. State*, 2 Humph. (Tenn.) 78; *State v. Bridges*, 1 Murph. (N. Car.) 134; *Holmes' Case*, Cro. Car. 376; 2 East P. C. 1027; 2 Hawks. P. C. (Conw. ed.) 621; *Rex v. Turnith*, 1 Mod. 26; *Rex v. Carardice*, Russ. & Ry. 205.

A statutory provision that an act criminal by both statute and at common law may be set out in an indictment in either the statutory or the common law form, does not apply where the act is a misdemeanor at common law, and a felony by statute, and in such case the offence must be charged to have been done “feloniously.” *Bowler v. State*, 41 Miss. 570; *Wile v. State*, 60 Miss. 260.

2. *Com. v. McLaughlin*, 105 Mass. 460; *Com. v. Sholes*, 95 Mass. (13 Allen) 554.

3. *State v. Wheeler*, 3 Vt. 344; s. c., 23 Am. Dec. 212.

4. *Harrington v. State*, 54 Miss. 490. See *Skags v. State*, 108 Ind. 53; *State v. Lowe*, 93 Mo. 547; *State v.*

Card, 34 N. H. 510; *State v. Massey*, 97 N. Car. 465; *Chapman v. Com.*, 5 Whart. (Pa.) 427; s. c., 34 Am. Dec. 565; *State v. Pennington*, 3 Head. (Tenn.) 119; *Dillard v. State*, 3 Heisk. (Tenn.) 260; *State v. Delue*, 1 Chand. (Wis.) 166.

“Feloniously” for “Unlawfully.”—Where the word “feloniously” is used in an indictment instead of the word “unlawfully,” as used in the statute, the indictment is sufficient on motion to quash, they being words of equivalent meaning. *Skaggs v. State*, 108 Ind. 53.

The words “With malice aforethought” are legal equivalents of “with malice and premeditation.” *State v. Lowe*, 93 Mo. 547.

Where the statute uses the words “wilfully and maliciously,” an indictment omitting “wilfully” and inserting “unlawfully and wantonly,” is sufficient. *State v. Pennington*, 3 Head (Tenn.) 119.

Where a statute makes an act a crime if done “wantonly and wilfully,” these words are not sufficiently supplied by an averment in an indictment drawn under the statute that the act was done “unlawfully and maliciously.” *State v. Massey*, 97 N. Car. 465.

An indictment describing the offence as having been done “feloniously and unlawfully, and maliciously,” will not be sustained where the statute uses the words “wilfully and maliciously.” *State v. Delue*, 1 Chand. (Wis.) 166.

Where a statute makes criminal the doing of the act “wilfully and maliciously,” it is not sufficient for the indictment to charge that it was done

person accessory to a felony committed in another State, and punished as if the felony were committed in the State where the indictment is found and the trial had, and in the same manner as the principal offender.¹

c. KNOWLEDGE.—Where a statement of the act itself necessarily includes a knowledge of the illegality of the act, an averment of knowledge or bad intent is unnecessary;² and where the statute does not make knowledge an ingredient of the offence, knowledge need not be averred in the indictment.³

16. Joinder of Counts and Offences—Duplicitv—a. GENERAL MATTERS.—No joinder of counts in an indictment, no matter how incongruous or illy joined, is illegal to such an extent as to be demurrable, nor is the judgment recovered thereon subject to be arrested or reversed on a writ of error because of such joinder;⁴ but a joinder of two distinct offences of a different nature requiring different places and modes of trial is illegal, and the indictment will be quashed.⁵

An objection to the whole indictment will not prevail if there be one good count,⁶ because an indictment which contains sufficient allegations to charge a respondent will not be impaired by other allegations which are insensible and immaterial.⁷

"feloniously and unlawfully," or "feloniously, unlawfully and wilfully." *State v. Card*, 34 N. H. 510.

1. *State v. Felch*, 58 N. H. 1.

Allegation Against Accessory.—The allegation in an indictment against a person as an accessory before the fact to a felony described, that he "feloniously and maliciously" incited and procured the principal to commit the felony, imports that the defendant acted with an unlawful intent. *Com. v. Adams*, 127 Mass. 15.

2. *Com. v. Stout*, 7 B. Mon. (Ky.) 247.

3. *United States v. Malone*, 20 Blatchf. C. C. 137.

4. See *People v. Garnett*, 29 Cal. 622; *People v. Shotwell*, 27 Cal. 394; *Jones v. State*, 37 Ga. 51; *Wall v. State*, 51 Ind. 453; *Miller v. State*, 51 Ind. 405; *Wreidt v. State*, 48 Ind. 579; *Hamilton v. People*, 29 Mich. 173; *Teat v. State*, 53 Miss. 439; *State v. Kibby*, 7 Mo. 317; *State v. Brown*, Winst. (N. Car.) No. II., 54; *Henwood v. Com.*, 52 Pa. St. 424; *State v. Nelson*, 14 Rich. (S. Car.) 169; *Janeway v. State*, 1 Head (Tenn.) 130; *Hobbs v. State*, 44 Tex. 353; *Varnwell v. State*, 1 Tex. App. 745; *Ketchingman v. State*, 6 Wis. 426; *U. S. v. Stetson*, 3 Woodb. & M. C. C. 164; *Rex v. Jones*, 2 Campb. 131; *Reg. v. Ferguson*, Dears 427; s. c., 6

Cox C. C. 454; *Rex v. Kingston*, 4 East 313; *Reg. v. Holman*, Leigh & C. 177; s. c., 9 Cox C. C. 201; 1 Stark. Cr. Pl. (2nd ed.) 39. Compare *Davis v. State*, 57 Ga. 66.

Origin of Practice.—The practice of uniting several counts in an indictment is of comparatively modern origin. *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559; s. c., 19 Am. Rep. 223; *O'Connell v. Queen*, 11 Cl. & Fin. 375.

5. *State v. Johnson*, 5 Jones (N. Car.) L. 221; *U. S. v. Gaston*, 28 Fed. Rep. 848.

The test whether an indictment provides or charges more than one offence is sometimes the identity of the evidence required to prove the offence, but the better way is thought to be the power to plead a former acquittal or conviction. *State v. Abrahams*, 6 Iowa 117; s. c., 71 Am. Dec. 399.

6. *State v. Coleman*, 5 Port. (Ala.) 32; *State v. Mathis*, 3 Ark. 84.

7. *State v. Longley*, 10 Ind. 482; *State v. Noyes*, 30 N. H. (10 Fost.) 279; *Jillard v. Com.*, 26 Pa. St. 169; See *State v. Lea*, 1 Cold. (Tenn.) 175.

An indictment is not void for duplicity, by reason of containing a part only of the words necessary to designate a statute offence, different from the one charged. *Jillard v. Com.*, 26 Pa. St. 169.

b. SEVERAL OFFENCES IN DIFFERENT COUNTS.—Two offences committed by the same person may be included in the same indictment in different counts, where they are the same general nature and belong to the same family of crimes, and where the mode and place of trial and nature of the punishment are also the same, notwithstanding the fact that they may be punished with different degrees of severity.¹

c. SEVERAL MISDEMEANORS.—Counts for distinct misdemeanors may always be joined, and a conviction had for each, and the indictment will not be objectionable at any stage of the proceedings, except in those cases where there is a statute prohibiting the joinder of two or more offences in the same indictment;² but two misdemeanors, one punishable by fine or imprisonment, and the other by fine only, cannot be joined in one indictment in some

One count in an indictment, incomplete and imperfect in itself when standing alone, may, if framed with that view, be supported by the averments of another count contained in the same indictment, even although a *nolle prosequi* may have been entered upon it, provided the united averments of the two constitute a complete accusation and statement of the offence. But, to have this effect, the count upon which the prisoner is to be tried must contain a reference in apt and proper words to the matter or thing embodied in the other count relied on to supply its defects, so as to appropriate and make such foreign matter its own. *State v. Lea*, 1 Cold. (Tenn.) 175.

1. *Wooster v. State*, 55 Ala. 217; *Cawley v. State*, 37 Ala. 152; s. c., 1 Ala. Sel. Cas. 59; *Johnson v. State*, 29 Ala. 62; s. c., 65 Am. Dec. 383; *Ben v. State*, 22 Ala. 9; s. c., 58 Am. Dec. 238; *Baker v. State*, 4 Ark. 56; *Hoskins v. State*, 11 Ga. 92; *Bulloch v. State*, 10 Ga. 47; s. c., 54 Am. Dec. 369; *Mershon v. State*, 51 Ind. 14; *Griffith v. State*, 36 Ind. 407; *Engleman v. State*, 2 Ind. 91; s. c., 52 Am. Dec. 499; *Gilbert v. State*, 65 Iowa 449; *State v. Green*, 37 La. An. 382; *State v. Gillie*, 35 La. An. 53; *State v. Cook*, 20 La. An. 145; *State v. Cazeau*, 8 La. An. 109; *State v. Frazier*, 79 Me. 95; *State v. Hood*, 51 Me. 363; *State v. Nelson*, 29 Me. 329; *Com. v. Ismahl*, 134 Mass. 201; *Com. v. Darling*, 129 Mass. 112; *Petts v. Com.*, 126 Mass. 242; *Com. v. Kimball*, 73 Mass. (7 Gray) 328; *Com. v. Hills*, 64 Mass. (10 Cush.) 530; *Carlton v. Com.*, 46 Mass. (5 Metc.) 532; *Sarah v. State*, 28 Miss. 267; *Wash v. State*, 22 Miss. (14 Smed. & M.) 120; *State v. Porter*, 26 Mo. 201;

Storrs v. State, 3 Mo. 9; *State v. Fowler*, 28 N. H. (8 Fost.) 184; *Hawker v. People*, 75 N. Y. 487; *Taylor v. People*, 5 N. Y. Week. Dig. (N. Y.) 359; *People v. Gates*, 13 Wend. (N. Y.) 311; *Kane v. People*, 8 Wend. (N. Y.) 203; *Nicholson v. Com.*, 96 Pa. St. 503; s. c., 91 Pa. St. 390; *State v. Scott*, 15 S. C. 434; *State v. Crank*, 2 Bail. (S. C.) L. 66; s. c., 23 Am. Dec. 117; *State v. Priestler*, 1 Cheves (S. C.) 103; *State v. Williams*, 2 McCord (S. C.) 301; *State v. Tidwell*, 5 Strobb. (S. C.) 1; *State v. Thompson*, 2 Strobb. (S. C.) L. 12; s. c., 47 Am. Dec. 588; *Hampton v. State*, 8 Humph. (Tenn.) 69; s. c., 47 Am. Dec. 599; *Tillery v. State*, 10 Lea (Tenn.) 35; *Waddell v. State*, 1 Tex. App. 720; *Weathersby v. State*, 1 Tex. App. 720; *Ketchingman v. State*, 6 Wis. 426; *U. S. v. Bennett*, 17 Blatchf. C. C. 357; *U. S. v. O'Callahan*, 6 McL. C. C. 596; *U. S. v. Peterson*, 1 Woodb. & M. C. C. 305; *Rex v. Jones*, 2 Campb. 131; *Rex v. Johnson*, 2 Leach 1103; *Young v. Rex*, 3 T. R. 98.

2. *Wooster v. State*, 55 Ala. 220; *Quinn v. State*, 49 Ala. 353; *Covy v. State*, 4 Port. (Ala.) 186; *Orr v. State*, 18 Ark. 540; *Lynes v. State*, 46 Ga. 208; *State v. Chandler*, 31 Kan. 201; *Com. v. McChord*, 2 Dana (Ky.) 242; *State v. Kibby*, 7 Mo. 317; *Burrell v. State*, (Neb.) 41 N. W. Rep. 399; *People v. Costello*, 1 Den. (N. Y.) 83; *Kane v. People*, 8 Wend. (N. Y.) 203; *State v. Thompson*, 2 Strobb. (S. C.) L. 12; s. c., 47 Am. Dec. 588; *Gage v. State*, 9 Tex. App. 259; *Waddell v. State*, 1 Tex. App. 720; *State v. Gummer*, 22 Wis. 441; *Rex v. Jones*, 2 Campb. 131; *Reg. v. Braun*, 9 Cox C. C. 284; 1 Bish. Cr. Proc., § 452; *Whart. Cr. Pr. & Pl.* § 285.

States, even in separate counts.¹

d. FELONY AND MISDEMEANOR OR DIFFERENT FELONIES.—Under the common law rule there can be no conviction for misdemeanor on an indictment for felony,² and for that reason counts for misdemeanor should not be joined with those for felony;³ but where the common law rule has been so modified that on an indictment for felony, a conviction on a misdemeanor is allowable, counts for a felony and misdemeanor, or for different felonies growing out of the same transaction, and of the same general nature and course of trial, may be joined.⁴

e. CHARGING SAME OFFENCE IN DIFFERENT WAYS.—An indictment usually includes as many counts as may be necessary to meet every possible contingency of evidence;⁵ but an indictment which charges the same offence in different forms under different counts must clearly show that the matters set forth in the different counts are descriptive of one and the same offence.⁶ Several indictments preferred at different times, but alleging the same facts in different forms, will be treated as separate counts of the one indictment.⁷

f. SEVERAL ACTS OR OFFENCES GROWING OUT OF SAME TRANSACTION.—It is no error to charge in one indictment the commission of several acts, all which go to constitute one offence.⁸ And where the offences charged in the several counts grow out of

1. *Norvell v. State*, 50 Ala. 174.

2. 1 Bish. Cr. L. (7th ed.), § 788.

3. *Gilbert v. State*, 65 Ga. 449; *Davis v. State*, 57 Ga. 66; *Hilderbrand v. State*, 5 Mo. 548; *Hunter v. Com.*, 79 Pa. St. 503; *Stevick v. Com.*, 78 Pa. St. 460; *Weathersby v. State*, 1 Tex. App. 720; *Scott v. Com.*, 14 Gratt. (Va.) 687; *Rex v. Gough*, 1 Moo. & R. 71; *U. S. v. Scott*, 4 Biss. C. C. 29; 1 Bish. Cr. Pr., § 445.

4. *Ben v. State*, 22 Ala. 9; s. c., 58 Am. Dec. 238; *State v. Hood*, 51 Me. 363; *Stevens v. State*, 66 Md. 202; *Burk v. State*, 2 Har. & J. (Md.) 426; *Com. v. McLaughlin*, 66 Mass. (12 Cush.) 612, 615; *State v. Lincoln*, 49 N. H. 464; *State v. Morrison*, 85 N. C. 561; *Barton v. State*, 18 Ohio 221; *Hutchinson v. Com.*, 82 Pa. St. 478; *Hunter v. Com.*, 79 Pa. St. 503; *Stevick v. Com.*, 78 Pa. St. 460; *Henwood v. Com.*, 52 Pa. St. 424; *Wayne v. Com.*, 26 Pa. St. 154; *State v. Stewart*, 59 Vt. 273; *U. S. v. Jacoby*, 12 Blatchf. C. C. 491; *U. S. v. Scott*, 4 Biss. C. C. 29; 1 Bish. Cr. Proc., § 446; *Whart. Cr. Pl. & Pr.*, § 291.

5. *Howard v. State*, 34 Ark. 433; *Bradley v. State*, 20 Fla. 738; *Bullock v. State*, 10 Ga. 47; s. c., 54 Am. Dec. 369; *Beasley v. People*, 89 Ill. 571; *McGregor v. State*, 16 Ind. 9; *Engleman*

v. State, 2 Ind. 91; s. c., 52 Am. Dec. 494; *State v. Brannon*, 50 Iowa 372; *State v. Watrous*, 13 Iowa 489; *State v. Collins*, 33 La. An. 152; *Com. v. Andrews*, 132 Mass. 263; *Com. v. Adams*, 127 Mass. 15; *Pettes v. Com.* 126 Mass. 245; *State v. Mallon*, 75 Mo. 355; *State v. Gray*, 37 Mo. 464; *State v. Porter*, 26 Mo. 206; *State v. Rust*, 35 N. H. 438; *People v. Dimick*, 107 N. Y. 13; *People v. Rugg*, 98 N. Y. 537; *People v. Davis*, 56 N. Y. 95; *Taylor v. People*, 12 Hun (N. Y.) 212; *People v. Menken*, 36 Hun (N. Y.) 90; *State v. Doyle*, 15 R. I. 527; *Shubert v. State*, 20 Tex. App. 320; *Gonzales v. State*, 12 Tex. App. 657, 663; *Dill v. State*, 1 Tex. App. 278; *State v. Haven*, 59 Vt. 399; *State v. Matthews*, 42 Vt. 542; *State v. Morton*, 27 Vt. 310; *Whart. Cr. Pl. & Pr.*, § 297.

Where the same offence is described in different counts it is not necessary to allege the offence described in each of the several counts to be other and different from that described in the others. *Com. v. Andrews*, 132 Mass. 263; *State v. Rust*, 35 N. H. 438.

6. *People v. Garcia*, 58 Cal. 102.

7. *State v. Brown*, 95 N. C. 685.

8. *State v. Palmer*, 4 Mo. 453; *Bailey v. State*, 4 Ohio St. 440.

the same transaction, and are mere variations of the statement of the same act, they may be joined.¹

g. CHARGING DISTINCT OFFENCES IN THE SAME COUNT.—An indictment is bad which charges in one count two or more distinct offences, for which different fines or punishments are provided by statute.² However, where offences are several in their nature, and yet of such a character that one of them when complete necessarily implies the other, there is no such repugnancy as to make their joinder in an indictment improper;³ and it has been said that in an indictment containing but one count, distinct felonies of the same character and degree, though committed at different times, may be joined.⁴ Where a statute makes either of two or more distinct acts connected with the same general offence, and subject to the same measure and kind of punishment, indictable separately and as crimes when each shall have been committed by different persons, or at different times, they may, when committed by the same person at the same time, be coupled in one count as constituting but one offence.⁵ The rule that the defendant must not be charged with having committed two or more offences in any count of the indictment does not apply to cumulative offences denounced in the same statute.⁶ It is thought that a count charging an offence and alleging distinct matters of aggravation which might of themselves constitute a distinct offence, is not bad for duplicity.⁷

A count charging two distinct offences is not double if one of the offences is adequately and the other inadequately alleged,

1. *People v. Cuddihy*, 54 Cal. 53; *State v. Glidden*, 55 Conn. 46; *Mergerheim v. State*, 107 Ind. 567; *Fahnestock v. State*, 102 Ind. 156; *Davis v. State*, 100 Ind. 154; *State v. Hendricks*, 38 La. An. 682; *State v. Watts*, 82 N. C. 656; *Staeger v. Com.*, 103 Pa. St. 469; *Thompson v. State*, 30 Tex. 356; *State v. Edmondson*, 43 Tex. 162; *State v. Haven*, 59 Vt. 399; *Sprouse v. Com.*, 81 Va. 374; *Byrne v. State*, 12 Wis. 519; *U. S. v. Jacoby*, 12 Blatchf. C. C. 491; *U. S. v. Hull*, 3 Colo. L. Rep. 157; *U. S. v. Corbin*, 11 Fed. Rep. 238.

2. *Johnson v. State*, 29 Ala. 62; s. c., 65 Am. Dec. 386; *McGahagin v. State*, 17 Fla. 665; *State v. Weil*, 89 Ind. 286; *Knopf v. State*, 84 Ind. 316; s. c., 17 West. Jur. 33; *State v. Shields*, 8 Blackf. (Ind.) 151; *Com. v. Powell*, 8 Bush (Ky.) 7; *State v. McPherson*, 9 Iowa 53; *Ben v. State*, 22 Ala. 9; s. c., 58 Am. Dec. 234; *State v. Taylor*, 37 La. An. 40; 17 Rep. 788; *State v. Stauderman*, 6 La. An. 286; *State v. Palmer*, 35 Me. 9; *Com. v. Symonds*, 2 Mass. 163; *State v. Beach*, 25 Mo. App. 554; *State v. Fowler*, 28 N. H. 184; *Morse v. Eaton*,

23 N. H. 415; *State v. Nelson*, 8 N. H. 163; *Reed v. People*, 1 Park. Cr. Cas. (N. Y.) 481; *People v. Wright*, 9 Wend. (N. Y.) 193; *Fulmer v. Com.*, 97 Pa. St. 503; s. c., 10 W. N. C. 437; *Com. v. Bartilson*, 85 Pa. St. 487; *Hutchison v. Com.*, 82 Pa. St. 472; *Com. v. Schaub*, (Pa.) St. 16 Chic. L. N. 204; *State v. Howe*, 1 Rich. (S. Car.) L. 260; *Womack v. State*, 7 Coldw. (Tenn.) 508; *Davis v. State*, 3 Coldw. (Tenn.) 77; *Greenlow v. State*, 4 Humph. (Tenn.) 25; *Weathersby v. State*, 1 Tex. App. 720; *U. S. v. Sharp*, Pet. (C. C.) 131. But compare *Ward v. State*, 22 Ala. 18; *Long v. State*, 12 Ga. 293; *State v. Bach*, 25 Mo. App. 354.

3. *State v. Randle*, 41 Tex. 292.

4. *Storrs v. State*, 3 Mo. 9.

5. *Byrne v. State*, 12 Wis. 519.

6. *State v. Adam*, 31 La. An. 717; *State v. Markham*, 15 La. An. 498.

7. *State v. Collins*, 33 La. An. 152; *Tucker v. State*, 6 Tex. App. 251; *McKinney v. State*, 25 Wis. 378. See also *Ben v. State*, 22 Ala. 9; s. c., 58 Am. Dec. 234; *U. S. v. Watkins*, 3 Cr. (C. C.) 441.

because in such case the latter allegation may be rejected as surplusage.¹

h. CONJUNCTIVE, DISJUNCTIVE AND ALTERNATIVE AVERMENTS.—Where a statute makes two or more distinct acts connected with the same transaction indictable, each one of which may be considered as representing a stage in the same offence, it is proper to charge conjunctively, acts constituting the offences which are stated disjunctively in the statute.²

An indictment must not charge disjunctively, or it will be bad for

1. *State v. Haskell*, 76 Me. 399; *Com. v. Powell*, 8 Bush. (Ky.) 7. See *State v. Palmer*, 35 Me. 9; *Com. v. Simpson*, 50 Mass. (9 Metc.) 138.

2. *Johnston v. State*, 32 Ala. 583; *Cochran v. State*, 30 Ala. 542; *Ben v. State*, 22 Ala. 9; s. c., 58 Am. Dec. 238; *State v. Raiford*, 7 Port. (Ala.) 101; *Slicker v. State*, 13 Ark. 397; *People v. Frank*, 28 Cal. 507; *People v. Ah Woo*, 28 Cal. 205; *State v. Byrne*, 47 Conn. 465; s. c., 4 Rep. 168; *Seacord v. People*, 121 Ill. 623; *State v. Stout*, 112 Ind. 245; *Knopf v. State*, 84 Ind. 316; s. c., 17 West. Jur. 333; *Baugh v. State*, 14 Ind. 29; *Keefer v. State*, 4 Ind. 246; *State v. Slocum*, 8 Blackf. (Ind.) 315; *State v. Kuns*, 5 Blackf. (Ind.) 314; *State v. Schweiter*, 27 Kan. 499; *Hinkle v. Com.*, 4 Dana (Ky.) 518; *State v. Smith*, 31 La. An. 406; *State v. Adam*, 31 La. An. 717; *State v. Markham*, 15 La. An. 498; *State v. Banton*, 4 La. An. 32; *State v. Burgess*, 40 Me. 592; *Com. v. Ashton*, 125 Mass. 384; *Com. v. Dolan*, 121 Mass. 374; *Com. v. Curran*, 119 Mass. 206; *Com. v. Nichols*, 92 Mass. (10 Allen) 199; *Com. v. Foss*, 80 Mass. (14 Gray) 50; *Com. v. Twitchell*, 58 Mass. (4 Cush.) 74; *Com. v. Eaton*, 32 Mass. (15 Pick.) 273; *State v. Gray*, 29 Minn. 142; *State v. Fancher*, 71 Mo. 460; *State v. Flint*, 62 Mo. 393; *State v. Murphy*, 47 Mo. 274; *State v. McCollum*, 44 Mo. 343; *State v. Fitzsimmons*, 30 Mo. 236; *State v. Fletcher*, 18 Mo. 425; *State v. Dilbey*, 21 Miss. 204; *State v. Price*, 11 N. J. L. (6 Halst.) 203; *People v. Casy*, 72 N. Y. 383; *Bailey v. State*, 4 Ohio St. 440; *Mackey v. State*, 3 Ohio St. 362; *Stoughton v. State*, 2 Ohio St. 566; *State v. Dale*, 8 Ore. 229; *State v. Bergman*, 6 Ore. 341; *State v. Carr*, 6 Ore. 133; *Com. v. Miller*, 107 Pa. St. 276; *U. S. v. Armstrong*, 5 Phila. (Pa.) 273; *State v. Brady* (R. I.), 12 Atl. Rep. 238; *State v. Nolan*, 15 R. I. 529; *State v. Wood*, 14 R. I. 151; *State v. Colwell*, 3 R. I. 284; *State v. Posey*, 7

Rich. (S. Car.) L. 484; *State v. Helgen*, 1 Spear (S. Car.) L. 310; *Lancaster v. State*, 43 Tex. 519; *Phillips v. State*, 29 Tex. 226, 233; *Hart v. State*, 2 Tex. App. 39; *State v. Reed*, 40 Vt. 603; *Bonneville v. State*, 53 Wis. 680; *U. S. v. Corbin*, 11 Fed. Rep. 238; *U. S. v. Hull*, 4 McCr. C. C. 272; s. c., 14 Fed. Rep. 324; *U. S. v. Fero*, 18 Fed. Rep. 901; *Rex v. North*, 6 Dowl. & R. 143; 1 Bish. Cr. L. (3rd ed.), § 436; *Whart. Cr. Pl. & Pr.*, § 251. Compare *Raisler v. State*, 55 Ala. 64; *Burgess v. State*, 44 Ala. 190; *Ellis v. State*, 78 Ky. 130; *Kirby v. State*, 1 Ohio St. 185; *State v. Dorsett*, 21 Tex. 656; *State v. Vermont Cent. R. Co.*, 28 Vt. 583.

"Send or Convey" an Insulting Letter.—An indictment under a statute making it a criminal offence to "send or convey" an insulting, etc., letter or communication to any female which charges that accused did "send and convey" is technically defective, the words "send" and "convey" importing a different mode of transmission. *Larison v. State*, 49 N. J. L. (20 Vr.) 256.

An indictment for an offence under the Texas estray laws charging that the defendant "did take up and use a horse coming within the meaning of an estray," etc., is defective, because "coming within the meaning of an estray" is not an averment that the horse was an "estrays," which it would be an offence to "take up." *State v. Meschac*, 30 Tex. 518.

An affidavit for an information for rape, charging that defendant at, etc., "upon one A, a female child, . . . did then and there unlawfully, feloniously and forcibly make a violent assault upon her, and the said A then and there unlawfully and feloniously did ravish and carnally know." Held, fatally defective in having no connectives between the clauses. *Strader v. State*, 92 Ind. 376; *State v. Moran*, 40 Me. 129; *State v. Meyer*, 1 Spear (S. Car.) L. 305; *Lancaster v. State*, 43

uncertainty.¹ But where the word "or" in a statute is used in the sense of "to wit," though in explanation of that which precedes the making, it signifies the same thing. An indictment is well framed which adopts the words of the statute.²

Charging an offence in the alternative of the statute is not fatal where the alternative words are synonymous.³

Where a statute contains several things in the alternative under an indictment charging all conjointly, the prosecution will be required to prove only so much as will show an offence to have been committed in one of the ways specified.⁴

17. Joinder of Persons—*a. WHO MAY BE JOINED.*—Several persons may be charged in the same indictment for the same act, when, from its nature, it admits of the agency of several persons in its commission.⁵ The proper test has been said to be "whether

Tex. 519; *Hart v. State*, 2 Tex. App. 39; *Clifford v. State*, 29 Wis. 327.

1. *Barber v. State*, 34 Ala. 213; *People v. Tomlinson*, 35 Cal. 503; *People v. Hood*, 6 Cal. 236; *Simons v. State*, 25 Ind. 331; *Com. v. Perrigo*, 3 Met. (Ky.) 5; *State v. Drake*, 30 N. J. L. (1 Vr.) 422, 447; *Com. v. France*, 2 Brewst. (Pa.) 568; *State v. O'Bannon*, 1 Bail. (S. Car.) L. 144; *Tompkins v. State*, 4 Tex. App. 161; *Reg. v. Craig*, 21 U. C. Q. B. 552; *Rex v. Middlehurst*, 1 Burr. 399; *Rex v. Brereton*, 8 Mod. 328, 330; *Rex v. Stocker*, 5 Mod. 137; *Rex v. Stoughton*, 2 Str. 900; *Rex v. Ward*, 2 Str. 747; *Rex v. Flint*, Cas. temp. Hardw. 370. *Compare Shafer v. State*, 26 Ind. 191; *Fagan v. State*, 53 Ind. 162; *Thompson v. State*, 37 Ark. 408; *State v. Bilby*, 21 Wis. 204.

The use of "or" instead of "and" is fatal in an indictment only where it renders the statement of the offence uncertain. *People v. Wilkinson*, 4 Park. Cr. Cas. (N. Y.) 26.

An indictment for stealing five red cows of the value of fifteen dollars each, five black cows of the value of fifteen dollars each and five white cows of the value of fifteen dollars each is not open to the objection that the offence is charged in the alternative. *Wein v. State*, 14 Mo. 125.

Section 1142, Mo. R. S., providing that a public officer intoxicated while in the performance of his duties, or becoming intoxicated so as to be incapable to perform his official duties, shall be deemed guilty of a misdemeanor, contains two offences stated in the disjunctive, and it is competent to indict him, according to the facts, for either or both of these offences, but where the indictment was

confined to the second offence an instruction that the jury might convict on either ground is reversible error. *State v. West*, 21 Mo. App. 309.

"**Hazard or Skill.**"—An indictment for gaming charged defendant with playing a game known as "craps," which was alleged to be a game of "hazard or skill." *Held*, that the indictment was not demurrable for duplicity for using the disjunctive "or." *State v. Hester*, 48 Ark. 40.

"**On or About.**"—An indictment charging that defendant did unlawfully "carry on or about" (instead of "on and about") his person a pistol is defective. *Davis v. State*, 23 Tex. App. 637.

2. *Blemer v. People*, 76 Ill. 265, 271; *Clifford v. State*, 29 Wis. 327, 329.

3. *State v. Ellis*, 4 Mo. 474; *Com. v. Hawkins*, 69 Mass. (3 Gray) 463; *State v. Rutherford*, 13 Tex. 24; *U. S. v. Potter*, 6 McL. C. C. 186. *Compare Clifford v. State*, 29 Wis. 330; *Whiteside v. State*, 4 Cold. (Tenn.) 175.

4. *State v. Harris*, 11 Iowa 414; *State v. Cooster*, 10 Iowa 453; *State v. Myers*, 10 Iowa 448.

5. See *State v. Pile*, 5 Ala. 72; *State v. Lonon*, 19 Ark. 577; *State v. Nail*, 19 Ark. 563; *Smith v. People*, 1 Colo. 121; *Com. v. Sampson*, 97 Mass. 407; *Com. v. Adams*, 73 Mass. (7 Gray) 43; *Com. v. Elwell*, 43 Mass. (2 Metc.) 190; s. c., 35 Am. Dec. 398; *Com. v. Cooley*, 27 Mass. (10 Pick.) 37, 38; *Stuart v. People*, 42 Mich. 255; *State v. Rambo*, 95 Mo. 462; *State v. Gay*, 10 Mo. 440; *State v. Nowell*, 69 N. H. 199; *Kane v. People*, 8 Wend. (N. Y.) 203; *People v. Mather*, 4 Wend. (N. Y.) 229, 259; *Hess v. State*, 5 Ohio 5; *Com. v. Gillespie*, 7 Serg. & R. (Pa.) 469; s. c., 10 Am.

each offender be guilty in some degree of the same crime, so that he might be separately convicted, even though another was the actual perpetrator." If each may be so convicted, it is joint, and otherwise it is several.¹ So also several persons may be charged in the same indictment in different counts, for different offences;² but it is thought that where inconvenience will arise from such joinder, the indictment will be liable to be quashed therefor, in the discretion of the court;³ but where two or more persons are charged with committing an offence which is in its nature several, they cannot be joined in the same indictment.⁴

b. SUFFICIENCY AND EFFECT OF JOINDER—(1) *Generally*.—An indictment against two or more persons may charge the act to have been done by them collectively;⁵ but the joinder of all the parties interested in one indictment, in the absence of statutory provisions controlling, is a matter resting in the discretion of the prosecuting officers, and a person indicted cannot avail himself of the fact that others not indicted were concerned with him in the same offence.⁶

Where the offence, though committed jointly, is of the nature to be severally exclusively, an allegation that two or more persons committed it is equivalent to the charge that each did the act.⁷ But an indictment which, upon its face, charges several defend-

Dec. 475; *State v. Atchison*, 3 Lea (Tenn.) 729; *State v. Brown*, 49 Vt. 437; *Reg. v. Kelly*, 2 Cox (C. C.) 171; *Reg. v. Whittaker*, 7 Den. (C. C.) 309, 310; *Reg. v. Haines*, 2 Car. & K. 368; *Reg. v. Nickless*, 8 Car. & P. 757; *Rex v. Lockett*, 7 Car. & P. 516; *Rex v. Passy*, 7 Car. & P. 511; *Reg. v. Mazeau*, 4 Car. & P. 676; *Reg. v. Smith*, 2 Moo. 115; s. c., 2 Lewin 119, 297; *Reg. v. Gerrish*, 2 Moo. & R. 219; *Reg. v. Hurse*, 2 Moo. & R. 360; *Rex v. Standley*, Russ. & Ry. 305.

Larceny and Receiving Stolen Goods.—A thief and a receiver of the stolen goods may be jointly indicted. *Com. v. Adams*, 73 Mass. (7 Gray) 43. *Compare* *People v. Hawkins*, 34 Cal. 181.

1. *Com. v. McChord*, 2 Dana (Ky.) 242. See *State v. Edwards*, 60 Mo. 490.

Accessories before or after the fact may be joined in one indictment. *Train & Head. Preced.* 13, 19. See *Scully v. State*, 39 Ala. 240; *Clifton v. State*, 53 Ga. 241; *Com. v. Gannett*, 83 Mass. (1 Allen) 7; *Hartshorn v. State*, 29 Ohio St. 635; *Baker v. State*, 12 Ohio St. 214; *State v. Clayton*, 11 Rich. (S. Car.) L. 581; *Thompson v. State*, *Humph. (Tenn.)* 138; *Duhman v. State*, 1 Tex. App. 593.

2. *Com. v. Gillespie*, 7 Serg. & R. (Pa.) 469; s. c., 10 Am. Dec. 475; *Lewellen v. State*, 18 Tex. 538.

3. *State v. Nail*, 19 Ark. 563; *Com. v. Gillespie*, 7 Serg. & R. (Pa.) 469; s. c., 10 Am. Dec. 475; *Lewellen v. State*, 18 Tex. 538.

4. *Lindsey v. State*, 48 Ala. 169; *People v. Hawkins*, 34 Cal. 181; *Vaughn v. State*, 4 Mo. 530; *State v. Hall*, 97 N. Car. 474; *State v. Deaton*, 92 N. Car. 788; *State v. Roulstone*, 3 Sneed (Tenn.) 107; *U. S. v. McDonald*, 3 Dill. C. C. 543; *U. S. v. Kazinski*, 2 Sprague C. C. 7; *U. S. v. Davis*, 33 Fed. Rep. 621; *Reg. v. Devett*, 8 Car. & P. 561; *Reg. v. Hayes*, 2 Moo. & R. 155; *Reg. v. Atkinson*, 1 Salk. 382; *Rex v. Phillips*, 2 Strange 921; *Reg. v. Dovey*, 1 Law J. Rep. (N. S.) M. C. 105; s. c., 2 Eng. L. & Eq. 532; s. c., 15 Jur. 230.

Larceny and Receiving Stolen Goods.—Two persons cannot be proceeded against in the same indictment, one for the larceny of the goods, the other for receiving, etc., the same. *People v. Hawkins*, 34 Cal. 181. *Compare* *Com. v. Adams*, 73 Mass. (7 Gray) 43.

5. *State v. Johnson*, 37 Minn. 493.

6. *State v. Davis*, 2 Sneed (Tenn.) 273; *State v. Jackson*, 32 Me. 40. See also *State v. Steptoe*, 65 Mo. 640.

7. *State v. Wadsworth*, 30 Conn. 55; *State v. Mills*, 39 N. J. L. (10 Vr.) 587. See also *State v. Rambo*, 95 Mo. 462.

Compare *State v. Bridges*, 24 Mo. 353.

ants for several offences, committed by them independently of each other, some of them being committed by some of the defendants at one time; and some of them by other defendants at another and different time, is fatally defective.¹ But the fact that some of the counts of an indictment, all the counts of which charge the same felony, and against the same persons, include also another person as defendant, does not render the whole indictment bad.²

(2) *Principal and Accessory*.—The common law rule is that the principal and all accessories before and after the fact may be properly joined in an indictment.³ In an indictment against both the principal and accessories, the count against the accessories should state the facts as fully as the counts against the principal, and should not do so simply by reference to the latter count.⁴ It has been said that an accusation in an indictment against principal and accessory, which commences and concludes in the manner provided by statute, amounts to but one count, and the objection that each is separate and should have the statutory conclusions is not well taken.⁵

1. *Elliott v. State*, 26 Ala. 78.

2. *Clarke v. State*, 32 Ind. 67; *Casily v. State*, 32 Ind. 62.

3. See *Scully v. State*, 39 Ala. 240; *Clifton v. State*, 53 Ga. 241; *Bulloch v. State*, 10 Ga. 47; s. c., 54 Am. Dec. 369; *State v. Carver*, 49 Me. 488; *Com. v. Gannett*, 83 Mass. (1 Allen) 7; *Hartshorn v. State*, 29 Ohio St. 635; *Baker v. State*, 12 Ohio St. 214; *State v. Clayton*, 11 Rich. (S. Car.) 581; *Thompson v. State*, 5 Humph. (Tenn.) 138; *Dunman v. State*, 1 Tex. App. 593.

4. *Territory v. Conley*, 2 Wyo. Tr. 331.

5. *Bulloch v. State*, 10 Ga. 47; s. c., 54 Am. Dec. 369.

An indictment charging that certain persons on a certain date did unlawfully play for money charges them severally with separate and distinct misdemeanors, and a conviction may be had against either upon proof that he has played with any person. *Lea v. State*, 64 Miss. 294.

The words "jointly and severally" in an indictment of two persons for threatening to take the life of another, *held* to be mere surplusage. *Gay v. State*, 3 Tex. App. 168.

Where persons held for trial for a joint offence were arrested on separate complaints and warrants, they may still be joined in the information and jointly tried, unless they claim separate trials under the statute. *Stuart v. People*, 42 Mich. 255.

An information as for a joint offence

may be filed, even though it does not appear from the return of the examining magistrate that it was committed jointly; but the burden of proving that it was jointly committed is on the prosecution. *Stuart v. People*, 42 Mich. 255.

Adultery.—Joint indictment may be found where the same evidence as to the act which constitutes the crime applies to all persons indicted. Therefore, where a married woman and single man commit adultery they may be indicted jointly. *Com. v. Elwell*, 2 Metc. 190; s. c., 35 Am. Dec. 398.

Assault and Inciting Assault.—An indictment against two, charging one with an assault, with intent maliciously and feloniously to kill and murder, and the other with maliciously and feloniously inciting his codefendant to make an assault with that intent, is good at common law. *State v. Pile*, 5 Ala. 72.

Assault and Battery.—Two persons may commit an assault and battery, each on the other, at the same time, but each would be guilty of a several offence, and if severally charged may be joined in the same indictment; but the court has the discretion to quash the indictment. *State v. Lonon*, 19 Ark. 577.

Two persons may be charged in the same count of an indictment for assault and battery upon two or more persons. *State v. Rambo*, 95 Mo. 462.

Libel.—An indictment for libel contained two counts, one against a corporation, and the other against two in-

dividuals; the matter alleged was the same in both counts. *Held*, that there was no error in the joinder of the counts. *State v. Atchison*, 3 Lea (Tenn.) 729.

Same—Officers of Corporations.—

Where an act of incorporation of a turnpike road and bridge company made it the duty of the president and directors to keep the road in repair, and the neglect to do so was declared a misdemeanor in the president and individual directors for the time being, it was *held* that an individual director might be indicted for such neglect, either separately or jointly with his codirectors, and, on conviction, might be punished separately, although the board of directors consisted of seven members, and the concurrence of a majority was necessary to the doing of a corporate act. *Kane v. People*, 8 Wend. 203. Under such act, the offence is set forth with sufficient certainty, by reciting the substance of the statute imposing the duty, averring the company to be in existence as a body corporate, and that they have erected gates, and exacted toll, without formally alleging the road to have been made and completed, adding, that the defendant was a director, that he had notice of the road being out of repair, and had been guilty of a neglect of duty in the premises. *Com. v. Cooley*, 27 Mass. (10 Pick.) 37.

Misdemeanors.—Persons guilty of misdemeanors may be indicted separately or jointly. *State v. Nowell*, 60 N. H. 199.

Though several defendants may be included in one indictment for several distinct misdemeanors of the same kind, if severally charged, it is within the discretion of the circuit court to quash such indictment. *State v. Nail*, 19 Ark. 563.

Several offenders may, in some cases, be included in the same indictment, for different offences of the same kind, the word separately being inserted to make the charge several as to each. *Lewellen v. State*, 18 Tex. 538.

Thus two cannot be indicted jointly for being drunk. *State v. Deaton*, 92 N. Car. 788.

Auctioneers.—Two persons cannot be jointly indicted for pursuing the business of auctioneers without a licence. *Vaughn v. The State*, 4 Mo. 530.

Departments of Municipal Corporation.—Where two separate and distinct departments of a municipal corporation

are charged with separate duties in the government of the corporation, the officers of such two departments cannot be joined in one indictment, charging a breach of public duty. *State v. Hall*, 97 N. Car. 474.

Obscenity.—Two defendants cannot be jointly indicted in a single count for the offence of obscenity, the acts which constitute such offence being in their nature personal. Such indictment will be quashed for duplicity. *State v. Roulstone*, 3 Sneed (Tenn.) 107.

Starkie says (1 Stark. Pl. 2d ed. 45) that "if in the same indictment as found by the grand jury, several offences be alleged to have been committed by several persons, no advantage, it seems, can be taken either upon demurrer or arrest of judgment; though the court will, in its discretion, either quash the indictment altogether or use such measures as shall obviate any inconvenience (see *Young v. Rex*, 3 T. R. 98, 106; *Rex v. Kingston*, 8 East 41, 46) to the defendants which might otherwise arise. If the charging the offence to have been committed severally makes each such case a separate indictment, and though there are instances where indictments have been quashed for charging several offences to have been committed by several persons, as against several officers *quod colore officiorum suorum, separaliter, extorsive ceperunt*, etc.; yet there are a great number of authorities which show that an indictment charging the offence to have been committed *separaliter* would be good. Thus, though an indictment against four persons, for erecting four several inns and selling victuals to travellers *ad commune nocumentum* (see *Rex v. Kingston*, 8 East 41, 47; 2 Hale, P. C. 174) was quashed, yet it was for want of alleging that they did the act *separaliter* which would have made the charges as several indictments; and, according to LORD HALE (2 H. P. C. 174), 'it is common experience at this day that twenty persons may be indicted for keeping disorderly houses, and they are daily convicted upon such indictments; for the word *separaliter* makes them separate indictments.' (See *Young v. Rex*, 3 T. R. 98, 106.) But it seems to warrant such a joinder in the same indictment. The offences must be of the same nature, and such as will admit of the same plea of the same judgment." See *Com. v. McChord*, 2 Dana (Ky.) 242.

INDIFFERENT—INDIRECTLY—INDIVIDUAL.

INDIFFERENT.—Impartial; unbiassed.¹

INDIGENT.—See note 2.

INDIGNITY.—See DIVORCE.

INDIRECTLY.—See note 3.

INDIVIDUAL.—A natural person; ⁴ personal.⁵

1. Under an act requiring indifferent appraisers to be appointed of land taken execution, an uncle of the plaintiff is not indifferent. *Tweedy v. Pickett*, 1 Day (Conn.) 109. Nor a nephew by marriage. "The legislature in directing that the appraisers should be indifferent must have intended that there should not be such a relation between them and the parties as could bias their minds and induce them to act with partiality. As the degree of relationship is not designated, it is reasonable to adopt the rule presented by statute as to cases in which judges are disqualified to judge between parties." *Fox v. Hills*, 1 Conn. 295. The appraiser is not indifferent who bears the relation of landlord and tenant to one of the parties. *Mitchell v. Kirkland*, 7 Conn. 229.

2. A trust "to aid indigent young men . . . in fitting themselves for the evangelical ministry" is not void for uncertainty. "Neither of the words 'indigent' or 'evangelical' is of rare use or hidden meaning. They are quite within ordinary intelligence and point with a sufficient degree of certainty to the individual to enable the statute of charitable uses to distinguish him from all others. It is a sufficiently accurate statement in this connection to say that they describe a man who is without sufficient means of his own, and whom no person is bound and able to supply to enable him to prepare himself for preaching the gospel." *Storr's Agricultural School v. Whitney* (Conn.), 35 Abb. L. J. 384.

3. Where the expression "shall take directly or indirectly for loan of money" is used in a usury statute, any contrivance, if the substance of it be a law, will come under the word indirectly. *Floyer v. Edwards*, 1 Cowp. 115.

In a contract by the defendant "not to be concerned, direct or indirect, in any line of stages in opposition to" the plaintiff, the word "indirect" is used for the special purpose of guarding against any kind of interference by the defendant in aiding or in any manner promoting the establishing or carrying

on of any opposition. *Davis v. Barney*, 2 G. & J. (Md.) 382.

4. *Com. v. Pittsburgh*, 41 Pa. St. 283; s. c., 1 Wall. (U. S.) 272.

In an act giving individuals the right to use the road of a railroad and to place cars thereon, "individual" includes partnerships and corporations. *Pennsylvania R. Co. v. Canal Commissioners*, 21 Pa. 20. So in an act providing that "no abatement shall be made in the taxes of any individual until," etc. *Otis Co. v. Inhab. of Ware*, 8 Gray (Mass.) 509.

5. "Individually" is used of the liability of stockholders in distinction from their liability in their corporate capacity. *Sewall v. Allen*, 6 Ward (N. Y.) 347. It means "personally," not "severally." *Mann v. Peuty*, 2 Sandf. Ch. (N. Y.) 270. See STOCKHOLDERS.

Under an act making every neglect to keep and preserve the road in good repair a misdemeanor in the president and individual directors of a turnpike company, the liability of the directors is personal and several. "If the individual officers are deemed guilty of an offence, they must be individually punishable, which of course must be personal." *Kane v. People*, 3 Wend. (N. Y.) 303.

Individual Banker, in a statute forbidding "any bank, banking association or individual banker to advertise," etc. "The contest is what is meant by the two words 'individual banker.' There is no contest as to what would be meant by either word if it stood alone. . .

An individual is one entity, one distinct being, a single one, and when spoken of the human kind means one man or one woman. To individualize is to single out from the species. So that a rigid definition of the words 'individual banker' is one person banking alone.

. . . The plaintiff's contention is that the legislature used the word 'individual' in the sense of natural, and that by the words 'individual banker' it means such a banker as any one or more members of the commonwealth may be in the exercise of no more than the rights common to all, and not resting on any

INDOOR—INDUBITABLE—INEVITABLE ACCIDENT.

INDOOR.—See note 1.

INDORSEMENTS.—See **BILLS AND NOTES.**

INDUBITABLE.—See note 2.

INDUCEMENT.—See **PLEADING; CONTRACTS; FALSE PRETENCES; PROSTITUTION.**

INELIGIBLE.—(See **ELIGIBLE**).—Disqualified to hold office as well as disqualified to be elected to an office.³

INEVITABLE ACCIDENT OR CASUALTY.—(See **ACCIDENT; ACT OF GOD; CARRIERS; NEGLIGENCE; SHIPPING**).—A fortuitous event; an accident which cannot be foreseen or prevented.⁴

special franchise or privilege derived from positive law. . . . This is a short phrase taken into legislative parlance to present in a few words the idea of one who has availed himself of the provisions of the banking acts of this State to obtain the privileges thereby granted to any person who will singly comply with the prerequisites; it is used to distinguish one person doing banking in the way those acts authorize from an association of persons joining together therefor. . . . An individual banker, then, is he who has availed himself of the banking statutes and become empowered to do banking thereunder." *People v. Doty*, 80 N. Y. 225.

1. Promissory notes do not pass by a bequest of "indoor moveables." *Peniman v. French*, 17 Pick. (Mass.) 404; s. c., 28 Am. Dec. 309.

A bequest of "all I possess, indoors and outdoors," will pass real estate. *Tolar v. Tolar*, 3 Hawks (N. Car.) 74; s. c., 14 Am. Dec. 575.

2. "When such terms as 'clear, precise, explicit, unequivocal and indubitable' are used by the courts in defining the requisite proof of a particular fact to be made out by verbal testimony, it is meant that a conviction shall be fastened in the minds of the jurors as strong as verbal testimony is able to convey. It is meant that witnesses shall be found to be credible—that the facts to which they testify are distinctly remembered—that details are narrated exactly and in due order, and that statements are true. The word 'indubitable' . . . was used in a sense subject to these limitations, and would necessarily so be understood. Absolute certainty is of course out of the question. Terms are used with relation to their subject matter." *Spencer v. Colt*, 89 Pa. St. 318.

3. *State v. Murray*, 28 Wis. 99.

4. *Bouv. L. Dict.*

In Law of Negligence and Common Carriers.—"To make an accident, or casualty, or, as the law sometimes states it, inevitable accident, it must be such an accident as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency, and in the circumstances in which he was placed." If one who is doing a lawful and proper act, using due care and proper precautions necessary to the exigency of the case to avoid injuring others, accidentally does injure another, it is the result of pure accident, or is involuntary and unavoidable, and no action will lie. *Brown v. Kendall*, 6 Cush. (Mass.) 296.

"All causes of inevitable accident *casus fortuitus* may be divided into two classes, those which are occasioned by the elementary forces of nature, unconnected with the agency of man or other cause, and those which have their origin either in the whole or in part in the agency of man, whether in acts of commission or omission, of non-feasance or misfeasance, or in any other cause independent of the agency of natural forces. It is obvious that it would be altogether incongruous to apply the term 'act of God' to the latter class of inevitable accident." *Nugent v. Smith*, 1 C. P. Div. 423; *Forward v. Pittard*, 1 T. R. 27. The latter sort of inevitable accident does not excuse a common carrier. *McArthur v. Sears*, 21 Wend. (N. Y.) 190; *Merritt v. Earle*, 31 Barb. (N. Y.) 38; s. c., 29 N. Y. 116; *Redpath v. Vaughan*, 52 Barb. (N. Y.) 498. "But, are 'act of God' and 'inevitable accident, convertible terms? No doubt they were so viewed by Sir William Jones, who introduced the second phrase in order to avoid the difficulty of particularizing certain eminently unexpected events as God's acts, leaving all other events to be viewed human. But cases have not been infrequent in which

Definition. *INEVITABLE ACCIDENT OR CASUALTY*. Definition.

this paraphrase has been rejected, and in which accidents which have been supposed to be inevitable have nevertheless been held not to be 'acts of God,' and hence not grounds on which the liability of the carrier could be discharged." Wharton's Law of Neg. 553. "The general principle is clear; the 'act of God' is natural necessity—as winds and storms, which arise from natural causes, and is distinct from inevitable accident." MANSFIELD, C. J., in *Trent Proprs. v. Wood*, 4 Doug. 287.

In the Law of Collisions.—"Where the collision occurs exclusively from natural causes, and without any negligence or fault either on the part of the owners of the respective vessels, or of those entrusted with their control and management, the rule of law is that the loss must rest where it fell, on the principle that no one is responsible for such an accident if it was produced by causes over which human agency could exercise no control . . . Inevitable accident, as applied to cases of this description, must be understood to mean a collision which occurs when both parties have endeavored by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident." *The Locklibo*, 3 W. Rob. 318; *The John Frazer*, 21 How. 184. It is not inevitable accident, as was well remarked by the learned judge in the case of the *Juliet Erskine*, 6 Notes of Cases 634, where a master proceeds carelessly on his voyage, and afterwards circumstances arise when it is too late for him to do what is fit and proper to be done. He must show that he acted seasonably and that he 'did everything which an experienced mariner could do, adopting ordinary caution,' and that 'the collision ensued in spite of such exertions.' *The Rose*, 7 Jur. 381." (11)

CLIFFORD, J., in the *Union Steamship Co. v. N. Y. & Va. Steamship Co.*, 24 How. (U. S.) 313; *Lucas v. Steamboat Swann*, 6 McLean (C. C.) 282. And see *The Brazas*, 14 Blatchf. (C. C.) 446.

A collision resulting from the darkness of the night, neither party being in fault, is an "inevitable accident." After quoting the above, the same judge says: "When applied to a collision occasioned by the darkness of the night, perhaps a more general definition is allowable." "Inevitable accident," says

DR. LUSHINGTON, in the case of *The Europa*, "must be considered as a relative term, and must be construed not absolutely but reasonably with regard to the circumstances of each particular case. Viewed in that light, inevitable accident may be regarded as an occurrence which the party charged with the collision could not possibly prevent by the exercise of ordinary care, caution and maritime skill." *The Morning Light*, 2 Wall. (U. S.) 550. But in the *Grace Girdler*, 7 Wall. (U. S.) 203, it was said, SWAYNE, J., delivering the opinion and CHASE, C. J., and CLIFFORD and DAVIS, JJ., dissenting: "Inevitable accident is where a vessel is pursuing a lawful vocation in a lawful manner, using the proper precautions against danger and an accident occurs. The highest degree of caution that can be used is not required; it is enough that it is reasonable under the circumstances." "When there is a reasonable doubt as to which party is to blame, the loss must be sustained by the party on whom it has fallen."

In Leases.—Fire, against the will and without the negligence or other default of the lessee, happening from some cause to him wholly unknown, is an inevitable casualty within the meaning of the term as used in an exception in a covenant to keep in good repair. "It is admitted that a casualty may be inevitable without happening by the act of God or by the public enemies of the country. In the present case, the expression seems to me to mean only such casualties as are inevitable by the defendant, and not such as might not be avoided by the united efforts of the whole society. . . . An accident which happens without the slightest degree of negligence or default of the defendant is, as to him, an inevitable casualty." *Hodgson v. Dexter*, 1 Cr. C. C. 109; s. c., 1 Cr. (U. S.) 345.

In a covenant in a lease for abatement of rent "in case the said warehouse and building, or any part thereof respectively, shall at any time during the said term be destroyed or damaged by fire, flood, storm, tempest or other inevitable accident," the inevitable accident intended is *ejusdem generis* with the other terms used and does not include one arising from defective construction of the building. "It is said that 'inevitable accident' includes that which was not evitable by the acts of the defendant. I do not think that is the real meaning. The clause is, I

INFAMOUS CRIMES.

- I. Definition, 603.
 II. What Crimes Are Infamous, 603.
 1. Considered as to Procedure, 604.
 2. Considered as to Effect, 604.
 III. Effect, 606.

I. Definition.—An infamous crime is one which works infamy in the one who has committed it.¹

II. What Crimes Are Infamous—1. *Considered as to Procedure.*—The importance of the term within the United States is principally due to its significance as used in the federal constitution, which forbids prosecution for such crimes otherwise than by indictment.² It was formerly held by the federal courts that no crime was infamous within the meaning of that provision unless it was expressly made infamous or declared a felony by an act of congress.³ Thus the offences of stealing or embezzling from the mails,⁴ of passing counterfeit money of the United States with intent to defraud;⁵ embezzlement as defined by the federal statutes,⁶ and the offence of wilfully and fraudulently omitting assets of a bankrupt from the inventory of his effects,⁷ were held not to be infamous crimes requiring an indictment for their prosecution; and in the absence of some positive provision in the statute, the presumption of the court is against an intention of congress to make the offence infamous.⁸ This doctrine has since been expressly disapproved by the Supreme Court of the United States, where it has been decided that any crime which is punishable under the laws of the United States by imprisonment for a term of years at hard labor is an infamous crime, and cannot be prosecuted except upon indictment or presentment by a grand jury,⁹ and that court has also held that crimes against the United States punishable in a state prison or penitentiary, whether with or without hard labor, are infamous crimes,¹⁰ thus repudiating

think, intended to apply to matters outside the existing state of things and outside the acts and defaults of the contracting parties." *FRY, J., Sauer v. Bitton*, 7 Ch. D. 815; s. c., 26 W. R. 394.

A fire occurring without any fault, negligence or blame of the lessee, and which could not reasonably be put out, is an inevitable casualty within the meaning of a covenant to surrender in good order and condition, ordinary decay and inevitable casualty excepted. *Kelley v. Duffy* (Pa.), 9 Cent. Rep. 410.

1. 1 Bouv. L. Dict. (15th ed.) 793.

2. "No person shall be held to answer for any capital or otherwise infamous crime unless on the presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public dan-

ger." Fed. Const., Amendment 5.

3. *United States v. Wynn*, 9 Fed. Rep. 886.

4. *United States v. Wynn*, 9 Fed. Rep. 886; *United States v. Baugh*, 1 Fed. Rep. 784.

5. *United States v. Yates*, 6 Fed. Rep. 861; s. c., 2 Cr. L. Mag. 520; *United States v. Burgess*, 6 Fed. Rep. 869; *United States v. Field*, 16 Fed. Rep. 778; *In re Wilson*, 18 Fed. Rep. 33.

6. *United States v. Reilley*, 20 Fed. Rep. 46.

7. *United States v. Block*, 4 Sawy. (C. C.) 211.

8. *United States v. Cross*, 1 MacAr. (C. C.) 149.

9. *Ex parte Wilson*, 114 U. S. 417; bk. 29, L. ed. 909.

10. *Mackin v. United States*, 117 U. S. 348; bk. 29, L. ed. 909.

the doctrine announced in some cases¹ that the question whether the crime is infamous is to be determined solely and entirely from the nature of the act, and in total disregard of the punishment inflicted.²

Under the rule thus laid down, the uttering or passing a counterfeit interest-bearing coupon bond of the United States,³ or counterfeit coin,⁴ and conspiracy to commit an offence against the United States, or to defraud the United States;⁵ and an attempt to defraud the United States by means of false pension vouchers⁶ are infamous crimes not to be prosecuted except upon accusation by a grand jury.

2. *Considered as to Effect.*—As a general rule, the crime itself, its nature and purpose, and not the punishment inflicted, is the criterion for determination as to whether conviction for its commission shall make the convict infamous, and shall deprive the person convicted of his competency to testify as a witness in judicial proceedings.⁷ It may be generally stated that besides treason, all felonies and all other offences known as *crimen falsi* are within the category of infamous crimes. The common law

1. See *United States v. Yates*, 16 Fed. Rep. 861; *People v. Whipple*, 9 Cow. (N. Y.) 708.

2. In *Ex parte Wilson*, 114 U. S. 417; bk. 29, L. ed. 91, the court say: "The question is, whether the crime is one for which the statutes authorize the court to award an infamous punishment, not whether the punishment awarded is an infamous one. Where the accused is in danger of being subjected to an infamous punishment, if convicted, he has the right to insist that he shall not be put upon his trial except on the accusation of a grand jury . . . The remaining question to be considered is, whether imprisonment at hard labor for a term of years is an infamous punishment. Infamous punishments cannot be limited to those punishments which are cruel and unusual; because by the seventh amendment of the constitution 'cruel and unusual punishments' are wholly forbidden, and cannot, therefore, be lawfully inflicted, even in cases of conviction upon indictments duly presented by a grand jury . . . Imprisonment at hard labor, compulsory and unpaid, is, in the strongest sense of the words, 'involuntary servitude' for crimes spoken of in the provision of the ordinance of 1887, and of the thirteenth amendment of the constitution, by which slavery was abolished. Deciding nothing but what is required by the facts of the case before us, our judgment is that a crime punishable by

imprisonment for a term of years at hard labor is an infamous crime within the meaning of the fifth amendment of the constitution."

And in *Mackin v. United States*, 117 U. S. 348, bk. 29, L. ed. 909, it is said, "The most conclusive evidence of the opinion of congress upon this subject is to be found in the act conferring upon the police court of the District of Columbia 'original and exclusive jurisdiction of all offences against the United States, committed in the district, not deemed capital or otherwise infamous crimes; that is to say, of all simple assaults and batteries and all other misdemeanors not punishable by imprisonment in the penitentiary.' Act of June 17th, 1870, ch. 133, § 1, 16 Stat. at L. 153; R. S. D. C., § 1049. 'Infamous crimes' are thus, in the most explicit words, defined to be those 'punishable by imprisonment in the penitentiary.'"

3. *Ex parte Wilson*, 114 U. S. 417; bk. 29, L. ed. 89.

4. *United States v. Petit*, 114 U. S. 429; bk. 29, L. ed. 93.

5. *Mackin v. United States*, 117 U. S. 348; bk. 29, L. ed. 909; *United States v. Butler*, 4 Hughes (C. C.) 513; *United States v. Brady* (D. C.), 3 Cr. L. Mag. 69.

6. *United States v. Tod*, 25 Fed. Rep. 815.

7. *People v. Whipple*, 9 Cow. (N. Y.) 708; *United States v. Yates*, 6 Fed. Rep. 861; 2 Stark. Ev., pt. 4, 715.

signification of *crimen falsi* makes it include any crime which may injuriously affect the administration of justice by the introduction of falsehood and fraud.¹

The principle above laid down is subject to the qualification that a crime involving a charge of falsehood, to be infamous, must not only involve a falsehood of such a nature and purpose as to make it probable that the party committing it is devoid of truth and insensible to the obligation of an oath, but the falsehood must be calculated to injuriously affect the public administration of justice.²

The scope of the term *crimen falsi* is not in all cases clearly defined,³ and the same may also be said of the term "infamous crime" itself. The following crimes are held to be infamous: perjury,⁴ subornation of perjury,⁵ the suppression of testimony by conspiracy or bribery,⁶ larceny,⁷ receiving stolen goods knowing their character,⁸ forgery,⁹ barratry,¹⁰ and other crimes which raise a strong presumption of the untruthfulness of the party under oath.¹¹

The question is not whether the offence be such as to affect strongly the moral character of the party, but where the character for truth and veracity is apparently destroyed. Therefore, such offences as adultery,¹² common prostitution,¹³ and the keeping of houses of ill fame,¹⁴ or of gaming houses,¹⁵ are not infamous crimes. And it seems that the same is true of obtaining

1. 1 Bouv. L. Dict. (15th ed.) 457.

2. United States v. Block, 4 Sawy. (C. C.) 214; United States v. Yates, 6 Fed. Rep. 861.

3. See 1 Greenl. Ev., § 373.

4. Howard v. Shipley, 4 East 180; Anonymous, 3 Salk. 155; Rex v. Teal, 11 East 307.

5. In re Sawyer, 2 Gale and D. 141; Ex parte Hannen, 6 Jur. 669.

6. Bushell v. Barrett, 1 Ryan and M. 434; Rex v. Proddle, 1 Leach C. C. 442.

But a mere conspiracy to get a witness's oath, which does not accomplish this object, although indictable, is not infamous. State v. Keys, 8 Vt. 57; s. c., 30 Am. Dec. 450.

7. State v. Gardner, 1 Root (Conn.) 485; Lyford v. Farrar, 31 N. H. (11 Fost.) 314.

In Tennessee, horse stealing is not an infamous crime. Wilcox v. State, 3 Heisk. (Tenn.) 110.

Petit Larceny.—Although petit larceny is infamous at common law, yet in many of the states it has been reduced to the grade of a misdemeanor, and made not infamous. See Pruitt v. Miller, 3 Ind. 16; Com. v. Keith, 48 Mass. (8 Metc.) 531; State v. Hurt, 7

Mo. 321; Carpenter v. Nixon, 5 Hill (N. Y.) 260; Shay v. People, 22 N. Y. 317; People v. Rawson, 61 Barb. (N. Y.) 619; People v. Alder, 3 Park. Cr. Cas. (N. Y.) 249; State v. Gray, 14 Rich. (S. C.) 174; Uhl v. Com., 6 Gratt. (Va.) 706; Pendock v. Mackinder, Willis 665.

It has been held in New Hampshire, however, a person convicted of petit larceny is infamous. Lyford v. Farrar, 31 N. H. (11 Fost.) 314.

8. Com. v. Rogers, 48 Mass. (7 Metc.) 500. It has been held otherwise, however, in Pennsylvania, where receiving stolen goods is only a misdemeanor. Com. v. Murphy, 3 Clark (Pa.) 290; s. c., 3 Pa. L. J. 290.

9. Rex v. Priddle, 1 Leach (C. C.) 442; 1 Greenl. Ev., § 373.

10. Poage v. State, 3 Ohio St. 229; State v. Candler, 3 Hawks (N. C.) 393; Rex v. Davis, 5 Mod. 74. See 2 East P. C. 1003.

11. See Utley v. Merrick, 52 Mass. (11 Metc.) 302.

12. Little v. Gibson, 39 N. H. 505.

13. State v. Randolph, 24 Conn. 363.

14. Deer v. State, 14 Mo. 348.

15. Rex v. Grant, 1 Ryan & M., N. P. 270.

goods under false pretences in Massachusetts,¹ and of embezzlement in Pennsylvania.²

A person guilty of an infamous crime cannot be affected by it until after the judgment of conviction, as that is the only way of determining his guilt.³ A mere conviction without a judgment rendered upon it is not sufficient.⁴ The judgment fixes the infamy if the court rendering it has jurisdiction;⁵ and even if the judgment be erroneous, the infamy attaches and continues until it is vacated.⁶

III. Effect.—A conviction of an infamous crime disqualifies the party convicted from being a witness in the state or jurisdiction where he is convicted, unless he is subsequently pardoned.⁷ But the disqualification elsewhere depends entirely upon the law controlling in the jurisdiction where he is offered as a witness.⁸ In some of the states, however, the rule excluding witnesses who have been convicted of infamous crimes has been abrogated; but even there infamy may be proved to affect the credibility of their testimony.⁹

Infamy also excludes from jury service.¹⁰ And some other disqualifications or incapacities are prescribed by some statutes as the effect of conviction, either for crime generally, for crimes of a certain class, or for some particular offence.¹¹

INFAMY.

I. Definition, 606.

II. At Common Law, 607.

III. Effect of, 611.

IV. Removal of, 611.

1. *By Reversal*, 611.

2. *By Pardon*, 611.

V. Statutory Provisions, 612.

I. Definition.—Infamy may be defined to be a state of incompetency produced by conviction of crime implying such a dereliction

1. *Utley v. Merrick*, 52 Mass. (11 Metc.) 302.

2. See *Schuylkill Co. v. Copely*, 67 Pa. 386.

3. *Dawley v. State*, 4 Ind. 128; *State v. Valentine*, 7 Ired. (N. C.) L. 225; *Jackson v. Osborn*, 2 Wend. (N. Y.) 555; *Skinner v. Perot*, 1 Ashm. (Pa.) 57; *People v. Whipple*, 9 Cow. (N. Y.) 707; *United States v. Dickinson*, 2 McL. (C. C.) 325; *Fitch v. Smallbrook*, T. Raym. 32; *Barber v. Gingell*, 3 Esp. 60; *Lee v. Gansel*, 1 Cowp. 1; s. c., *Lofft* 374; *Rex v. Castell*, 8 East 77.

4. See *Dawley v. State*, 4 Ind. 128; *People v. Whipple*, 9 Cow. (N. Y.) 707; *Jackson v. Osborn*, 2 Wend. (N. Y.) 555; *United States v. Dickinson*, 2 McL. (C. C.) 325; *Barber v. Ginzell*, 3 Esp. 60.

5. *Cooke v. Maxwell*, 2 Stark. 183.

6. *Com. v. Keith*, 49 Mass. (8 Metc.) 531.

7. See *People v. Whipple*, 9 Cow.

(N. Y.) 707; *State v. Harston*, 63 N. C. 294; *Com. v. Green*, 17 Mass. 515; *Schuylkill Co. v. Copeley*, 68 Pa. 386; *Reg. v. Alerman*, 1 Gale & D. 261; *Rex v. Webb*, 11 Cox C. C. 133; 1 Greenl. Ev., § 372.

8. *Kirschner v. State*, 9 Wis. 140. See 1 Greenl. Ev., § 376.

9. See *Curtis v. Cochran*, 50 N. H. 242; *Com. v. Hall*, 86 Mass. (4 Allen) 305; *Johnson's Case*, 2 Gratt. (Va.) 581; *Reynold Ev.* 116; 1 Whart. Ev., § 397; 1 Bish. Cr. L., § 976.

10. See 2 Hale P. C. 115; 2 Hawk. P. C., ch. 43, § 25; 1 Coke Lit. 6 b.; *Duncomb Trials*, per Pais 104; 1 Bish. Cr. L., § 977; 1 Bish. Crim. Proc. 924.

11. By act passed Nov. 5th, 1816 (sess. 40, ch. 1), State of New York, imposes as a penalty for challenging another to fight a duel, or disqualification to hold or be elected to any office of trust, proved emolument, civil or military, under the state; and in *Barker v. People*, 3 Cow.

of moral principle as carries with it the inference or conclusion of a total disregard of the obligations of an oath.¹

II. At Common Law.—At common law those crimes which on conviction work disqualification of a witness² are usually classed under treason,³ and such *crimen falsi*⁴ as involves falsehood, and which may affect injuriously the administration of justice;⁵ but a conviction of felony without an attainder does not destroy the competency of a witness.⁶ It is said that it is the crime, and not the punishment, which renders the offender unworthy of belief.⁷ But on the other hand it is held that infamy of character does not render anyone incompetent as a witness, nor does the commission of any crime, however atrocious, though acknowledged;⁸ hence, in order to incapacitate a party to be a witness, it must be made to appear that the judgment was rendered by a court of competent jurisdiction and for an infamous crime.⁹

It has been held, however, that a conviction of an infamous

(N. Y.) 686; s. c., 15 Am. Dec. 322, it is held that an act is constitutional and that therefore a judgment of conviction under it legal and valid, and that a person under conviction for that offence is incapacitated to hold office under the state.

1. Ville de Varsovie, 2 Dods. 186; 1 Greenl. Ev. (14th ed.), § 373; 1 Bouv. L. Dict. (15th ed.) 793.

Offence Inconsistent with Honesty and Humanity—Effect of.—It has been said that where a man is convicted of an offence which is inconsistent with the principles of honesty and humanity, the law considers his oath to be of no weight, and excludes his testimony as of too doubtful and suspicious a nature to be admitted in a court of justice to deprive another of life, liberty or property. Layfield v. Hellicar, 2 Bulstr. 154; Bull., N. P. 291; Gill Ev. 256; 1 Phill. Ev. 23.

2. An admission of the conviction of a felony in another state does not disqualify without the production of the record. Com. v. Hanlon, 3 Brewst. (Pa.) 461.

3. Layfield v. Hellicar, 2 Bulstr. 154; Rex v. Crosby, 5 Mod. 16; Celier's Case, T. Raym. 369; Co. Litt. 6.

4. King v. Senior, 1 Leach C. C. 496.

5. Ville de Varsovie, 2 Dods. 174, 191. As to what crimes disqualify a person after conviction, from being a witness at common law, see *ante*, tit. INFAMOUS CRIMES.

Fraudulent Conduct of Witness.—The fraudulent conduct of a witness might affect his civil liability; does not affect

his competency as a witness. Rose v. Bates, 12 Mo. 30.

Conspiracy to Defraud Creditors.—A conviction of the offence of conspiracy to defraud creditors does not disqualify the party as a witness. Bickel v. Fasig, 33 Pa. St. 463.

6. Skinner v. Perot, 1 Ashm. (Pa.) 57.

7. See 1 Phill. Ev. 25.

What Creates Disability.—It is said, however, by the supreme court of North Carolina, in the case of State v. Valentine, 7 Ired. (N. C.) L. 225, that, "it is not the conviction, then, but the judgment which creates the disability." 2 Russ. on Cr. (5th Eng. ed.) 597; Hawk. P. C., ch. 6, § 94, 95; 1 Phill. on Ev. 31.

8. See State v. Valentine, 7 Ired. (N. C.) L. 225, 227; Rex v. Castele Careinion, 8 East 77.

9. See Campbell v. State, 23 Ala. 44; Utley v. Merrick, 52 Mass. (11 Metc.) 302; Carpenter v. Nixon, 5 Hill (N. Y.) 260; State v. Valentine, 7 Ired. (N. C.) L. 225; Schulykill Co. v. Copely, 67 Pa. St. 386; Uhl v. Com., 6 Gratt. (Va.) 706; Wicks v. Smallbroke, 1 Sid. 51; Cooke v. Maxwell, 2 Stark. 183; Stark. Ev., pt. 2, p. 184; note 1, pt. 4, p. 716.

Conviction Followed by Judgment Necessary.—The supreme court of North Carolina say in the case of State v. Valentine, 7 Ired. (N. C.) L. 225, that to render the party incompetent to testify as a witness his guilt "must be legally ascertained by a conviction and that followed by a judgment. The objection is a strictly legal one and must be supported by strictly legal

proof. This can only be done by the record, and that must show both the conviction and judgment; otherwise it is incomplete and not a full record of the case. The judgment may have been arrested and the conviction thereby rendered a nullity,—as if it never had an existence.” *Rex v. Castelle Careinion*, 8 East 77; *Comyn. Dig.*, tit. Testimony, a. 5.

Assault and Battery with Intent to Murder.—A person who has been convicted of an assault and battery with intent to murder, and sentenced to fine and imprisonment, is a competent witness. *United States v. Brockius*, 3 Wash. C. C. 99. In this case the court say that “Any incompetency produced by the conviction of a witness depends on the punishment, and not on the nature of the offence. Yet where an infamous punishment, in the discretion of the court, is not added there is no disqualification, because it might have been inflicted. Fine and imprisonment is not an infamous punishment.”

Libel—Alabama Doctrine.—A conviction of libel in another state does not disqualify a witness in Alabama; nor is the record of conviction admissible in evidence to discredit him. *Campbell v. State*, 23 Ala. 44, 72. In this case the court say: “Waiving the consideration of the question whether a conviction of an infamous offence in another state would render the convict incompetent to testify in this, it is sufficient to state in response to this objection that a conviction for libel does not disqualify the witness. In England, where, for a libel against the government, a party was condemned to stand in the pillory, thus suffering ignominious punishment, it was *held* not to render him incompetent to testify as a witness. 2 Russ. on Cr. (7th Am. ed.) 974; *Gilb.* 127. Our statutes have not changed the common law in this respect.”

Same—Doctrine in Massachusetts.—It is said by the supreme judicial court of Massachusetts in the case of *Utley v. Merrick*, 52 Mass. (11 Metc.) 303, that: “The publishing of a malicious libel is an atrocious offence, and is punishable in England by standing in the pillory. Yet a person convicted of that offence and so punished has been adjudged to be a competent witness. See *Charter v. Hawkins*, 3 Lev. 426.”

Obtaining Goods by False Pretences.—The supreme court of Massachusetts say, in the case of *Utley v. Merrick*, 52 Mass. (11 Metc.) 303, that a conviction

of the offence of obtaining goods by false pretences does not render the party an incompetent witness, nor can the record of such conviction be given in evidence for the purpose of affecting his credibility. See to the same effect *Campbell v. State*, 23 Ala. 45, 73.

Receiving Stolen Goods.—It has been said that a conviction of the offence of receiving stolen goods does not disqualify the person as a witness. *Com. v. Murphy*, 3 Pa. L. J. 290. But it was *held* by the supreme judicial court of Massachusetts, in the case of *Com. v. Rogers*, 48 Mass. (7 Metc.) 503, that a person convicted of the offence of receiving stolen goods, knowing them to be stolen, was not competent as a witness. See *Rohan v. Swain*, 59 Mass. (5 Cush.) 281, 287. In the latter case the court say, after using the above language, that: “This does not, I am aware, necessarily indicate that the offence is a felony, but the distinction taken by the court between the case of a conviction for this offence and that of cheating by false pretences, holding that the former does and the latter does not disqualify (*Utley v. Merrick*, 52 Mass. (11 Metc.), 302) tends to confirm the position above advanced, that this offence is substantially of the same character as larceny.”

Petit Larceny.—It is said by the supreme court of New York, in the case of *Carpenter v. Nixon*, 5 Hill (N. Y.) 260, that petit larceny is not a felony within the meaning of 2 Rev. Stat. 701, § 23, and consequently a conviction for that offence does not render the offender an incompetent witness; though the fact of his conviction may be shown by way of impeaching his credit.

In *Carpenter v. Nixon*, 5 Hill (N. Y.) 260, the court say: “At common law petit larceny is a felony and the offender an incompetent witness after conviction and sentence. In the case of *Wark v. People*, 3 Hill (N. Y.) 395, we were inclined to think, and indeed had no doubt, that this offence still continued a felony at common law, though it was thought probable the legislature supposed they had reduced it to the grade of a misdemeanor; we there came to the conclusion that the provision defining what should constitute a felony within the statute did not reach those at common law which were not included in the provision. I do not think, however, that this conclusion controls the question whether the offender has been restored to competency as a wit-

ness by the section above referred to. The section removes the common law disqualification in all cases of conviction for 'any offence other than a felony,' the term 'felony' as here used meaning that offence as defined by the revised statute. . . . Petit larceny not being a felony within this provision of the statute, though one still at common law, it, of course, falls within the class of offences which are accepted from the general operation and not the 23rd section. All are accepted under the degree of such felonies. The record of the conviction, however, was admissible for the purpose of affecting the credit of the witness, and the court erred in refusing to receive it for that purpose. *King v. Crosby*, 5 Mod. 15. Archb. Cr. L. 125; Cowen & Hill's Notes to Phill. Ev. 66; 2 Hale P. C. 278; 1 Phill. Ev. 35; 1 Stark. Ev. 99."

Same—Record of Conviction to Impeach.—The supreme court of Virginia say in *Uhl v. Com.*, 6 Gratt. (Va.) 706, that the record of the conviction of a witness for petit larceny in another state is not admissible in evidence to impeach the veracity of a witness in Virginia.

Embezzlement.—The supreme court of Pennsylvania say, in the case of *Schuykill Co. v. Copely*, 67 Pa. St. 386, that one who has been convicted and is undergoing his sentence for embezzlement as a public officer is a competent witness, and that the nature of the offence, not its punishment, determines its character and infamy.

Stigma of Public Infamy.—The stigma of public infamy will not affect the admissibility of a witness. *Jones v. State*, 13 Tex. 168. See *United States v. Dickinson*, 2 McL. C. C. 325, 329; *United States v. Vansickle*, 2 McL. C. C. 219; *Ville de Varsovie*, 2 Dods. 186. Thus it is said that the character limited by a want of chastity does not render a witness infamous in the legal sense of the term. How far the want of chastity would impair a woman's credit is a question of which the jury has the sole right to judge. *Jones v. State*, 13 Tex. 168.

Judgment and Conviction.—A person is not rendered incompetent to give evidence by a conviction of crime, but only by the judgment on the conviction. *State v. Valentine*, 7 Ired. (N. C.) L. 225; Bull., N. P. 392. Consequently one convicted of an infamous offence is a competent witness until after sentence has been passed. *United States v.*

Dickinson, 2 McL. C. C. 325; *United States v. Brockius*, 3 Wash. C. C. 99.

Certificate of Conviction.—In ordinary cases a conviction or sentence must be proved by the production of a record regularly drawn up. 2 Phill. Ev. 356. Thus, where it is necessary to prove that the prisoner is in lawful custody under a sentence of imprisonment, neither the production of the sentences signed by the clerk of the assize, nor the evidence of a person who heard sentence passed upon the prisoner is insufficient for that purpose. *Rex v. Rourdon*, 2 Car. & K. 266.

Record of Conviction.—A record of the conviction of a witness is the sole evidence of infamy. *Castelano v. Teylton*, 2 Mart. N. S. (La.) 466; *Com. v. Gorham*, 99 Mass. 420; *Cushman v. Loker*, 2 Mass. 108; *People v. Whipple*, 9 Cow. (N. Y.) 707; *People v. Herrick*, 13 Johns. (N. Y.) 82; *Rex v. Castello-Careinion*, 8 East 77.

The supreme court of Massachusetts say, in the case of *Com. v. Gorham*, 99 Mass. 420, that: "It was the rule of the common law that the production of the complete record, including the conviction, technically so called, and the final judgment thereon was necessary in order to show that a witness offered was incompetent on account of infamy. This rule is founded on the reason that it is always within the power of the court, on motion in arrest or for a new trial, to set aside a verdict illegally or improperly rendered at any time before judgment, and the prosecution may in the end result in the defendant's acquittal."

Same.—Attorney's Surrender of Licence.—The supreme court of Michigan held in the case of *Dickinson v. Dustin*, 21 Mich. 561, that the entry on the records of a circuit court reciting that an attorney had been guilty of malpractice and directing the prosecuting attorney to draft the proper charges, whereupon the attorney appeared, confessed his misconduct and tendered a return of his licence, which was accepted and his name stricken from the role of attorneys, is not admissible to impeach the veracity of an attorney when examined as a witness. The court say that: "It is not proper on cross-examination to question a witness upon his criminal punishment or conviction (*Clemens v. Conrad*, 19 Mich. 170; *Wilbur v. Flood*, 16 Mich. 40); but he can only be directly attacked by record evidence of his conviction, and we do not think this

crime in another country or in a sister state of the United States does not render the witness incompetent on the ground of infamy;¹ but this doctrine appears to be at variance with the opinion entertained by foreign jurists, who maintain that the state or condition of a person in the place of his domicile accompanies him wherever he may go.²

While infamy totally disqualifies as a mere witness in a case,³ its effect and extent are limited in the case of a party to the suit who may make an affidavit necessary to his exculpation or defence, or for relief against an irregular judgment.⁴

Whether or not a judgment of conviction of an infamous crime rendered by a foreign tribunal of competent jurisdiction is admissible to affect the competency of a party as a witness in a state or country where the crime is also held to be infamous is not entirely settled.⁵

document can be used as a record of that sort. A record of conviction for contempt of court punished summarily may, perhaps, be comprehended in the single order and judgment, but where an attorney has appeared for any other misconduct it can only be done upon specific charges, and an opportunity to be heard upon them so that there may be a full defence, and an appellate court can never arrest to determine their legal sufficiency. The judgment and hearing must be, as in other cases, upon the particular charges he is called upon to answer. *Ex parte Bradley*, 74 U. S. (7 Wall.) 364; bk. 19, L. ed. 214.

Same—Judgment of Conviction.—The judgment of conviction, when offered against the competency of the witness, must be proved by the record of an authenticated copy produced and offered at the time the witness was sworn or in the course of the trial. *Com. v. Green*, 17 Mass. 515; *Hilts v. Colvin*, 14 Johns. (N. Y.) 182; *People v. Herrick*, 13 Johns. (N. Y.) 82.

Parol Evidence of Transportation.—It was held by the supreme court of Maryland, however, that parol evidence is admissible to prove that the witness has been transported as a convict. *Clark's Lessee v. Hall*, 2 Har. & McH. (Md.) 378; *State v. Ridgely*, 2 Har. & McH. (Md.) 120. In the former case the court expresses the further opinion that it was incumbent on the party objecting, in order to show the incompetency of the witness, to prove by record or other evidence that he was transported for some offence made felony or infamous by the common law of England or by the statute of Great Britain.

1. *Pyncheon v. Stearns*, 52 Mass. (11 Metc.) 304; *Com. v. Green*, 17 Mass. 515. See *Sanders v. Leigh*, 2 Har. & McH. (Md.) 380; *Chase v. Blodgett*, 10 N. H. 22; *State v. Candler*, 3 Hawks. (N. C.) L. 393; *Com. v. Hanlon*, 3 Brewst. (Pa.) 461.

2. See Story on Conf. L., § 620; Fœlix, *Traite de Droit Intern Prive*, § 31; *Merlin Repert, Loi*, § 6, n. 6. See also 3 Am. & Eng. Encycl. of L., tit. CONFLICT OF LAWS, 499.

Statutes Destroying Capacity.—It is the general rule, however, among English speaking people, that statutes which destroy capacity have no territorial force; and the subject of a state in which such statutes obtain is relieved from the disabilities so imposed when he touches the soil of a foreign state. See Whart. Conf. of L., §§ 101, 105; 3 Am. & Eng. Encycl. of L. 516.

3. *State v. Mullen*, 33 La. An. 159.

4. Although the general rule is that in actions between third persons the testimony of a convicted person must be excluded (*In re Sawyer*, 2 Ad. & Ell. N. S. 721), yet he is allowed in cases where he is a party to make affidavits in exculpation or defence of himself, or for relief against regular judgments. *Rex v. Gardner*, 2 Burr. 1117; *In re Davis*, 2 Salk. 461.

5. Affirming the doctrine, *State v. Foley*, 15 Nev. 64; *Chase v. Blodgett*, 10 N. H. 24; *State v. Chandler*, 3 Hawks (N. C.) 393; *Com. v. Hanlon*, 3 Brewst. (Pa.) 461. Denying this doctrine, *Clark's Lessees v. Hall*, 2 Har. & McH. (Md.) 378; *State v. Ridgely*, 2 Har. & McH. (Md.) 378; *Cole v. Cole*, 1 Har. & J. (Md.) 572; *Com. v. Green*, 17 Mass. 515, 539, 549;

III. Effect of.—Where a witness becomes incompetent because of conviction and sentence for a crime which implies infamy of character, the effect is the same as if he were dead; and if he has attested any instrument as a witness previous to his conviction, evidence may be given as to his handwriting the same as if he were dead.¹

IV. Removal of.—The disability of infamy may be removed either by a reversal of the judgment or by a pardon.²

1. *By Reversal.*—The incompetency of a person to be a witness who has been convicted of an infamous crime may, in general, be restored by a reversal of the judgment of conviction. In such case the reversal of the judgment is proved in the same manner as the judgment itself.³

2. *By Pardon.*—A pardon restores the party to all former rights, and is said to make the witness a new creature and give him a new capacity as the consequence of conviction and judgment. The pardon removes the incapacity only when it is a consequence of the judgment according to the common law and not annexed to a conviction by express words;⁴ but where the disability is an-

National Trust Co. v. Gleason, 77 N. Y. 400; Sims v. Sims, 75 N. Y. 466; Langdon v. Evans, 3 Mackey U. S., D. C. 1; Story on Conf. L., §§ 91, 92, 104, 620, 625.

1. Jones v. Mason, 2 Str. 833; Stark. Ev., pt. 2, § 193; pt. 4, p. 723.

2. Hoffman v. Coster, 1 Whart. (Pa.) 453.

3. 1 Phill. Ev. (6th Am. ed. from 9th London ed.) 21.

In Texas the reversal of the judgment, if for felony, or a pardon is necessary to restore the witness to competency, and in case of perjury there is no relief. Code Crim. Proc. art. 730.

4. People v. Pease, 3 Johns. Cas. (N. Y.) 333; s. c., 11 Am. Jur. 360, 362. See Howser v. Com., 51 Pa. St. 332; Com. v. Hanlon, 3 Brewst. (Pa.) 461; Losser v. Ohio & P. R. Co., 1 Grant's Cas. (Pa.) 309; Hoffman v. Coster, 2 Whart. (Pa.) 453.

A pardon granted after term of sentence has been fully served restores competency but not full credibility. United States v. Jones, 2 Wheel. Cr. Cas. (N. Y.) 454; Hoffman v. Coster, 2 Whart. (Pa.) 453.

A pardon before conviction restores competency. *Ex parte* Garland, 71 U. S. (4 Wall.) 333; bk. 18, L. ed. 336.

Without pardon infamy remains, in Louisiana. See State v. Benoit, 16 La. An. 273.

Pardon Must be Accepted.—A criminal under conviction of felony for whom

the pardon under the seal of the commonwealth is produced, is competent as a witness if he accept the pardon; but his identity with the person named in the pardon must be established. Com. v. Hanlon, 3 Brewst. (Pa.) 461.

Error in Pardon.—A pardon, although stating the date of conviction improperly, is sufficient to restore the incompetency of a witness if it is possible to show that it was intended to cover, and does cover, the offence of which the record shows the prisoner to be guilty. Losser v. Ohio & P. R. Co., 1 Grant's Cas. (Pa.) 329.

Phraseology of Pardon.—The supreme court of Pennsylvania say, in the case of Hoffman v. Coster, 2 Whart. (Pa.) 453, that a pardon by the President of the United States, reciting that J B was convicted at a circuit court of the United States of passing a counterfeit bank note and sentenced to three years' imprisonment, and concluding "I do hereby remit unto him, the said J B, the remainder of said sentence, and order him to be liberated from further imprisonment on the payment of costs," would restore the competency of J B as a witness. The court say: "The remainder of the sentence embraced all except that which had been executed, as well what is expressed in the pardon itself as the legal consequences that follow from it. A remission of the whole sentence could not do more since it could not undo what had been done.

nexed to the conviction of a particular offence, by the express words of a statute, the general rule is that a pardon will not restore his competency. Thus, if a man be found guilty on an indictment for a felony at common law, a pardon will make him a good witness; but if he be convicted of perjury or subornation of perjury he will not be rendered competent by a pardon, if the statute expressly provides that he shall never be admitted to give evidence in any court of record.¹ And in those cases where the pardon is conditional, the condition must be shown.² In those cases, however, where a witness states that he has been convicted of a felony and pardoned, it seems that he is competent without producing the pardon.³

VI. Statutory Provisions.—In England,⁴ and in most of the United States, the disqualification of infamy is removed by statute, leaving the fact of conviction to be proved for the consideration of the jury upon the sole question of credibility. Such is the present state of the law in California,⁵ Colorado,⁶ Connecticut,⁷ Delaware,⁸ Georgia,⁹ Illinois,¹⁰ Indiana,¹¹ Iowa,¹² Kansas,¹³ Maine,¹⁴

One of the consequences resulting from the sentence was, the disability of the party to be sworn as a witness; and where all the sentence removed together with the consequences of the sentence, except what had been suffered, this disability is removed. It cannot exist separate from the sources from which it is derived. As to the language of the pardon it does not appear that any particular form of words is necessary in such an instrument. In some of the ancient pardons a variety of language is found, such as acquit, pardon, release and exonerate. 3 Co. Inst. 234. In others only the word pardon. 3 Co. Inst. 235. In the forms used by the executives of Pennsylvania, the word remit is employed; and also, it would seem, in those given by the executive of the United States; nor is it, we conceive, necessary to remit the crime or offence, though it is also often done in the English forms. Our practice is to recite the offence and conviction and sentence and then remit the sentence, and, as it is by the sentence the disability attaches as one of its consequences, this form would seem appropriate. In 3 Co. Inst. 235, it appears that the King's remitting the indictment before conviction pardons the offence; *a fortiori* after sentence. Remitting the sentence pardons the offence."

1. See *Hollridge v. Gillespie*, 2 Johns. Ch. (N. Y.) 30, 35; *Houghtaling v. Kelderhouse*, 1 Park. Cr. Cas. (N. Y.)

241; 2 N. Y. Rev. Stat. 681; 5 Eliz. Ch. 9.

In *Holridge v. Gillespie*, 2 Johns. Ch. (N. Y.) 30, 35, an objection was made and sustained to the reading of the deposition of a party on the ground that, having been convicted of statutory perjury, though pardoned by the governor, his competency as a witness is not restored (*Rex v. Crosby*, 2 Salk. 689; *Peake's Ev.* 129; *Phill. Ev.* 28), the statute having made the total disability to become a witness a part of the punishment and conviction is reversed. See 1 N. R. L. 171; Sess. 24, ch. 74, § 1.

2. *Beverige's Case*, 3 P. Wms. 485.

Proof of Pardon—How Made.—A granting of the pardon is to be proved by its production under seal. 1 *Phill. Ev.* (6th Am. ed.) from 9th London ed. 21.

3. *Howser v. Com.*, 51 Pa. St. 332.

4. 6 & 7 Vict., ch. 35; 14 & 15 Vict., ch. 99; 2 *Tayl. on Ev.*, §§ 1346, 1347.

5. 2 *Hilt. Code*, § 1, 1879.

6. *Gen. St.* 1877, ch. 104.

7. *Rev. St.* 1849, tit. 1, § 141; *Gen. St.* 1875, ch. 440.

8. *Laws of* 1874, p. 652.

9. *Code* 1882, § 3854. *Frain v. State*, 40 Ga. 529.

10. *Rev. St.* 1880, ch. 505, § 1. *Bartholomew v. People*, 104 Ill. 601.

11. *Code*, § 243. *Glenn v. Clore*, 42 Ind. 60.

12. *Code* 1851, art. 2380; *Rev. Code* 1880, p. 3636.

13. *Comp. Laws of* 1879, § 3847.

14. *Laws of* 1861, ch. 53.

Massachusetts,¹ Michigan,² Minnesota,³ Missouri,⁴ New Hampshire,⁵ New Jersey,⁶ New York,⁷ North Carolina,⁸ Rhode Island,⁹ Vermont,¹⁰ Virginia,¹¹ and Wisconsin.¹²

INFANTS.—(See also BAIL; BILLS AND NOTES; BONDS; CARRIERS; CHILD; CONFLICT OF LAWS; CONTRACTS; COSTS; DEEDS; DIVORCE; DOMICILE; EQUITY; EQUITY PLEADINGS; ERROR; ESTOPPEL; GUARDIAN AND WARD; PARENT AND CHILD.)

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I. DEFINITION.—An infant is a person who has not yet arrived at the age of majority. This age is placed by the common law

- 1. Gen. St., ch. 31, § 13; Pub. St., ch. 169, § 18; Laws of 1852, ch. 312, § 60. *Com. v. Gorham*, 99 Mass. 420; *Newhall v. Jenkins*, 68 Mass. (2 Gray) 562.
 - 2. Rev. St. 1846, ch. 102, § 99; Laws of 1861, ch. 125, p. 118. *Dickinson v. Dustin*, 21 Mich. 561.
 - 3. St. 1878, p. 792, § 7.
 - 4. *United States v. Biebusch*, 1 Fed. Rep. 213; s. c., 1 McCr. C. C. 42.
 - 5. Gen. Law 1878, ch. 228, § 27.
 - 6. Rev. St., p. 278, § 1.
 - 7. Laws of 1869, ch. 678; Code Civ. Proc., § 832; *People v. McGloin*, 91 N. Y. 241; *Perry v. People*, 86 N. Y. 353; s. c., 62 How. (N. Y.) Pr. 148; *National T. Co. v. Gleason*, 77 N. Y. 400; *Donohue v. People*, 56 N. Y. 208; *Delamater v. People*, 5 Lans. (N. Y.) 332.
 - 8. Rev. St. 1873, p. 388, § 14; *State v. Oarston*, 63 N. Car. 294.
 - 9. Pub. St. 1882, ch. 214, § 38.
 - 10. Rev. St. 1880, § 1008.
 - 11. *Johnson v. Com.*, 2 Gratt. (Va.) 581.
 - 12. Rev. St. 1878, § 4073; *Sutton v. Fox*, 55 Wis. 531.
- Exceptions.**—In a few states an exception is made in the case of a person convicted of perjury, such person not being permitted to testify, even though he has received a pardon or has suffered the full punishment provided by law for the offence. Among these states are Florida (Thompson's Dig. 334, 335; Dig. of Law 1881, p. 518); Maryland (Rev. Code 1878, p. 741, § 1); Mississippi (Rev. Code 1880, § 1600), and South Carolina (Gen. St. 1882, § 2532).
- In Arkansas** the parties may consent to receive the testimony of a person convicted of one of the higher grades of crime. Dig. of St. 1874, § 24.
- In Tennessee** such incompetency remains until the full rights of citizenship are restored according to the statute provided. St. 1871, § 3812.
- Where incompetency at common law has been relieved by statute** and it is sought to impeach the credibility of the

- a. *Contributory Negligence*, 674.
- b. *Suit of Parent and Child for Injury*, 678.
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for both sexes at twenty-one years.¹ In some States, however, females attain their legal majority at eighteen.² Popularly, it

witness, the judgment of conviction must be offered in evidence. *Com. v. Gorham*, 99 Mass. 420.

Record Admissible to Affect Credit of the Witness.—*Com. v. Hall*, 87 Mass. (4 Allen) 305; *Com. v. Knapp*, 26 Mass. (9 Pick.) 497.

In Texas, to disqualify a witness convicted of perjury on information from another State, it should be shown that perjury is a felony in such foreign State, and that it could be prosecuted upon such information. *Pitner v. State*, 23 Tex. App. 366.

1. Age of Majority.—Full age is attained on the beginning of the day next preceding the twenty-first anniversary of birth. "Thus if a person were born at any hour on the first day of January, A. D. 1801 (even a few minutes before twelve o'clock of the night of that day), he would be of full age at the first instant of the 31st of December, A. D. 1821, although nearly forty-eight hours before he had actually attained the full age of twenty-one, according to years, days, hours and minutes; because there is not in law, in this respect, any fraction of a day; and it is the same thing whether a thing is done upon one moment of a day or another." *State v. Clarke*, 3 Harr. (Del.) 557; *Wells v. Wells*, 6 Ind. 447; *Hamlin v. Stevenson*, 4 Dana (Ky.) 597; *Herbert v. Turball*, 1 Keble 589; *Fitzhugh v. Pennington*, 6 Mod. 259; 2 Kent Com. 233. Judge Redfield dissents from the doctrine laid down in the opinion quoted. 1 Redf. on Wills 18-20.

In California a person is of age at the first minute of his proper birthday. Civil Code, § 5026. So. Dak. Civ. C. 10.

In Louisiana and Texas the common, and not the civil law, prevails. Means v. Robinson, 7 Tex. 502.

Conflict of Laws as to Age of Majority.—In case of any conflict of laws arising over the time at which an infant arrives at majority, the following rules are laid

down by Schouler, Dom. Rel., § 393. *First*, that the actual domicile will be preferred to the domicile of birth. *Second*, that the law of situation of real property must prevail over that of domicile. *Third*, that the law of the place where a contract is made must prevail over that of domicile. *Male v. Roberts*, 3 Esp. 163; *Saul v. His Creditors*, 17 Mart. (La.) 569; *Huey's App.* 1 Grant (Pa.) 51; *Story Confl. Laws*, §§ 75, 82, 332.

In *Barrera v. Alpuente*, 18 Mart. (La.) 69, it was decided that when an infant becomes of age in the country in which he is, he remains of age, no matter what may be the laws of the country into which he removes. In *Hiestand v. Kuns*, 8 Blackf. (Ind.) 345, an infant of age in Ohio (18 years) removed to Indiana before she was twenty-one, the legal age of majority in Indiana. It was held that being of age by the domicile of origin she was entitled to change her domicile, and, electing to make Indiana her home, she became subject to the laws of that state and became an infant again until she was twenty-one.

In *Thompson v. Ketcham*, 8 Johns. (N. Y.) 189, suit was brought on a promissory note made in Jamaica. The defendant pleaded infancy. Held, that he must show that the plea would be good in Jamaica.

When an infant has been disseised, his right of action for the recovery of the land will be governed by the law in force when he becomes of age, and not by the law in force at the time he was disseised. *Gilker v. Brown*, 65 Mo. 349.

2. A woman is of age at eighteen (by statute) in Vermont, Ohio, Illinois, Iowa, Minnesota, Kansas, Nebraska, Maryland, Missouri, Arkansas, California, Colorado, Oregon, Nevada, Washington, Dakota, Idaho. *Stimson Am. St. Law*, § 6601. And see *Sparhawk v. Buel*, 9 Vt. 41; *Stevenson v. Westfall*, 18 Ill. 209; *Cogel v. Raph*, 24

means one of tender age, who is quite incapable of taking care of himself; a child, in fact, under seven years of age; and one who has reached years of discretion, but not of majority, is usually styled a minor.¹

II. PRIVILEGES AND DISABILITIES IN GENERAL.—1. Legislative Relief from Non-Age.—In several States, the statutes allow a minor, under certain circumstances, to obtain a decree of court rendering him of age for all purposes of property and contract.²

2. Right to Hold Office.—Offices where judgment, discretion and experience are essentially necessary to the proper discharge of the duties they impose, or offices of pecuniary and public responsibility cannot be held by infants.³ So an infant cannot be appointed an executor or administrator. The general practice is to appoint some person, generally the guardian, to act during the minority of the infant entitled to administration.⁴ The

Minn. 194; *Parker v. Starr*, 21 Neb. 680; *Jackson v. Allen*, 4 Colo. 263; and see *Dent v. Cork*, 65 Ga. 400.

In *Maryland*, a female infant between sixteen and twenty-one may give a valid receipt for her property, but not an acknowledgment for the payment of an equivalent. *Crapster v. Griffith*, 2 Bland. Ch. (Md.) 5. In a few States a woman is of age on marriage. *Chubb v. Johnston*, 11 Tex. 469; and see *White v. Latimer*, 12 Tex. 61. So also in *Oregon*. In *Nebraska* a married woman over sixteen is of age. *Ward v. Laverty*, 19 Neb. 429. In *Iowa*, *Texas* and *Louisiana* all minors, male and female, attain their majority on marriage. *Stimson St.*, § 6601.

1. *Eversley*, Dom. Rel., p. 784. The law does not recognize this distinction, for the "child of nineteen is as the child of five years old." *Hearle v. Greenbank*, 3 Atk. 695, 703; and see *Morgan v. Thorne*, 7 M. & W. 400. But a minor may have a voice in the choice of its guardian, while an infant, in the sense above used, may not.

2. *Kansas*, *Arkansas*, *Texas*, *Alabama*, *Mississippi*, *Louisiana*. When thus emancipated he may be appointed administrator. *Succession of Lyne*, 12 La. Ann. 155. Or become surety on a bond. *Cooper v. Rhodes*, 30 La. Ann. 533. But the statute authorizing the removal of the disabilities of minors applies only to such minors as are capable of attending to their own business, and an order of the probate court removing the disabilities of a minor under fourteen is void. *Doles v. Hilton*, 48 Ark. 305. See *Cox v. Johnson*, 80 Ala. 22. But such a statute can have no effect outside the State in which it is

law to give validity to the acts of an infant in another State. *State v. Bunce*, 65 Mo. 349.

3. **Service of Process.**—The reason seems to be that an infant cannot be held legally responsible for his acts. Thus an infant may serve a writ where he is deputized by the sheriff who is responsible to the plaintiff for the acts of his deputy. *Moore v. Graves*, 3 N. H. 408; *Barrett v. Seward*, 22 Vt. 176. *POLAND, J.*, dissenting; but an infant cannot be specially authorized to serve process by the magistrate signing it, for in this case there is no one responsible to the plaintiff for misfeasance, non-feasance, etc. *Harvey v. Hall*, 22 Vt. 211. That an infant cannot serve process see *Tyler v. Tyler*, 2 Root (Conn.) 519; *Cuckson v. Winter*, 2 Man. & Ry. 313. In *Indiana* it is held that an infant may be deputed to serve a particular writ, but he cannot act as a general deputy. *N. A. & S. Ry. Co. v. Grooms*, 9 Ind. 243.

Where an infant has sat as a juror, the verdict will not be set aside, though the losing party did not learn of the infancy of the juror until after verdict. *Wassum v. Feeney*, 121 Mass. 93; s. c., 23 Am. Rep. 258.

An infant cannot act as bailiff, factor or receiver, as he cannot be charged on an account. *Tyler on Infancy & Cov.*, § 7; he cannot act as justice of the peace. *Golding's Petition*, 57 N. H. 146; s. c., 24 Am. Rep. 66. Though he may serve as notary public. *United States v. Bixby* (Ind.), 9 Fed. Rep. 78. An infant may act as clerk of a militia company. *Dewey Ex parte*, 11 Pick. (Mass.) 265.

4. **Infant Executor or Administrator.**

court will never appoint an infant as trustee, and if he is named as such in any instrument, someone, generally his guardian, will

—An infant cannot hold an office requiring the receipt or disbursement of money. *Claridge v. Evelyn*, 5 B. & Ald. 81. So an infant cannot act as administrator, executor or trustee. *Collins v. Spears*, 1 Miss. 310; *In re Goods of Duchess of Orleans*, 1 Sw. & Tr. 253; *Schouler, Dom. Rel.*, § 394. But if he is appointed to such an office he will be liable for money received after his majority, but not to account for his administration during minority. *Ilindmarsh v. Southgate*, 3 Russ. 324. *Carow v. Mowatt*, 2 Edw. Ch. (N. Y.) 57.

In 1856, S, then in his seventeenth year, qualified as one of the administrators of H. He paid out on just debts all the assets that came to his hands, but did not apportion them ratably. He turned over everything in his hands to his co-administrator in 1858 and left the State. In 1877 a bill was filed charging S with *devastavit*. He pleaded infancy. *Held*, S being an infant and innocent of fraud or tort, was not liable for the alleged *devastavit*. *Saum v. Coffelt*, 79 Va. 510.

Where the only next of kin is a daughter sixteen years old, the court *held* she could not be appointed administrator of her father's estate, nor have a voice in the appointment, and a creditor of the estate received the appointment. *Rea v. Englesing*, 56 Miss. 463. The fact that the minor is a married woman does not qualify her to act. *Briscoe v. Tarkington*, 5 La. Ann. 192.

Where a minor is appointed executor, the court will appoint an administrator *cum testamento annexo, durante minoritate*; and so also in the case of an infant who is entitled to administer as next of kin, the court will appoint someone to act during his minority. *Schouler, Exrs. & Admsrs.*, § 132; *Wms. on Exrs.* 481, 482; *Cope v. Cope*, 16 Ch. Div. 49. This administration continues until the disability of the infant ends, and the latter then takes the duty on himself. A provision in a will that A shall act as executor until the testator's son becomes 21 years old, is not an appointment of the son as executor when he arrives at 21. *Frisby v. Withers*, 61 Tex. 134.

In America, this matter is sometimes regulated by statute, as in Massachusetts, where it is provided (Pub. Stats., ch. 130, § 7) that "when a person who

has been appointed executor is at the time of the probate of the will under the age of twenty-one years, administration with the will annexed may be granted during his minority, unless there is another executor who accepts the trust." And see also *Rev. Stats. of Wis.*, § 3797; *Stats. Minn.*, ch. 50, § 7.

This rule is recognized in other jurisdictions. *Pitcher v. Armat*, 5 How. (Miss.) 588; *Ellmaker's Est.*, 4 Watts (Pa.) 34; *Taylor v. Barron*, 35 N. H. 484, 493.

If there are several executors, and one of them is of full age, no administration of this kind ought to be granted, because he who is of full age may execute the will. *Williams on Exrs.* 479, 480. See *Cartright's Case*, 1 Freem. 258, and see also *Pub. Stats. Mass.*, ch. 129, § 4, that "when a person named as executor of a will is at the time of the probate thereof under the age of twenty-one years, the other executor or executors, if any, shall administer the estate until the minor arrives at full age, when, upon giving bond according to law, he may be admitted as joint executor of such will."

In *Wallis v. Wallis*, 1 Winst. (N. Car.) 78, the rule is laid down that where the widow is a minor, the court may appoint an administrator *durante minoritate* and give the administration to her on her majority, or may fill the office on her appointment. The English rule is to appoint the guardian of the minor to the temporary administration. *John v. Bradbury*, L. R., 1 P. & D. 243. And this is the rule in New York by statute. *McClellan's Practice in Probate Courts*, p. 132; 2 N. Y. Rev. St. 74; pt. 2, ch. 6, tit. 2, art. 2, § 27. So in Louisiana, the parents of a child are entitled to act for him. *Gusman's Succ.*, 36 La. Ann. 299. But in general it may be said that the probate courts in America are bound by no hard and fast rules in the appointment of administrators in such cases, and may pass over minors and next of kin and appoint whomever they deem best fitted for the office. *William's App.*, 7 Pa. St. 259; *Pitcher v. Armat*, 5 How. (Miss.) 288; *Schouler, Exrs.*, § 132; *Wms. on Exrs.*, p. 479, 480; 3 *Redfield on Wills* *105; though if no special objection exists it is regarded as proper to grant administration to the guardian.

be appointed to act in his stead.¹ Whenever, however, property is conveyed to an infant under such circumstances as would create a constructive trust in an adult grantee, there is a tendency in the courts to hold that the infant takes the beneficial interest also.² Infants may hold offices which are purely ministerial, and

Brunson v. Burnett, 2 Pin. (Wis.) 185, 194, and see *Alford v. Alford*, Deane & Sw. 322. Whether the infant can, on arriving at full age, demand administration as a matter of right, is, in the absence of statutes, a question on which the American courts do not seem to have passed. It would hardly seem that he could.

See farther vol. 7, p. 173, EXECUTORS AND ADMINISTRATORS, IV.

1. Trustees.—An infant is regarded as wanting in the judgment and capacity of a trustee, and can do nothing that requires the exercise of discretion, as every act not simply ministerial is at least voidable. An infant would never be appointed a trustee by a court, for he could not give a valid bond for the safety of the fund, nor could he be made liable for a breach of trust. *Whitmore v. Weld*, 1 Vern. 328; *Russell's Case*, 5 Rep. 27 a; *Hindmarsh v. Southgate*, 3 Russ. 324. An infant, however, has no privilege to cheat, and will not be protected in cunning and contrived frauds. *Evroy v. Nicholas*, 2 Eq. Cas. Ab. 489; *Hillyer v. Bennett*, 3 Edw. Ch. (N. Y.) 222; *Hill v. Anderson*, 5 Sm. & M. (Miss.) 216; *Wright v. Snowe*, 2 De G. & Sm. 321; *Davies v. Hodgson*, 25 Beav. 117; *Ebbett's Case*, 18 W. R. 202; *Lempriere v. Lange*, L. R., 12 Ch. Div. 675. An infant may exercise a power simply collateral over both real and personal estate. *King v. Bellord*, 1 H. & M. 343; *Re D'Angibau*, L. R., 15 Ch. Div. 228. And as to personal estate he may exercise a power in gross, notwithstanding that it may involve the application of discretion. *Re D'Angibau*, L. R., 15 Ch. Div. 228. But as to real estate it would seem that such a power could not be exercised unless expressly authorized by the instrument creating the power. *Hearle v. Greenbank*, 3 Atk. 695; s. c., 1 Ves. 298; *Re Cardrass' Settlement*, L. R., 7 Ch. Div. 728. And where an intention appears that the power is to be exercisable notwithstanding infancy, an infant may appoint even though his interest may be affected by the appointment. *Re Cardrass' Settlement*, L. R., 7 Ch. Div. 728; *Re D'Angibau*, L. R., 15 Ch. Div.

228. A trust which requires the exercise of discretion cannot be exercised by an infant. *King v. Bellord*, 1 H. & M. 343; *Lewin, Trusts*, pp. 37-8. If an infant is named as trustee in an instrument, the estate will vest in him. No beneficial interest will pass to him in such case. *King v. Denison*, 1 Ves. & B. 260, 275; *Jevon v. Bush*, 1 Vern. 342; *Lake v. De Lambert*, 4 Ves. 596, n. The court in such case, however, will remove the infant and appoint someone to act in his place, possibly his guardian, if a suitable person. *Ex parte Sergison*, 4 Ves. 147. In the matter of *Fallen*, 14 N. J. L. 147; *Re Porter*, 25 L. J., Ch. 482; s. c., 2 Jur. (N. S.), § 349. But without prejudice to the right of the infant to be restored to his trusteeship on reaching majority. *Re Sheldermine*, 33 L. J., Ch. 474. In the case of *Binion v. Stone*, 2 Freem. 169, a father bought land and took the title in the name of his son, five years of age. The court held the land was held in the hands of the son charged with a resulting trust in favor of the father. And see *Re Windle*, 2 Edw. Ch. (N. Y.) 585. Where an infant takes as trustee he may be held to his trust after he becomes of age. *Jevon v. Bush*, 1 Vern. 342.

2. From the great inconvenience attending the appointment of an infant as trustee, a strong presumption arises that property conveyed to an infant is intended for his benefit as an advancement or otherwise, and the court will not infer an intention that he is to take it in trust, unless it distinctly appears. But if such an appointment is actually made, the parties cannot, on the strength of its singularity or inconvenience, or their own incompetence to act as trustees, set up a claim to the beneficial interest. *Perry, Trusts*, § 54; *Tiffany & Bullard, Trusts and Trustees*, p. 348; *Smith v. King*, 16 East 283; *Blinkhouse v. Feast*, 2 Ves. Sr. 27; *Mumma v. Mumma*, 2 Vern. 19; *Taylor v. Taylor*, 1 Atk. 386. In *Lamplugh v. Lamplugh*, where the father purchased an estate in the name of a younger son, it was presumed to be an advancement rather than to make the infant a trustee. See also *Pole v. Pole*, 1 Ves. 76; *King*

which require nothing more than skill and diligence in their performance.¹

3. Right to Make a Will.—The age at which a person may make a valid will is now generally fixed by statute. In absence of statutes, the common law allows males of fourteen and females of twelve to dispose of personalty by will,² but real estate cannot be devised until the owner reaches full age.³ The age for disposing of both kinds of property is now generally fixed by statute at twenty-one years;⁴ but in some States persons of eighteen years of age may dispose of personalty by will, while no will devising real estate is valid until the testator is twenty-one;⁵

v. Denison, 1 Ves. & B. 260, 278; *Stileman v. Ashdown*, 2 Atk. 480. Likewise in America a conveyance to a child, the parent paying the purchase money, is presumed to be intended as an advancement, and there is no resulting trust in favor of the parent. *Cartwright v. Wise*, 14 Ill. 417; *Stanly v. Brannon*, 6 Blackf. (Ind.) 193; *Slack v. Slack*, 26 Miss. 287 (personal property); *Partridge v. Havens*, 10 Paige (N. Y.) 618; *Tremper v. Burton*, 18 Ohio 418; *Murphy v. Nathans*, 46 Pa. 508; *Douglas v. Price*, 4 Rich. Eq. (S. Car.) 322; *Thompson v. Thompson*, 1 Yerg. (Tenn.) 97; but this presumption may be rebutted by evidence. *Butler v. Insurance Co.*, 14 Ala. 777; *Taylor v. Taylor*, 9 Ill. 303; *Doyle v. Sleeper*, 1 Dana (Ky.) 531; *Peer v. Peer*, 3 Stockt. (N. J.) 432; *Jackson v. Matdorf*, 11 Johns. (N. Y.) 91; *Shepard v. White*, 10 Tex. 72; *Rankin v. Harper*, 23 Mo. 579. Where, however, the minor has conveyed to the father, he cannot avoid his deed on the ground of infancy. *Starr v. Wright*, 20 Ohio St. 97.

1. An infant may fill a purely ministerial office as clerk of the peace, either in person or by deputy. *Crosbie v. Hurley*, Alc. & Nap. (Ir.) 431.

Schouler, Dom. Rel., § 398, says: "The true principle to be extracted from the authorities seems, therefore, to be that the court will enquire whether an infant, as such, is by law capable of discharging suitably, faithfully and efficiently the duties of a particular office, and so as to leave open all the usual remedies to others; and this is a proper rule of guidance, the statutes being silent, rather than ancient precedents laid down as to particular offices in times when they were transmissible in families and mere sinecures."

In New York, by statute, no person can hold a civil office who at the time

of his election or appointment is not twenty-one years old. So if he is elected constable and execute process as such, he is a trespasser. *Green v. Burke*, 23 Wend. (N. Y.) 490. This is the law in other States, and in Rhode Island it is a provision of the State constitution (art. 9, § 1 and art. 2, § 1), but it seems that the acts of an infant as a public officer are binding upon the public until his appointment or election shall be declared void. *People v. Dean*, 3 Wend. (N. Y.) 438.

An infant cannot be naturalized on his own petition. *Le Forrester's Case*, 2 Mass. 419. Nor can he acquire a settlement by cormorancy. *Sterling v. Plainfield*, 4 Conn. 114.

2. Co. Litt. 89 b; *Davis v. Baugh*, 1 Sneed (Tenn.) 477. The common law rule prevails in Wyoming; and in New Mexico males of fourteen and females of twelve may dispose of both realty and personalty by will. Comp. St., § 1378.

3. 4 Kent Com. 505.

4. *Moore v. Moore*, 23 Tex. 637. This is the rule in England, Canada, Delaware, Florida, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Texas and Wisconsin. In Georgia an infant of fourteen may make a will. *O'Byrne v. Feeley*, 61 Ga. 77. In Louisiana the age is sixteen. Code, §§ 1476-77. In Kentucky an infant under twenty-one may make a will under a power specially given him. Gen. St., ch. 113, § 3. In Dakota, California, Connecticut, Idaho, Montana, Nevada, Utah, an infant can make a will at eighteen.

5. In Alabama, Arkansas, Missouri, Oregon, Rhode Island, Virginia and West Virginia the age at which realty

and in a few States females may make a valid will at an earlier age than is permitted to males.¹

4. Testimony of Infants.—At the age of fourteen, there is a presumption that every person has common discretion and understanding, until the contrary is made out; but under that age there is no such presumption.² Therefore, when a child under fourteen is offered as a witness, a preliminary inquiry into the degree of understanding of the child is necessary. This inquiry is conducted by the judge, and if it appears to his satisfaction that the child has sufficient natural intelligence, and has been so instructed as to understand the nature and effect of an oath, the witness is admitted to testify.³ The question is wholly one of intelligence

can be devised is fixed at twenty-one, and for disposing of personalty at eighteen; but in case of insufficiency of personalty a legacy in a will made under twenty-one cannot be charged on the realty. *Banks v. Sherrod*, 52 Ala. 267. Where an infant old enough to make a will of personalty devises real estate to a stranger and personal property to his heir the stranger has no claim, and the heir takes the realty also. *Kearney v. Macomb*, 16 N. J. Eq. 189. *Tongue v. Nutwell*, 17 Md. 212, 229; *Jones v. Jones*, 8 Gill & J. (Md.) 197; *Snelgrove v. Snelgrove*, 4 Des. Eq. (S. Car.) 274; *Melchor v. Burger*, 1 Dev. & Bat. Eq. (N. Car.) 634.

1. In the District of Columbia, Illinois, Vermont and Washington Territory women may make a will at eighteen and men at twenty-one. In Maryland the same rule holds, but the statute is silent as to personalty. In Colorado an unmarried male or female of seventeen may so dispose of personalty. Gen. St., § 3481. In Nebraska an unmarried female of eighteen or of sixteen, if she be married, may make a will. *Ward v. Laverty*, 19 Neb. 429. In New York a male of eighteen and a female of sixteen may make a will of personalty.

2. *Greenl. on Ev.*, § 367; *Wharton Ev.*, § 398; *Schoul. Dom. Rel.*, § 398; *Rapalje on Witnesses*, § 7.

3. Preliminary Examination by the Court.—It is error to allow a child under seven to testify without a preliminary examination by the court to ascertain the capacity of a child for understanding the obligation of an oath. *Hughes v. Detroit*, G. H. & M. Ry. Co., 31 N. W. Rep. (Mich.) 603; *People v. McNair*, 21 Wend. (N. Y.) 608.

For the preliminary examination by the court see *Rex v. Perkins*, 2 Moody

C. C. 135; *State v. Whittier*, 21 Me. 341; *Blackwell v. State*, 11 Ind. 196; *State v. Lattin*, 29 Conn. 389; *McGuire v. People*, 44 Mich. 286; *State v. Edwards*, 79 N. Car. 648; *Flanagin v. State*, 25 Ark. 92; *People v. Bernal*, 10 Cal. 66; *Com. v. Le Blanc*, 3 Brev. (S. Car.) 339; *Com. v. Mullins*, 2 Allen (Mass.) 295; *Simpson v. State*, 31 Ind. 90; *Den v. Van Cleve*, 5 N. J. L. 589.

The fact that a girl of seven was held incompetent does not affect the question of her competency on a new trial when her age was over eight. *Kelly v. State*, 75 Ala. 21.

The evidence of a child of six or seven has been received on a trial for attempt to ravish. *State v. Morea*, 2 Ala. 275; *Washburn v. People*, 10 Mich. 372; *State v. Richie*, 28 La. Ann. 327. A child of eight years has been held competent. *Wade v. State*, 50 Ala. 164. So where the child says that if she did not tell the truth, "The bad man will get me." *Logston v. State*, 3 Heisk. (Tenn.) 414; and see *Vincent v. State*, 3 Heisk. (Tenn.) 120, "I shall go to the bad world"; *Com. v. Hutchinson*, 10 Mass. 225. So a child of nine years. *Draper v. Draper*, 68 Ill. 17. Ten years. *Davidson v. State*, 39 Tex. 129. On the other hand, the evidence of a child of four was rejected because she was too young to testify. *Smith v. State*, 41 Tex. 352; *Rex v. Pike*, 3 C. & P. 598 (dying declarations). A child of nine was disqualified for lack of intelligence where her examination showed utter ignorance of the nature and consequences of an oath. *Williams v. State*, 12 Tex. App. 127. In *Carter v. State*, 63 Ala. 52; s. c., 35 Am. Rep. 4, "The witness was a little negro girl about nine years old; and to questions put by counsel for the defendant, she answered that she

did not know what the Bible was; had never been to church but once, and that was to her mother's funeral; did not know what book it was she laid her hand on when she was sworn; had heard tell of God, but did not know who it was; and said if she swore to a lie she would be put in jail, but did not know she would be punished in any other way." She was *held* incompetent to testify. So also a child of eleven, who had never heard of God or the devil. *Beason v. State* 72 Ala. 191. A child of eight, who did not know what the Bible is, and could not read, but stated she would "go to the big fires of hell" if she did not tell the truth, was *held* competent in *Com. v. Carey*, 2 Brewst. (Pa.) 404.

Allowance should be made for the nervous agitation of a child. "The State then offered as a witness Mamie Scanlan. Upon being thus presented, the defendant objected to her being sworn and examined because of her tender years, whereupon she was examined by the judge respecting her qualifications as a witness; and upon examination, the child being much frightened and scarcely able to speak above her breath, stated to the judge that she could not tell her age, that she did not know the nature or obligation of an oath, nor what would be the consequences of false swearing. The answers of the child to the questions of the judge were invariably in monosyllables, yes and no, and uttered in a tone scarcely audible. Upon the first examination the judge refused to have her sworn. Upon re-examination, the court, on inspection of the witness, judged her to be between nine and ten years of age, and having partially recovered from the fright occasioned by surroundings entirely new to her, the judge ascertained from her statements that she was the daughter of the defendant, that she knew her prayers, could read some, believed in God, and thought it wrong to tell lies." The witness was then sworn, and the action of the court was sustained on appeal. *State v. Scanlan*, 58 Mo. 204; *Davidson v. State*, 39 Tex. 129. The examination should be public, and it is error to have the child examined in a room apart. In *Simpson v. State*, 31 Ind. 90, the principal witness in a trial for rape was a child only six years old at the time of the trial, which was sixteen months after the alleged offence. The witness was examined by the judge, who, not being satisfied, appointed two

gentlemen to retire with the child and examine her in private. They reported that "in their opinion her testimony ought to be heard, but received with great allowance." This reference was *held* irregular, as the court should have acted on its own judgment at a public examination in the defendant's presence. See also *State v. Morea*, 2 Ala. 275; *People v. Welsh*, 63 Cal. 167.

Where, however, the child has sufficient intelligence, but has never been instructed as to the nature and obligation of an oath, the child may be instructed and the trial may be postponed for that purpose. 1 Greenl. Ev., § 366 (14th ed.); *Com. v. Lynes*, 142 Mass. 577; *Com. v. Carey*, 2 Brewst. (Pa.) 404; *Jenner's Case*, 2 City Hall Rec. (N. Y.) 147; *State v. Edwards*, 79 N. Car. 648; *Rex v. White*, 2 Leach, C. C. 48*n*; but this practice has been condemned. *Taylor v. State*, 22 Tex. App. 529; *Reg. v. Nicholas*, 2 C. & K. 246. In *Rex v. Williams*, 7 C. & P. 320, it appeared that at the time of the crime, sixteen weeks before the trial, the infant had never heard of God, or of a future state of rewards or punishments, and that she never prayed, and did not know the nature of an oath. She had, before the trial, been twice visited by a clergyman, who instructed her as to the nature of an oath. At the trial she said she would go to hell if she told a lie, and hell was under the kitchen grate. She showed no intelligence as to religion or the future state. Her evidence was rejected, the court saying that "The effect of an oath on the conscience of a child should arise from religious feelings of a permanent nature, and not merely from instructions confined to the nature of an oath, recently communicated to her for the purpose of this trial."

"It may be regarded as settled that wherever there is intelligence enough to observe and narrate, there a child, a due sense of the obligation of an oath being shown, can be admitted to testify." 1 Whart. Ev., § 398; *Rex v. Powell*, 1 Leach 110; *Rex v. Brazier*, 1 Leach 199; *State v. Whittier*, 21 Me. 341; *State v. De Wolf*, 8 Conn. 98; *Com. v. Hutchinson*, 10 Mass. 225; *Jackson v. Gridley*, 18 Johns. (N. Y.) 98; *Com. v. Carey*, 2 Brewst. (Pa.) 404; *Draper v. Draper*, 68 Ill. 17; *Blackwell v. State*, 11 Ind. 196; *McGuire v. People*, 44 Mich. 286; *State v. Levy*, 23 Minn. 104; *Spears v. Snell*, 74 N. Car. 210 (boy of thirteen); *Wade*

and of a due sense of the obligation of an oath, and the judge is allowed a large discretion.¹ Children are sometimes held incompetent to testify in suits to which their parents are parties.² (See WITNESSES.)

v. State, 50 Ala. 164; *State v. Denis*, 19 La. Ann. 119; *State v. Scanlan*, 58 Mo. 204; *Logston v. State*, 3 Heisk. (Tenn.) 414; *Flanagin v. State*, 25 Ark. 92; *Davidson v. State*, 39 Tex. 129; *People v. Bernal*, 10 Cal. 66.

The presumption of incompetency ceases at ten years by an Indiana statute, and the question of credibility is for the jury. *Holmes v. State*, 88 Ind. 145. See also, for same rule in Ohio, act Feb. 1859, § 1, and as to the same limit in Missouri, *State v. Scanlan*, 58 Mo. 204. In Arkansas, a child under ten cannot testify in civil cases, but the common law rule applies to criminal cases. *Warner v. State*, 25 Ark. 447.

1. Competency is not inconsistent with immunity from prosecution for perjury. *Johnson v. State*, 61 Ga. 35, and of *McGuire v. People*, 44 Mich. 286.

The question of competency is for the court and the decision is final except in a flagrant case of error. *Peterson v. State*, 47 Ga. 524; *Brown v. State*, 2 Tex. App. 115; *Oliver v. Com.*, 77 Va. 590; *State v. Edwards*, 79 N. Car. 648; *State v. Denis*, 19 La. Ann. 119; *Ake v. State*, 6 Tex. App. 286; *Wade v. State*, 50 Ala. 164; *State v. Jackson*, 9 Oreg. 457. Recent statutes in many States have abolished the test as to the religious belief of witnesses, and it may be questioned in these jurisdictions whether a child can be longer held to an understanding of the religious significance of an oath. *Stephen Dig.*, Ev. n. 40. See *State v. Levy*, 23 Minn. 104, where the court say: "Upon the question of her understanding the obligation of an oath, the court below seems to have held it sufficient to admit her if she understood that she was brought to court to tell the truth, that it is wrongful to tell a lie, and that she would be punished if she told a lie. Under our statute, which admits as well those who profess to believe only in the punishment which human laws inflict, as those who believe in punishment by divine law, we think the test acted upon by the court below sufficient." In *Davidson v. State*, 39 Tex. 129, a child ten years old was admitted to testify, who "did not know what God and the laws of the country would do

to her if she swore falsely, but she would tell the truth," and in *Blackwell v. State*, 11 Ind. 196, the witness was a child under ten, who stated on the *voir dire* that she did not know how perjury would be punished, but believed it would be; she knew it was not right to swear to a lie, and said she would tell the truth if sworn, and always, if her mother wanted her to, and that her mother had told her to in this case. The court below admitted her, and the court on appeal declined to interfere.

2. Interest.—So in Mississippi a child was held incompetent to testify that his father did not execute a note on which it was sought to charge the estate. *McIntyre v. Ledyard*, 1 Sm. & M. (Miss.) Ch. 191, but a daughter was held competent to testify in a suit to which her mother was a party, although her testimony might go to show that the property in controversy belonged to her deceased father. *Parker v. McNeill*, 12 Sm. & M. (Miss.) 355. Natural children have been rejected as witnesses in a suit involving the property of their deceased natural father (*Lazare v. Jacques*, 15 La. Ann. 599), and the doctrine has been extended to a son-in-law (*McKinney v. McKinney*, 2 Stew. (Ala.) 17), and in a suit against two, the son of one who died pending the suit was held incompetent. *Shepard v. Ward*, 8 Wend. (N. Y.) 542.

But this doctrine has not received universal approval. A child may testify for his father on a criminal complaint. *State v. Thompson*, 10 La. Ann. 122. So where the father sues to recover for labor performed by the child, the latter is competent to testify for the plaintiff (*Keen v. Sprague*, 3 Me. 77, and *cf.* *Belt v. Miller*, 4 Har. & M. (Md.) 536. And where a father sued for the debauching of his daughter, the girl was admitted to testify. *Mott v. Goddard*, 1 Root (Conn.) 472.

And where a *cestui que trust*, with a power of appointment among her children, sued to recover land conveyed in violation of the trust, the testimony of her son in her behalf was held competent. *Murray v. Finster*, 2 Johns. Ch. (N. Y.) 155; *cf.* *McClung v. Spotswood*, 19 Ala. 155; *Aiken v. Cato*, 23 Ga. 154; *Mester*

5. Marriage.—The common law, following the civil law, has established an age of consent at which infants may contract valid marriages. This age is intended to follow the age of puberty, and is fixed at fourteen for males and twelve for females;¹ but these limits have been raised by statute in many States.² Infants who have arrived at the age of consent may contract a valid marriage which cannot be disaffirmed by either party.³ Where infants below the age of consent marry, the law regards the marriage as voidable by either party when both parties have arrived at the age of consent;⁴ but ratification of the marriage will be inferred from continued cohabitation or other circum-

v. Zimmerman, 7 Bradw. (Ill.) 156.

The objection has never been held to extend to grandchildren. *Highberger v. Stiffler*, 21 Md. 388.

1. *Arnold v. Earle*, 2 Lee (Eng. Ec.) 529; *Rex v. Gordon*, Russ. & Ry. 48; *Co. Litt.*, 79 b.; *Reeve*, Dom. Rel. 236, 237; 2 *Kent Com.* 78; *Pool v. Pratt*, 1 Chip. (Vt.) 254, and marriages at these ages are valid without the consent of the parents. *The Governor v. Rector*, 10 Humph. (Tenn.) 57; *Bennett v. Smith*, 21 Barb. (N. Y.) 439, and this in spite of a statute prohibiting ministers from solemnizing any marriage where the man is under twenty-one, or the woman under eighteen, without the parent's consent. *Parton v. Harvey*, 1 Gray (Mass.) 119. Such a statute is directory merely.

The common law rule is expressly adopted by statute in *New Hampshire*, *Virginia*, *West Virginia*, *Kentucky* and *Louisiana*. *Stimson Statutes*, § 6110.

2. **Age of Consent.**—In *Iowa*, *North Carolina* and *Texas* the age of consent is put at sixteen for males and fourteen for females; at seventeen in the male and fourteen in the female in *Alabama*, *Arkansas*, *Georgia* and *Illinois*; eighteen the male and fifteen in the female, *California*, *Dakota*, *Minnesota*, *New Mexico*, *Oregon* and *Wisconsin*; eighteen in the male and sixteen in the female, *Indiana*, *Michigan*, *Idaho*, *Nebraska*, *Nevada*, *Ohio* and *Wyoming*; twenty-one in the male and eighteen in the female, *Montana* and *Washington*; twenty-one in the male and fourteen in the female, *New York*. In *Maryland* and *South Carolina* females under sixteen must first obtain the consent of their parents. In *Virginia* if a female between twelve and fourteen marry without the consent of her parent or guardian, the

court may commit her estate to a receiver, who shall hold it during coverture and then deliver it to her or her heirs excluding her husband, and in *West Virginia* the same provision is law, except that the receiver delivers the estate to the woman as her sole estate on reaching majority.

These various statutes thus raising the age of consent should be interpreted, when possible, in accordance with the common law as merely substituting the statutory ages for fourteen and twelve. 1 Bish., Mar. & Div., § 145.

In *Koonce v. Wallace*, 7 Jones (N. C.) 194, under a statute providing that "females under the age of fourteen and males under the age of sixteen shall be incapable of contracting marriage," a marriage between parties under these ages, who continued cohabitation after having passed such ages was held valid. PEARSON, C. J., says: "In the opinion of this court, the only effect of the statute was to make sixteen instead of fourteen years, in respect to males, and fourteen instead of twelve years, in respect to females, the ages at which the parties respectively were capable of making a perfect marriage, leaving the rule of the common law unaltered in all other respects." So also in *Iowa*, where the statute reads that "male persons of the age of eighteen years and female persons of the age of fourteen years . . . may be joined in marriage," the case of *Goodwin v. Thompson*, 2 Greene (Ia.) 329, held, that infants below these ages might still marry, and see also *Beggs v. State*, 55 Ala. 108.

3. See note 10. Mere infancy is no disqualification. *Gavin v. Burton*, 8 Ind. 69; *Frost v. Vaught*, 37 Mich. 65; *Bonney v. Reardin*, 6 Bush. (Ky.) 34.

4. **Marriage Under Age of Consent.**—

Co. Litt. 79, and Hargraves note No. 45; 1 Bl. Com. 436; 1 East P. C. 468; 1 Bish. Mar. & Div., § 149. Thus differing from other contracts of infants, either party may disaffirm, for in matrimony it is important that both parties should be bound or an equal election of disagreement be open to both. Tyler Inf. & Cov., § 81; People v. Slack, 15 Mich. 193. The majority of the court in this case, however, doubt whether a man above the age of consent, who marries a woman under such age, can, on her arriving at such age, repudiate the marriage, and lay down the rule that there must be a separation by mutual consent during non-age, or a repudiation by the wife on her arriving at the age of consent.

It seems to be law, however, that both parties should have reached the age of consent before the marriage can be annulled. 1 Bish. Mar. & Div., § 147. Reeve, Dom. Rel. 237, dissents from this rule in commenting on a case in Rolle's Abr. 341, where a wife, being only eleven years old, did disagree to the marriage, and the husband, being then of the age of consent, married another woman and by her had a child. Such child was adjudged to be a bastard, because the first marriage continued valid, for the first wife when she dissented to the marriage had not arrived at the age when she could dissent. And see Tyler, Inf. & Cov., § 81. In *New York*, in *Aymar v. Roff*, 3 Johns. Ch. 49, a man married a girl twelve years of age, who immediately declared her ignorance of the nature and consequences of the ceremony and her dissent therefrom. The court of chancery, in a bill filed by the next friend of the infant, ordered her to be placed under the protection of the court and enjoined the man from all intercourse or correspondence with her. This course allows the girl to affirm the marriage on reaching the age of consent. And see Eyre v. Countess of Shaftesbury, 2 P. Wms. 111.

Tyler, Inf. & Cov., § 81, says: "The better opinion now is that parties marrying before the age of consent may dissent to the marriage during non-age and thus avoid it *in toto*."

A marriage contracted by an infant under the age of consent is voidable only, and until disaffirmed is a marriage in fact and sufficient to support a prosecution for bigamy in contracting a subsequent marriage. *Beggs v. State*, 55 Ala. 108; *Walls v. State*, 32 Ark.

565; and in this state there must be a judicial decree avoiding the marriage. *People v. Bennett*, 39 Mich. 208. But see *contra*, *Shaffer v. State*, 20 Ohio 1.

The dissent to the marriage may be expressed by a judicial decree. 1 Bish. Mar. & Div., § 150; 2 Burn, Eccl. Law 500; *Harford v. Morris*, 2 Hagg. Con. 423; *Walls v. State*, 32 Ark. 565, or without such decree. Co. Litt. 79b; 1 Bl. Com. 436; 2 Burn, Eccl. L. 435; and Bishop, 1 Mar. & Div., § 150, expresses a doubt whether such judicial decree could be obtained before the infant reaches the age of consent. The guardian of the infant cannot avoid the marriage. *Parks v. Maybee*, 2 U. C. C. P. 257.

In a few States marriages contracted while either party is below the age of consent are declared void by statute. *Kentucky*, *Arkansas*, *Texas*, and after judicial decree, *New Mexico*, and only when the parties separate during non-age and do not cohabit thereafter, in *Massachusetts*, *Michigan*, *North Carolina*, *Virginia* and *Arizona*. *Stimson*, Am. Sts., § 6212. In other states such marriages are declared voidable and may be annulled on petition or suit from the date of the decree, *Vermont*, *New York*, *Indiana*, *Wisconsin*, *Minnesota*, *Dakota*, *West Virginia*, *Arkansas*, *California*, *Oregon* and *Nevada*; and on application of the party injured only in *Iowa*, *Idaho*, *Washington*, and generally without restriction in *Michigan*, *Kansas* and *Wyoming*.

In *Delaware* it is a cause of divorce where a marriage was procured when the wife was under sixteen, or the husband under eighteen, and there has been no ratification, and similar statutes exist in *Arizona* and *Idaho*.

In most States a magistrate is forbidden to issue a marriage certificate to a male under twenty-one or a female under eighteen, *Massachusetts*, *Maine*, *Vermont*, *Ohio*, *Indiana*, *Illinois*, *Minnesota*, *Nebraska*, *Missouri*, *Arkansas*, *Texas*, *California*, *Wyoming*, *Alabama* and *Mississippi*, or if either party be under twenty-one, *Rhode Island*, *Connecticut*, *Pennsylvania*, *Virginia*, *West Virginia*, *North Carolina*, *Florida* and *Louisiana*, except on the written or personal consent of parent or guardian. The clerk may require an affidavit or other evidence as to the age, *Massachusetts*, *Pennsylvania*, *Virginia*, *Arkansas*, *California*, *Mississippi*, and in

stances after such age is reached.¹ Marriages of infants under seven years of age are regarded as absolutely void.² While the law thus holds an executed contract of marriage binding on infants, the same does not hold true of executory contracts of marriage. An infant cannot be held liable for breach of promise of marriage, although if the other contracting party is an adult, he or she cannot avoid the contract on such ground.³

6. Child en Ventre Sa Mere.—A child en ventre sa mere is a child while yet unborn. Although the point was formerly in doubt, it is now settled, both in England and in this country, that from the time of conception the infant is *in esse*, for the purpose of taking any estate which is for his interest, whether by descent, devise or under the statute of distributions; provided, however, that the infant is born alive, and after such a period of foetal

Indiana, Colorado, Oregon and Washington, such an affidavit is obligatory. *Stimson, Am. Sts.*, § 6122.

In many States no minister or magistrate shall solemnize a marriage when he has reasonable cause to believe that either party is below the statutory age, generally twenty-one, *Massachusetts, Maine, New York, New Jersey, Ohio, Wisconsin, Maryland, Delaware, Missouri, Colorado, Idaho, New Mexico and Arizona*, and see further *Stimson, Am. Sts.*, § 6134, but a marriage solemnized in violation of this provision is unquestionably lawful, although the officer would incur a penalty for a breach of his duty. *Milford v. Worcester*, 7 Mass. 48; *Parton v. Hervey*, 1 Gray (Mass.) 119; *Hantz v. Sealy*, 6 Binn. (Pa.) 405; *Londonderry v. Chester*, 2 N. H. 268; *Rex v. Birmingham*, 8 B. & C. 29.

Fraud.—Where the marriage with an infant is obtained by fraud or undue influence, it will be set aside. In *Lyndon v. Lyndon*, 69 Ill. 43, the family coachman inveigled the complainant into marriage. He procured the licence by falsely swearing as to her age, and the girl never conabited with him, but repudiated the marriage at once. The marriage was held void. *Robertson v. Cole*, 12 Tex. 356; *Harford v. Morris*, 2 Hagg. Con. 423.

1. Such a marriage is regarded as "inchoate and imperfect." *Co. Litt.* 33 a; 2 Kent. Com. 78, 79; *Fitzpatrick v. Fitzpatrick*, 6 Nev. 63; *Warwick v. Cooper*, 5 Sneed (Tenn.) 659. No new ceremony is required to affirm the marriage. *Co. Litt.* 79; *Koonce v. Wallace*, 7 Jones (N. Car.) 194. And continued cohabitation is regarded as an affirm-

ance. 2 Dane Abr. 301; *Coleman's Case*, 6 City Hall Rec. 3; *Schouler, Husb. and Wife*, § 24; *Tyler, Inf. and Cov.*, § 81. The same is said to follow from kissing, embracing, sending gifts, and so on. 1 Bish. Mar. & Div., § 130.

2. 2 Burn, Eccl. Law 434 a; 1 Bl. Com. 436; note 11 by Chitty; *Swinb. Spousals* 20, 23; 1 Bish. Mar. & Div., § 147; *Schouler, Husb. & Wife*, § 24.

3. **Breach of Promise.**—*Hunt v. Peake*, 5 Cow. (N. Y.) 475; s. c., 15 Am. Dec. 475; *Willard v. Stone*, 7 Cow. (N. Y.) 22; s. c., 17 Am. Dec. 496; *Hamilton v. Lomax*, 26 Barb. (N. Y.) 615; *Fiebel v. Obersky*, 13 Abb. Pr. (N. Y.) N. S. 403; *Morris v. Graves*, 2 Ind. 354; *Develin v. Riggsbee*, 4 Ind. 464; *Reish v. Thompson*, 55 Ind. 34; *Cannon v. Alsbury*, 1 A. K. Marsh. (Ky.) 76; s. c., 10 Am. Dec. 709; *Frost v. Vought*, 37 Mich. 65; *Reish v. Wick*, 31 Ohio St. 521; s. c., 27 Am. Rep. 523; *Warwick v. Cooper*, 5 Sneed (Tenn.) 659; *Hale v. Ruthven*, 20 L. T. (N. S.) 404; *Holt v. Ward Clarencieux*, 2 Stra. 937; *Ditcham v. Worall*, S. C. P. D. 410. And a male infant may plead his infancy in a suit for breach of promise of marriage, even though the plaintiff may, by reason of such promise, have been induced to allow him to have connection with her. *Leichtweiss v. Treskow*, 21 Hun (N. Y.) 487. But such a promise may be ratified after he is of age, and the jury may determine whether language used by him after majority amounts to ratification or a fresh promise. *Northcote v. Doughty*, 4 C. P. D. 385; *Coxhead v. Mullis*, 3 C. P. D. 439.

The plaintiff need not allege in the

existence that its continuance in life might reasonably be expected.¹

declaration that he or she is of marriage age. *Glasscock v. Shell*, 57 Tex. 215. Nor that his or her parent or guardian had consented to the marriage. *Cannon v. Alsbury*, 1 A. K. Marsh. (Ky.) 76; s. c., 10 Am. Dec. 709.

1. The early English cases holding that an unborn child is not to be regarded as *in esse*, *Pierson v. Garnet*, 2 Bro. C. C. 38; *Ellison v. Airey*, 1 Ves. Sr. 111; *Musgrave v. Perry*, 2 Vern. 710; *Bate v. Amherst*, T. Raym. 83, have long been overruled, and the law is as stated in the text. *Wallis v. Hodson*, 2 Atk. 115; *Clarke v. Clarke*, 2 H. Blacks. 399; *Clarke v. Blake*, 2 Bro. C. C. 320; s. c., 2 Ves. jr. 673; *Scatterwood v. Edge*, 1 Salk. 229; *Snow v. Tucker*, 1 Sid. 153; *Long v. Blackhall*, 7 T. R. 100; *Millar v. Turner*, 1 Ves. Sr. 85; *Burnet v. Mann*, 1 Ves. Sr. 156; *Beale v. Beale*, 1 P. Wms. 244; *Durdet v. Hopegood*, 1 P. Wms. 486; *Trower v. Bults*, 1 Sim. & St. 181; *Thelluson v. Woodford*, 4 Ves. Jr. 227; s. c., 11 Ves. Jr. 112; *Morrow v. Scott*, 7 Ga. 535; *Harper v. Archer*, 4 Sm. & Mar. (Miss.) 99; s. c., 43 Am. Dec. 472; *Crisfield v. Storr*, 36 Md. 129; *Hall v. Hancock*, 15 Pick. (Mass.) 255; *Picot v. Armstead*, 2 Ired. Eq. (N. Car.) 226 (*semble*); *Stedfast v. Nicoll*, 3 Johns. Cas. (N. Y.) 18; *Marsellis v. Thalhimer*, 2 Paige (N. Y.) 35; s. c., 21 Am. Dec. 66; *Jenkins v. Freyer*, 4 Paige (N. Y.) 47; *Mason v. Jones*, 2 Barb. (N. Y.) 229, 251; *Barker v. Pearce*, 30 Pa. St. 173; *Burke v. Wilder*, 1 McCord Ch. (S. Car.) 551.

Children *en ventre sa mere* are considered within the meaning of the word "children" in a will. *Petway v. Powell*, 2 Dev. & Bat. Eq. (N. Car.) 308; *Simpson v. Spence*, 5 Jones Eq. (N. Car.) 208; *Hall v. Hancock*, 15 Pick. (Mass.) 255; *Crook v. Hill*, L. R., 3 Ch. Div. 773 (an illegitimate child). So also of "grandchildren;" *Smart v. King*, Meigs (Tenn.) 149; *Hone v. Van Schaick*, 3 Barb. Ch. (N. Y.) 488; *Swift v. Duffield*, 5 S. & R. (Pa.) 38. So of "persons living at the death;" *Rawlins v. Rawlins*, 2 Cox Cas. in Eq. 425; *Groce v. Rittenbury*, 14 Ga. 232; *Hall v. Hancock*, 15 Pick. (Mass.) 255; *Starling v. Price*, 16 Ohio St. 29; *Laird's App.*, 85 Pa. St. 339, and note the distinction made *In re Corless*, L. R., 1 Ch. Div. 460.

A devise to an unborn illegitimate child is valid. *Pratt v. Flamer*, 5 Har. & J. (Md.) 10.

But this fiction is for the child's interest only, and applies only to enable him to take a benefit which if born he would be entitled to. *Blasson v. Blasson*, 10 Jur. N. S. 1113; *McKnight v. Read*, 1 Whart. (Pa.) 213; and see *Armistead v. Dangerfield*, 3 Munf. (Va.) 220; s. c., 5 Am. Dec. 501. And *In re Gardiner's Est.*, L. R., 20 Eq. 647, it was held that where a testatrix made a gift to "all my brothers and sisters, share and share alike, but no share to vest until the recipient had attained the age of twenty-one years," the class was closed when the eldest became twenty-one, and a child *en ventre sa mere* at that time, but born afterwards, was not entitled to share.

The child is regarded as *in esse* from the time of its conception. *Hall v. Hancock*, 15 Pick. (Mass.) 255; *Marsellis v. Thalhimer*, 2 Paige (N. Y.) 35; s. c., 21 Am. Dec. 99; *Harper v. Archer*, 4 Sm. & M. (Miss.) 99; s. c., 43 Am. Dec. 472. If the child is subsequently born alive, it must be so far matured as to be capable of living. *Hone v. Van Schaick*, 3 Barb. Ch. 488; *Harper v. Archer*, 4 Sm. & M. (Miss.) 99. A child within six months of conception is presumed to be incapable of living. *Marsellis v. Thalhimer*, 2 Paige (N. Y.) 35.

Beck, Medical Jurisprudence, vol. 1, p. 407 (12th ed.), says: "As a general rule, it seems now to be generally conceded that no infant can be born viable, or capable of living, until one hundred and fifty days, five months, after conception. There are, however, cases mentioned to the contrary. In such cases, we should recollect that females are liable to mistakes in their calculations and that conceptions may take place at various times during the menstrual intervals, and thus vary the length of the gestation. Such early births are at the present day very generally and very properly doubted . . . We may . . . conclude that between five and seven months, there have been instances of infants living, though most rare; and even at seven, the chance of surviving six hours after birth is much against the child." And see *Chitty, Med. Jur.* 406 *acc.*

On the other hand, by statute, a

child born ten months after the death of the father comes within the rule. *Massie v. Hiatt*, 82 Ky. 314.

A devise to A for life, remainder to his children, carries the property to an unborn son on A's death. *Snow v. Tucker*, 1 Sid. 153; *Reeves v. Long*, 1 Salk. 228. So the remainder was limited first to male children and then to female, and A died leaving a daughter and his wife pregnant, who was afterwards delivered of a son, the latter took by devise. *Stedfast v. Nicoll*, 3 Johns. Cas. (N. Y.) 18. A posthumous child is within marriage articles limiting property to such children as may be living at the death of the father, and will take under the statute of distributions. *Millar v. Turner*, 1 Ves. 85; *Burnet v. Mann*, 1 Ves. 156. Where such a child takes land that has descended, he takes by descent, but the intermediate profits go to the one who took prior to his birth. *Bassett v. Bassett*, 3 Atk. 202; *Goodtitle v. Newman*, 3 Wils. 516, 526. A child *en ventre sa mere* is regarded as "a life in being" within the rule against perpetuities. *Thelluson v. Woodford*, 11 Ves. 112, 149.

The testator gave "to each and every of my other children now born, or hereafter to be born, and who shall be living at the time of my decease, £5000 apiece, to be paid at their ages of 21, etc., with interest thereon to be computed from the day of my death." *Held*, that a child *en ventre sa mere* at the testator's death, but born seven months afterwards, was entitled, but with interest only from the time of the birth. *Rawlins v. Rawlins*, 2 Cox, Cas. in Eq. 425.

A testator gave property to his married daughter for life, and if she had no children at the expiration of five years from the death of his wife, then over to certain persons named, as if the daughter had died without heirs. Her first child was born five years and six months after the testator's widow's death. *Held*, that as the daughter had a child *en ventre sa mere* within the five years, the gift over had not taken effect. *Pearce v. Carrington*, L. R., Ch. App. 969.

A collision occurred at sea whereby some of the crew of one of the vessels were drowned. In a suit in admiralty, entered on behalf of the owners of that vessel, an appearance was entered in behalf of a child of one of the drowned men *en ventre sa mere*. The court reserved leave to the child *en ventre*, if

born within due time, to prefer a claim for damages sustained by death of the father. *The George & Richard*, 3 L. R., Adm. 466; s. c., 24 L. T. 717. The child was afterwards born and its claim was assessed. 20 W. R. 245, 246. Marriage and the birth of a posthumous child revokes a will. *Doe d. Lancashire v. Lancashire*, 5 T. R. 49; *Warner v. Beach*, 4 Gray (Mass.) 162. This is so by statute in some States, *e. g.* Pennsylvania and Rhode Island.

Partition of Real Estate.—An infant *en ventre sa mere* is not bound by a decree of partition made before his birth. *Pearson v. Carlton*, 18 S. Car. 47; *Gillespie v. Nabor*, 59 Ala. 441; and may reclaim his interest from a remote vendee of the purchaser. *Massie v. Hiatt*, 82 Ky. 314. So the interest of such a child is not divested by a judicial sale made before his birth. *Detrick v. Miggatt*, 19 Ill. 146; *McConnel v. Smith*, 23 Ill. 611; *Bowman v. Tallman*, 27 How. Pr. (N. Y.) 212. And see *Mead v. Mitchell*, 17 N. Y. 210. In England it seems that a child *en ventre sa mere* is bound by all proceedings in a case up to the time of its birth; so if an infant is born after a decree, who, if born before it, would have been a necessary party to the suit, he is bound by the decree. *McPherson on Inf.* 567. Where the interest of children then born, or the enjoyment of the dower right of the widow requires the conversion of real estate into a personal fund, a child *en ventre sa mere* does not, until born, possess any estate therein which can affect the power of the court to pass a decree directing such conversion. Whatever estate devolves on such a child at his birth is an estate in the property in its then condition. *Knotts v. Stearns*, 91 U. S. 638.

Statutes.—Where a future estate or remainder is limited by deed or will to the heirs, issue or children of any person, a child *en ventre sa mere* at the time of the death of such person takes as if living, although there is no estate to support the contingent remainder until the birth. This is the rule by statute in *New York, Illinois, Michigan, Wisconsin, Minnesota, Virginia, West Virginia, North Carolina, Kentucky, Missouri, California, Nevada, Colorado, Alabama, Mississippi, Dakota, Idaho, Montana, New Mexico*. See *Hawley v. James*, 5 Paige (N. Y.) 318, 464. In *Michigan* such a child takes a vested interest. *Catholic Mut. Benefit Ass. v. Firnane*, 50 Mich.

§2. Consequently a future estate dependent on the death of any person without heirs, issue or children, is defeated by the birth of a posthumous child capable of inheriting from such person in *New York, Illinois, Michigan, Wisconsin, Minnesota, Virginia, West Virginia, North Carolina, Tennessee, Missouri, California, Nevada, Alabama, Dakota, Idaho, Montana and New Mexico*. Such posthumous child must be born within ten months of the father's death. *Kentucky, Mississippi, North Carolina, Tennessee, Virginia and West Virginia*.

In *Delaware and Louisiana* unborn children take under a will if conceived at the testator's death. So also where the child, if born, would answer to a class. *California, Dakota, Montana, Utah*. In *Connecticut* by Stat. 1885, ch. 110, § 130, no devise can be made to a person not in being at the testator's death, but it may be doubted whether the court would not consider a child *en ventre sa mere* as "in being" within the terms of this statute.

Descent and Distribution.—Generally for the purposes of descent and distribution a child *en ventre sa mere* is considered as living at the death of the parent. *Hill v. Moore, Murph. (N. Car.)* 233. The *Maryland* Code, art. 93, § 134, allows posthumous children of an intestate to take as other children, but declares that no other posthumous relation shall be considered as entitled to distribution in his or her own right. *Held*, that one born after his father's death, but before his aunt's, is not a posthumous relation to his aunt. *Shriver v. State*, 65 Md. 278.

It follows that a child *en ventre sa mere* not mentioned in its parent's will, takes a share in the estate just as any other child that is born after a will is made. *Chicago B. & Q. R. R. Co. v. Wasserman*, 22 Fed. Rep. (Neb.) 872. Express provision to this effect is made by statute in *Alabama, Arkansas, Delaware, Kentucky, Mississippi, Missouri, New Jersey, New York, Nebraska, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington*. But in some States a slight difference is made between a posthumous child and one born after the will is made but before the death of the testator. Thus, in a few States, such child will take the share it would have had if its parent had died intestate, unless (1) provision has been made for him by the will or

otherwise. *Arizona, Iowa, Massachusetts, Maine, New Hampshire, or (2)* unless he is expressly excluded by the will. *Arizona, New Hampshire, Illinois* (See *Stimson Sts.*, §§ 2844, 2622 and 1413). *Osborn v. Jefferson Bank*, 116 Ill. 130. A child born before its parents' marriage, and rendered legitimate by the subsequent marriage, is not an "afterborn" child within the meaning of that term as used in the statute defining the rights of such a child omitted from a parent's will. *McCulloch's Appeal*, 113 Pa. St. 247.

Evidence that a testatrix, who, by a will dated nine months after marriage, devised all her estate to her husband, had, by an antenuptial settlement, reserved to herself certain real estate and the right to dispose of it by will, and that she had a child born a month after the will was made, will justify a finding that her omission to provide for the child was intentional, and not occasioned by accident or mistake. *Peters v. Siders*, 126 Mass. 135.

A posthumous child not provided for by settlement, nor disinherited by the will of his father, is entitled, under *N. J. Rev. St.*, p. 1246, § 19, to a contribution from the other children of the testator of such portions of their estate derived under the will as will make the share of such child equal to what it would have been had his father died intestate; but the will should not otherwise be disturbed. *Wilson v. Fritts*, 32 N. J. Eq. 59. And see *Mitchell v. Blair*, 5 Paige (N. Y.) 588. And it is not necessary to make all the heirs or devisees parties when suing one heir or devisee for his proportional contribution. *Haskins v. Spiller*, 1 Dana (Ky.) 170. If, however, there is a residue, the share of such child should be taken therefrom. *Bowen v. Hoxie*, 137 Mass. 527.

The fiction of the child *en ventre sa mere* being *in esse* cannot be invoked to aid anyone but the infant, and therefore where the child is delivered by the *cæsarean* operation after the death of the mother the father does not become tenant by the curtesy. *Marsellis v. Thalhimer*, 2 Paige (N. Y.) 35; *In re Francis Winne*, 1 Lans. (N. Y.) 508. The party who claims through such a child must establish the fact that the child was born alive, and if the child never breathed, there is no legal presumption in favor of life. *Marsellis v. Thalhimer*, 2 Paige (N. Y.) 35; *Tyler, Inf. & Cov.*, § 158.

7. Custody of Infants.—This subject, together with the commitment of children to charitable institutions, will be treated under PARENT AND CHILD, which see.

III. ACTS AND CONTRACTS OF AND CONVEYANCES BY AND TO INFANTS.—**1. Right of the Infant to Avoid His Acts.**—*a. Void and Voidable.*—Infants are regarded by the law as lacking in judgment and understanding sufficient to enable them to guard their own interests, and the law protects them against their own improvidence or the designs of others by allowing them to avoid any act, contract or conveyance not manifestly for their interests, to which they are parties, and to place themselves *in statu quo*. Thus, acts and contracts of infants are in some cases binding on them, and in others voidable at their election. This is the modern doctrine; but the older cases introduced a third distinction and held all acts of infants which were necessarily prejudicial to their interests as absolutely void and incapable of subsequent ratification, while those acts only were regarded as voidable and capable of subsequent ratification as might or might not be of benefit to the infant. This distinction throws upon the court the necessity of deciding whether an act of the infant is necessarily prejudicial to his interests or not. The courts of late years have refused to take this responsibility on the ground that if the infant wishes to determine the question for himself on arriving at his majority he should be allowed to do so, and he is sufficiently protected by his right of avoidance. Therefore, in some jurisdictions, acts that were formerly considered void are now regarded as voidable; and in cases where acts have been pronounced void, the infant has exercised his option to avoid the act, and the language used is not necessary to the decision.¹ Thus, the negotiable

An infant *en ventre sa mere* may be appointed executor, and if the mother bring forth two or three children at one birth they are all to be admitted as executors. 1 Wms. Exrs. *232.

A provision made for a child *en ventre sa mere*, which is afterwards born before the death of the testator, was held not to extend to an afterborn posthumous child, although the division of the property was suspended until the eldest son became twenty-one, and the division was to be made between "all my children now born or to be born." *Burke v. Wilder*, 1 McCord Ch. (S. Car.) 551; *Richardson v. Sinkler*, 2 Dessaus. (S. Car.) 127.

A devise to A and his children gives him an estate tail if he have no children living at the time of the devise, and this rule is not changed by the fact that the devisee has a child *en ventre sa mere*. *Roper v. Roper*, L. R., 3 C. P. 32, 35.

1. Void and Voidable.—Pollock, in his

work on contracts (4th Eng. ed.), pp. 52-59, says: "It has been commonly said that an agreement made by an infant, if such that it cannot be for his benefit, is not merely voidable, but absolutely void; though in general his contracts are only voidable at his option. But this distinction is in itself unreasonable, and is supported by little or no real authority, while there is considerable authority against it. The unreasonableness seems hardly to need any demonstration. The object of the law, which is the protection of the infant, is amply secured by not allowing the contract to be enforced against him during his infancy, and leaving it in his option to affirm or repudiate it at his full age. Moreover the distinction is arbitrary and doubtful, for it must always be difficult to say whether a particular contract cannot possibly be beneficial to the party. As for the authorities, the word *void* is no doubt

frequently used; but then it is likewise to be found in cases where it is quite settled that the contract is in truth only voidable; and as applied to other subject matters, it has been *held* to mean only voidable in journal instruments. *Malins v. Freeman*, 4 Bing. N. Car. 395; and even in acts of parliament, *Davenport v. Reg.*, L. R., 3 App. Cas. 128. Thus the language of text writers, of judges, and even of the legislature, is no safe guide apart from actual decisions.

"But when we look at the decisions they appear to establish in the cases now in question only that the contract cannot be enforced against the infant, or some other collateral point equally consistent with its being only voidable, except when they show distinctly that the contract is voidable and not void." After reviewing the English cases, he adds, p. 58: "On the whole, then, we have seen that in several important classes of cases (including some that were formerly supposed exceptional) an infant's contract is certainly not void; and we have also seen that there is not any clear authority for holding that in any case it is in fact void."

In many cases the courts seem to have used the terms void and voidable as interchangeable, and the word *void* has merely denoted that the contract at the time the suit was brought was not binding, but leaving the question whether the contract might not be ratified undecided. Thus the case of *Conroe v. Birdsall*, 1 Johns. Cas. (N. Y.) 127, is cited as an authority that an infant's bond is void, and the head note of the case so states the decision; but the language used was that "the bond is voidable only at the election of the infant." And in *Curtin v. Patton*, 11 S. & R. (Pa.) 311, the court, in speaking of an infant's contract of suretyship, calls it in one place "absolutely void," and yet in the very next line are found the expressions "confirming" and "distinct acts of confirmation," showing that the court did not mean to hold the contract incapable of ratification. So also in *Thornton v. Illingworth*, 2 B. & C. 824, *BAYLEY, J.*, calls an infant's trading contract *void*, but all the case decided was that ratification after action brought would not avail, and the case plainly shows that if the ratification had been before suit brought, the infant would have been held. For other cases showing how "void" is often interpreted to mean "voidable," see *State v.*

Richmond, 26 N. H. 232; *Allis v. Billings*, 6 Met. (Mass.) 415; *Pearsoll v. Chapin*, 44 Pa. St. 9; *Terrill v. Auchauer*, 15 Ohio St. 80, 85; *Van Schaack v. Robbins*, 36 Iowa 201.

In the leading English case of *Williams v. Moor*, 11 M. & W. 256, an infant was sued on account stated, which his counsel contended was absolutely void as prejudicial to his interest. Baron Parke, in his opinion, says: "But we can see no sound or reasonable distinction in this respect between the liability of an infant on an account stated and his liability for goods sold and delivered, *or on any other contract*."

The general doctrine is that a party may, after he attains the age of twenty-one, ratify and so make himself liable on contracts made during infancy. We think that on principle unopposed by authority this may be done on a contract arising on an account stated as well as on *any other contract*."

This view of the division of contracts and acts of infants into two classes, valid and voidable, and rejecting the old class of "void," is taken by most modern text writers. See *Wharton on Contracts*, § 36; *Anson, Contracts* (4th ed.), 105; *Eversley, Dom. Rel.*, p. 795; *Benj. Sales*, § 26; 1 *Am. Lead. Cas.* (5th ed.) 300; *Schouler, Dom. Rel.*, § 403; *Addison, Contracts*, *121; 1 *Parsons on Contr.* *295; *Daniel, Neg. Instr.*, § 223. In *Cheshire v. Barrett*, 4 *McCord* (S. Car.), 241, the court say: "The result of my reflections after a good deal of labor bestowed on the subject is that, in general, there is but little distinction in this respect between contracts entered into by adults and infants. . . . Those [contracts] based upon a moral, legal and valuable consideration bind adults. The policy of the law permits an infant to avoid them, but if, after arriving at full age, he thinks proper to affirm them, he ought to be bound. The moral obligation is sufficient consideration to support the new undertaking." In *Hyer v. Hyatt*, 4 *Cranch C. C.* 276, the court say: "I am inclined to think that no contract entered into by an infant is absolutely void, though all contracts by infants, except for necessities, are voidable. There are some *dicta* that contracts made by an infant to his prejudice are void, not voidable; but I doubt whether in law there be any difference as to validity between those which are beneficial and those which are prejudicial to the infant; both are voidable;

instruments of infants are universally regarded as voidable, and not void, and also their indorsements of such instruments;¹ and

but neither is absolutely void. There is no case in which it has been decided that a contract between an infant and an adult can be avoided by the adult upon the ground of the infancy of the other party. If the contract were absolutely void, neither party would be bound. The question whether the contract be prejudicial to the infant is a question of fact, not of law, and is too uncertain to become the test of the validity of the contract. It is a question which depends upon many circumstances, and cannot always be ascertained at the time of the contract." And see *Reed v. Batchelder*, 1 Met. (Mass.) 559.

"The mere fact that the infant assumed to become a surety for another is not in itself ground sufficient to say that such a dealing was a wrong to the infant. The most that can be said is that the court cannot see how the infant could derive benefit from such an act, but that is not sufficient if he himself, after arriving at maturity, deliberately has determined the matter for himself." *Williams v. Harrison*, 11 S. Car. 412. "Infancy confers a privilege rather than imposes a disability." *Lemmon v. Beeman*, 45 Ohio St. 505; *Harner v. Dipple*, 31 Ohio St. 72; s. c., 27 Am. Am. Rep. 496; *Owen v. Long*, 112 Mass. 403; *Cole v. Pennoyer*, 14 Ill. 158; *Morton v. Seward*, 5 Bradw. (Ill.) 533; *Sparman v. Keim*, 83 N. Y. 245; *Chapin v. Shafer*, 49 N. Y. 407; *Anderson v. Soward*, 40 Ohio St. 325; s. c., 48 Am. Rep. 687; *Scott v. Buchanan*, 11 Humph. (Tenn.) 468; *Ridgeley v. Crandall*, 4 Md. 435; *N. H. Mut. Fire Ins. Co. v. Noyes*, 32 N. H. 345; *Jenkins v. Jenkins*, 12 Iowa 195; *Strain v. Wright*, 7 Ga. 568; *Vaughan v. Parr*, 20 Ark. 600; *Babcock v. Bowman*, 8 Ind. 110; *Holmes v. Rice*, 45 Mich. 142; *Weaver v. Jones*, 24 Ala. 420.

The old rule is still laid down in *dicitur*, when the court can pronounce the contract of an infant to be to his prejudice it is void, and when to his benefit, as for necessities, it is good; and when the contract is of an uncertain nature as to benefit or prejudice, it is voidable only at the election of the infant; but that election must be exercised within a reasonable time after attaining majority.

Green v. Wilding, 59 Iowa 679; s. c.,

44 Am. Rep. 696; *United States v. Bainbridge*, 1 Mason (U. S.) 71, 82; *Robinson v. Weeks*, 56 Me. 102.

An indictment under the act of 1873—74, ch. 31, for disposing of crops under mortgage cannot be sustained, where it appears that the defendant is an infant. The alleged disposition was a disaffirmance of the contract and renders it void. *State v. Howard*, 88 N. C. 650.

1. Bills and Notes.—The almost universal rule is that the bills and notes of infants are voidable only, and this whether they are or are not negotiable. *Fant v. Cathcart*, 8 Ala. 725; *Buzzell v. Bennett*, 2 Cal. 101; *Alsop v. Todd*, 2 Root (Conn.) 105; *Young v. Bell*, 1 Cranch, C. C. 342; *Strain v. Wright*, 7 Ga. 568; *Gavin v. Burton*, 8 Ind. 169; *Trustees of La Grange Inst. v. Anderson*, 63 Ind. 367; *Best v. Givens*, 3 B. Mon. (Ky.) 72; *Stern v. Freeman*, 1 Met. (Ky.) 309; *Reed v. Batchelder*, 1 Met. (Mass.) 559; *Boody v. McKenney*, 23 Me. 517; *Balwin v. Rosier*, 1 McCrary C. C. 384; *Minock v. Shortridge*, 21 Mich. 304; *Fisher v. Jewett*, *Berton* (N. B.) 69; *Aldrich v. Grimes*, 10 N. H. 194; *State v. Plaisted*, 43 N. H. 413; *Goodsell v. Myers*, 3 Wend. (N. Y.) 473; *Baldwin v. Van Deusen*, 37 N. Y. 487; *Armfield v. Tate*, 7 Ired. L. (N. Car.) 258; *Hesser v. Steiner*, 5 W. & S. (Pa.) 476; *Stokes v. Brown*, 3 Pin. (Wis.) 311; *Dubose v. Wheddon*, 4 McCord (S. Car.) 221; *Little v. Duncan*, 9 Rich. (S. Car.) 55 (sealed note); *Harris v. Wall*, 1 Ex. 122; *Hunt v. Massey*, 5 B. & Ad. 902; *Wamsley v. Lindenberger*, 2 Rand (Va.) 478; *Everson v. Carpenter*, 17 Wend. (N. Y.) 419. The few early cases *contra* may now be considered as overruled. These are: *Swasey v. Vanderheyden*, 10 Johns. (N. Y.) 33; *Bouchell v. Clary*, 3 Brev. (S. Car.) 194; *McMinn v. Richmond*, 6 Yerg. (Tenn.) 9; *Beeler v. Young*, 1 Bibb (Ky.) 519. But as to this last case see *Byles on Bills* (7th Am. ed.), *61, note 1. An indorsement or assignment of a bill or note by an infant is voidable only and the endorsee may sue any party to the bill except the infant and him on a ratification. *Nightingale v. Withington*, 15 Mass. 272; *Frazier v. Massey*, 14 Ind. 382; *Briggs v. McCabe*, 27 Ind. 327; *Burke v. Allen*, 29 N. H. 106 (*semble*); *Dul-*

the same is now held of instruments under seal, although the older opinion held them wholly void.¹ The mortgages and conveyances generally of infants have long been considered as voidable only; in short, valid until disaffirmed.² In fact, the only

ty v. Brownfield, 1 Barr (Pa.) 497; *Taylor v. Croker*, 4 Esp. 187; *Jones v. Darch*, 4 Price 300; *Drayton v. Dale*, 2 B. & C. 293; *Hardy v. Waters*, 38 Me. 450; *Story on Prom. Notes*, § 80. If the indorsement of the infant and the note to him has been rescinded and a new note given by the maker of the original note to the father of the infant payee in consideration of discharge from liability on the old note, it will bar a recovery on the first note. *Willis v. Twambly*, 13 Mass. 204.

An injunction to restrain proceedings at law upon a note of an infant, endorsed by his father, given for the purchase of lands by the infant, issued on a bill filed by the infant to disaffirm the sale, will be dissolved as to the father but be allowed to stand as to the infant. *Parker v. Baker, Clarke, Ch.* (N. Y.) 136.

Where an infant is a co-maker with an adult the latter is held although the infant disaffirms. *Taylor v. Dansby*, 42 Mich. 82.

A bill of exchange drawn on an infant but accepted by him after arriving at full age, cannot be avoided by him. *Stevens v. Jackson*, 4 Camp. 164.

Suretyship.—Where an infant signs a promissory note as surety his contract is voidable only. *Owen v. Long*, 112 Mass. 403; *Harner v. Dipple*, 31 Ohio St. 72; *Fetrow v. Wiseman*, 40 Ind. 148; *Williams v. Harrison*, 11 S. Car. 412; *Shropshire v. Burns*, 46 Ala. 108; *Cole v. Pennoyer*, 14 Ill. 158; *Cummings v. Powell*, 8 Tex. 80; *Mustard v. Wohlford*, 15 Gratt. (Va.) 329; *Scott v. Buchanan*, 2 Humph. (Tenn.) 468; *Patchin v. Cromach*, 13 Vt. 330; *Curtin v. Patton*, 11 S. & R. (Pa.) 305; *Cockshott v. Bennett*, 2 T. R. 763. See *contra* (that such contracts are void), *Allen v. Minor*, 2 Call (Va.) 70; *Carnahan v. Alderdice*, 4 Harr. (Del.) 99; *Wheaton v. East*, 5 Yerg. (Tenn.) 41; *Maples v. Wightman*, 4 Conn. 376; 8. c., 10 Am. Dec. 149 (based, however, on a statute). And see *Lumsden's Case*, L. R., 4 Ch. App. 431.

Interest.—An infant's contract to pay interest is voidable only. *Bradley v. Pratt*, 23 Vt. 378; that it is void, *Fisher v. Mowbray*, 8 East 330.

1. Bonds by infants are voidable. *Conroe v. Birdsall*, 1 Johns. Cas. (N. Y.) 127; *Patchin v. Cromach*, 13 Vt. 330; *Blake v. Supervisors*, 61 Barb. (N. Y.) 149; *Weaver v. Jones*, 24 Ala. 420 (bond for deed); *Mustard v. Wohlford*, 15 Gratt. (Va.) 329 (bond for deed). The case of *Boylis v. Dineley*, 3 M. & S. 477, is usually cited to the point that an infant's bond is void, but all that was decided in that case was that a bond, being under seal, cannot be ratified save by an act of at least equal solemnity with the original instrument. And see *Swafford v. Ferguson*, 3 Lea. (Tenn.) 292.

Where an infant is arrested he cannot execute a valid bail bond and must go to prison unless the bond is executed by a responsible person, as next friend. *Vincent v. Warner*, 16 Phila. 87. But this is clearly not law. *State v. Weatherwax*, 12 Kan. 463; *Fagin v. Goggin*, 12 R. I. 398; for it is surely for an infant's benefit to avoid imprisonment. But see *Cassier's Case*, 139 Mass. 458, that an infant cannot be arrested on civil process.

2. Mortgages by an infant are voidable. *Skinner v. Maxwell*, 66 N. Car. 45; *State v. Plaisted*, 43 N. H. 413; *Monumental etc. Asso. v. Herman*, 33 Md. 128; *Eagle Fire Ins. Co. v. Lunt*, 6 Paige (N. Y.) 635; *Palmer v. Miller*, 25 Barb. (N. Y.) 309; *Richardson v. Boright*, 9 Vt. 368; *Gilchrist v. Ramsay*, 27 U. C. Q. B. 500. This is the rule also with chattel mortgages. *Miller v. Smith*, 26 Minn. 248; *Corey v. Burton*, 32 Mich. 30; *Chapin v. Shafer*, 49 N. Y. 411. An infant who has bought personal property and given a mortgage back to secure the purchase money, may avoid the mortgage, but by so doing he annuls the sale to himself. *Heath v. West*, 28 N. H. 101; *Curtiss v. McDougall*, 26 Ohio St. 66.

Where, however, a surety on an infant's notes given for the purchase of chattels holds a mortgage on these chattels and is obliged to pay the notes, the infant cannot avoid the mortgage. *Knaggs v. Green*, 48 Wis. 601.

A mortgage by an infant wife to secure a debt of her husband is held absolutely void. *Chandler v. McKinney*,

act of an infant as to which there now exists any serious question whether it is voidable or wholly void is the appointment of an agent or attorney, and the modern tendency is to restrict the authority of those cases holding the appointment void to the exact facts to which the decisions are applicable, and to hold void only powers of attorney under seal, and "warrants of attorney";¹

6 Mich. 217; *Cronise v. Clark*, 4 Md. Ch. 403; *Colcock v. Ferguson*, 3 Desau. (S. Car.) 482.

Conveyances by an infant are voidable. *Schaffer v. Lavsetta*, 57 Ala. 14; *Illinois Land Co. v. Bonner*, 75 Ill. 315; *Tunison v. Chamblin*, 88 Ill. 378; *Philips v. Green*, 5 Mon. (Ky.) 344; *Kendall v. Lawrence*, 22 Pick. (Mass.) 540; *Davis v. Dudley*, 70 Me. 236; *Dixon v. Merritt*, 21 Minn. 196; *Allen v. Poole*, 54 Miss. 323; *Ferguson v. Bell*, 17 Mo. 347; *Gillet v. Stanley*, 1 Hill (N. Y.) 121; *Bool v. Mix*, 17 Wend. (N. Y.) 119; *Eagle Fire Ins. Co. v. Lent*, 6 Paige (N. Y.) 635; *Skinner v. Maxwell*, 66 N. Car. 45; *Roberts v. Wiggin*, 1 N. H. 73; *Wheaton v. East*, 5 Yerg. (Tenn.) 45; *Gillespie v. Bailey*, 12 W. Va. 70; *Wiser v. Lockwood*, 42 Vt. 720; *Tucker v. Moreland*, 10 Pet. (U. S.) 58; *Irvine v. Irvine*, 9 Wall. (U. S.) 617; *Jackson v. Woodruffe*, 7 U. C., Q. B. 332; *Mills v. Davis*, 9 U. C., C. P. 510; *Foster v. Lee*, 2 Hannay (N. B.) 486. It is immaterial whether the conveyance is by an infant *wife*, *Scranton v. Stewart*, 52 Ind. 68; *Hoyt v. Swar*, 53 Ill. 134; *Youse v. Norcoms*, 12 Mo. 549; or *husband*. *Barker v. Wilson*, 4 Heisk. (Tenn.) 468.

An exchange of property is voidable by the infant. *Williams v. Brown*, 34 Me. 594; *Miller v. Ostrander*, 12 Grant Ch. (N. Car.) 349. So a conveyance to an infant is voidable. *Spencer v. Carr*, 45 N. Y. 406; *Baker v. Kennett*, 54 Mo. 82.

A deed made during infancy but not delivered until after majority is valid. *Sims v. Smith*, 99 Ind. 469; s. c., 50 Am. Rep. 99.

In the case of *Touch v. Parsons*, 3 Burr. 1794, 1804, the rule was laid down by LORD MANSFIELD that all deeds that take effect by delivery by the infant are voidable, while those delivered by another hand are void, and this technical rule has been repeated in later cases, although it has no significance at the present day. *Bool v. Mix*, 17 Wend. (N. Y.) 119, 131; *Conroe v. Birdsall*, 1 Johns. Cas. (N. Y.) 127; *State v. Plaisted*, 43 N. H. 413; *Fonda v. Van*

Horne, 15 Wend. (N. Y.) 631 (personal property). Covenants in a deed have been declared void. *Bagley v. Fletcher*, 44 Ark. 153.

Even a gift of land by an infant has been held voidable only. *Slaughter v. Cunningham*, 24 Ala. 260; *f. Person v. Chase*, 37 Vt. 647 (chattels). But see *contra* that it is void. *Swofford v. Ferguson*, 3 Lea (Tenn.) 292. And see *Oxley v. Tryon*, 25 Iowa 95.

Land was conveyed to A to hold in trust for B, then an infant, for life. The deed provided that the land should be sold if B should at any time so request in writing. B made such a request when ten years old, and it was held that he could avoid the sale on reaching majority. *Hill v. Clark*, 4 Lea (Tenn.) 405.

Leases by or to infants are voidable. *Griffith v. Schwenderman*, 27 Mo. 412; *Holmes v. Blogg*, 2 Moore 552; s. c., 8 Taunt. 508, and that, too, whether the rent reserved is the best rent or not. *Slater v. Brady*, 14 Ir. C. L. 61. A rent charge granted by an infant is voidable only. *Hudson v. Jones*, 3 Mod. 310. And see *Co. Litt. 308*, *a. Touch v. Parsons*, 3 Burr. 1794; *Johnson v. Packer*, 1 N. & McCord (S. Car.) 1; *Stafford v. Roof*, 7 Cow. (N. Y.) 179.

Marriage settlements are voidable. *Temple v. Hawley*, 1 Sandf. Ch. (N. Y.) 153; *Jones v. Butler*, 30 Barb. (N. Y.) 64; *Levering v. Levering*, 1 Md. Ch. 365. And see *McCartee v. Teller*, 2 Paige (N. Y.) 511.

1. Agents and Attorneys.—On principle, it would seem that the power of attorney of an infant should stand on the same basis as any other voidable act of an infant, and should be considered voidable and not void; and it seems that the doctrine that an infant's acts done through an agent are void, should at all events be restricted to acts done under mere naked powers of attorney, to do acts requiring an authority under seal. It may, however, probably be considered settled upon authority that a mere naked power of attorney to do some act requiring an authority under seal is absolutely void;

and many modern cases hold the appointment of an agent by an infant as voidable only.¹ So, also, if an infant submit to arbitration he must elect to avoid the award if he does not wish to be

and the authorities usually lay down the rule in general terms that an infant cannot empower an agent or attorney to act for him, and that he cannot affirm what he cannot authorize; though, as to acts not requiring an authority under seal, perhaps it can hardly be said that the law is settled. *M. D. Ewell* in 13 Am. Law Rev., p. 288. It seems that an infant cannot give power of attorney to confess judgment. *Oliver v. Woodroffe*, 4 M. & W. 650; *Knox v. Flack*, 22 Pa. St. 337; *Kain v. Postley*, 2 Edm. Sel. Cas. (N. Y.) 132; *Bennett v. Davis*, 6 Cow. (N. Y.) 393; *Waples v. Hastings*, 3 Harr. (Del.) 403; *Pickler v. State*, 18 Ind. 266; *Cole v. Pennoyer*, 14 Ill. 158. Where a judgment has been entered on a warrant of attorney given by two or more persons, one of whom is an infant, the warrant, and with it the judgment, will be vacated as to the infant, and allowed to stand as to the other parties. *Mottaux v. St. Aubin*, 2 Wm. Bl. 1133; *Ashlin v. Laughton*, 4 Moore & Sc. 719. But see *Powell v. Gott*, 13 Mo. 485, where a judgment against an infant appearing by attorney was regarded as voidable.

So a power of attorney (not under seal) to sell land is regarded as void. *Lawrence v. McArter*, 10 Ohio 37; *Pyle v. Cravens*, 4 Litt. (Ky.) 17. It was held, however, in *Duvall v. Graves*, 7 Bush (Ky.) 461, that a power of attorney coupled with an interest is not absolutely void, and in the case of a deed to a trustee, executed by an infant with a power to sell with her concurrence, it was held that such delegation of power was not void and was capable of ratification by her joining in the conveyance after she became of age.

An infant brought a suit by next friend, afterwards she employed an attorney and requested him to dismiss the suit, which was done. The next friend then moved the court to strike out the entry of "off" from the docket and reinstate the case for trial. It was held that the act of the infant in appointing the attorney was void and his action nugatory, and the infant was unable to ratify the act on majority. *Wainwright v. Wilkinson*, 62 Md. 146. And see *Wamhole v. Foote*, 2 Dak. 1. So an infant is not responsible for the tort

of an alleged agent. *Robbins v. Mount*, 4 Rob. (N. Y.) 553.

A sale under a power of attorney given by an infant does not confer even an inchoate title. *Philpot v. Bingham*, 55 Ala. 435. It is said that an infant cannot confirm what he cannot authorize. *Armitage v. Widoe*, 36 Mich. 124; and in *Fetrow v. Wiseman*, 40 Ind. 148, it is laid down as settled law that "the contract of an infant appointing an agent or attorney in fact is absolutely void and incapable of ratification." And see *Trueblood v. Trueblood*, 8 Ind. 195; *Carnahan v. Alderdice*, 4 Harr. (Del.) 99; *Flexner v. Dickerson*, 72 Ala. 318. This rule is not generally recognized, however. *Tyler, Infancy and Coverture*, § 13, says a power of attorney under seal is void, while a parol power is voidable only. *Saunderson v. Marr*, 1 H. Bl. 75, and *Schouler, Dom. Rel.*, § 406, says that the rule declaring the power void does not seem to include more than the technical warrant of attorney to appear and confess judgment in court. See *Cheshire v. Barrett*, 4 McCord (S. Car.) 241, 244; *Cummings v. Powell*, 8 Tex. 88.

In *Ward v. Steamboat Little Red*, 8 Mo. 358, it was held that an infant can become a party to a contract (not required to be made by deed) made without authority from him, by his subsequent adoption of it, as well as by his previous expressed consent.

1. It is expressly held in several jurisdictions that the appointment of an agent is voidable only, and in *Hardy v. Waters*, 38 Me. 450, it was held that an infant promisee of a negotiable note may authorize another by parol to transfer such note by indorsement for him, and that the transfer so made was valid until avoided; and to the same effect see *Hastings v. Dollarhide*, 24 Cal. 195; *Whitney v. Dutch*, 14 Mass. 457; *Fairbanks v. Snow*, 145 Mass. 153. But in *Semple v. Morrison*, 7 B. Mon. (Ky.) 298, it was held that the immediate presence and concurrence of the infant in the act of her attorney in the assignment of a promissory note did not help the case, and that such assignment was void. See also *Patterson v. Lippincott*, 47 N. J. L. 457; *McCarthy v. Murray*, 3 Gray (Mass.) 578; *Kingman v. Perkins*, 105 Mass. 111; *Vogelsang v. Null*,

bound, and his compromise of an action is merely voidable.¹ Infants can also become stockholders in corporations, but can avoid their obligations if they signify their election in due season; there seem to be very few cases in America on the rights of infant stockholders.² Among other acts that are considered as

67 Tex. 465; *Towle v. Dresser*, 73 Me. 252; *Helps v. Clayton*, 17 C. B. (N. S.) 553; *Hall v. Jones*, 21 Md. 439, and *cf.* *Pottinger v. Stewart*, 3 Har. & J. (Md.) 347; *King v. Belford*, 32 L. J., Ch. 646; *Bennett v. Walker*, 100 Ill. 525. In *Doe v. Roberts*, 16 M. & W. 778, a lease by the agent of an infant was *held* void and the infant allowed to bring ejectment without notice.

Where the agency has been executed, however, it seems that the infant cannot avoid it; as where money belonging to an infant was received by his brother and applied by him at the infant's direction to the support of their parents; then the infant cannot recover the money so expended from the brother. *Welch v. Welch*, 103 Mass. 562.

The good sense of the rule seems to be that an authority delegated by an infant for a purpose which may be beneficial to him, or which the court cannot pronounce to be to his prejudice, should be considered as rendering the contract made, or act done by virtue of it, as voidable only, in the same manner as his personal acts and contracts are considered. *Met. on Contr.* 42. See *Powell v. Gott*, 13 Mo. 458.

All the adult heirs at law to a tract of land affected by a will, united in employing attorneys to prosecute a suit to set the will aside, agreeing that in case of success, as compensation for their services, the attorneys should receive one-half of the land. Through the exertions of the attorneys the will was set aside. *Held*, that a minor heir, although benefited by the result equally with the others, was not bound either at law or in equity to contribute to the payment of the fee. *Dillon v. Bowles*, 77 Mo. 603; s. c., 8 Mo. App. 419.

1. Awards and compromises are voidable. *Baker v. Lovett*, 6 Mass. 78; *Barnaby v. Barnaby*, 1 Pick. (Mass.) 221; *Tipton v. Tipton*, 3 Jones L. (N. Car.) 552. If an infant submit to arbitration, he may execute or avoid the award at his election. *Bac. Abr.*, Arb. C; *Godfrey v. Wade*, 6 Moore 488; *Harvey v. Ashley*, 3 Atk. 607; *Holt v. Ward*, *Fitzgibbon* 175, 275; *Britton v.*

Williams, 6 Munf. (Va.) 453. In an old case an infant's submission to the arbitration was said to be void. *Rudston v. Yates*, March 111, 141. And in this country it is laid down in *Gamache v. Prevost*, 71 Mo. 84, that an action to which a minor is a party cannot be referred to a referee, but in Georgia this rule is qualified so that an infant cannot submit to arbitration except by order of court. *Jones v. Payne*, 41 Ga. 23. In New York it is *held* that under the code relating to the submission of controversies to arbitration without action that an infant cannot so submit. *Lathers v. Fish*, 4 Lans. (N. Y.) 213; and see *Fisher v. Stilson*, 9 Abb. Pr. (N. Y.) 33, but in the same State it has been *held* that where the infant received the proceeds of the award, and retained them for two years after he had attained his majority, he had affirmed the award. *Jones v. Phoenix Bank*, 8 N. Y. 228.

An infant may be directed by the award to pay costs. *Proudfoot v. Poile*, 3 D. & L. 524.

Equity, it has been said, will not decree an award to bind an infant. *Russell on Arb.* (5th Eng. ed.) 18; *Cavendish v. —*, *Eq. Cas.*, Abb. 49; s. c., 1 Cas. in Ch. 279; *Evans v. Cogan*, 2 P. Wms. 450; but the rule is not without an exception. *Bishop of Bath etc. v. Hipplesey*, cited in *Harvey v. Ashley*, 3 Atk. 607. Infant plaintiffs suing in chancery by their next friends cannot be bound by acts of the attorney referring the suit to arbitration, and the award will be void for want of mutuality, if the object of the reference fails in consequence. *Biddell v. Dowse*, 6 B. & C. 255; s. c., 9 D. & R. 404.

An executed compromise by an infant of a claim against him is voidable. *Pitcher v. The Turin Plank Road Co.*, 10 Barb. (N. Y.) 436.

The compromise of an action for slander is voidable. *Ware v. Cartledge*, 24 Ala. 622.

2. Stock contracts are voidable. So where an infant bought stock he was allowed to recover back the purchase money. *Robinson v. Weeks*, 56 Me. 102. So also where an infant purchased of

his employer, an incorporated company, certain shares of its capital stock and gave his promissory note in payment, he was allowed to recover money paid on the note. *Indianapolis Chair Co. v. Wilcox*, 59 Ind. 429.

A stock gambling contract is void, and an infant cannot recover back money paid for margins. *Crumney v. Mills*, 40 Hun (N. Y.) 370. But where a minor of limited means embarks in stock transactions to a large amount by way of margins, the court will, even in absence of direct evidence that he did not intend to receive or deliver the stock bought or sold on his behalf, infer that such was not his intent, and will, therefore, stamp the contract as a wagering contract merely, contrary to the policy of the law, and void *ab initio*, and if the whole amount deposited by the minor as margins is lost in such transactions, he is at liberty to recover back at any time from the brokers employed by him the amount so deposited. *Ruchizky v. DeHaven*, 97 Pa. St. 202.

An Infant May Be a Shareholder.—Infant shareholders are not mere contractors, for then they would have been exempt, but in truth they are purchasers who have acquired an interest, not in a mere chattel, but in a subject of a permanent nature, either by contract with the company, or purchase or devolution from those who have contracted, and with certain obligations attached to it, which they were bound to discharge, and have been thereby placed in a situation analogous to an infant purchaser of real estate who has taken possession, and thereby becomes liable to all the obligations attached to the estate, for instance, to pay rent in the case of a lease rendering rent, and to a fine due on the admission in the case of a copyhold to which an infant has been admitted, unless they have elected to waive or to disagree to the purchase altogether, either during infancy or after full age, at either of which times it is competent for an infant to do so. Per PARKE B., in *Northwestern Ry. Co. v. McMichael*, 5 Ex. 114.

Subscriptions.—So it is generally held that an infant's subscription for stock is voidable either during infancy or within a reasonable time thereafter. *Re Nassau Phosphate Co.*, L. R., 2 Ch. D. 610; *Ebbett's Case*, L. R., 5 Ch. App. 302; *Baker's Case*, L. R., 7 Ch. 115. The corporation has a corresponding right to refuse to accept an infant as a

shareholder on learning the fact, and can continue to hold the transferee to the infant. *Castello's Case*, L. R., 8 Eq. 504; *Symon's Case*, L. R., 5 Ch. App. 298; *Davis v. Southern Cross Co.*, 4 New Zeal. L. R., Sup. Ct. 410. But see *Parsons' Case*, L. R., 8 Eq. 656. But this cannot be done after the corporation has accepted a transferee of the infant as a shareholder. *Gooch's Case*, L. R., 8 Ch. App. 266, overruling the same case in L. R., 14 Eq. 454. The infant's subscription must be repudiated within a reasonable time after majority or he will be held to have ratified it. *Dublin etc. Ry. Co. v. Black*, 8 Ex. 181. Where an infant allowed his name to remain on the stock book after he became of age, he ratifies the subscription. *Cork etc. Ry. Co. v. Cazenove*, 10 Q. B. 935; *f. Mitchell's Case*, L. R., 9 Eq. 363. A court will not presume that an infant has avoided his subscription, and hence a defence of infancy in an action for an unpaid subscription is ineffectual without an allegation of avoidance. *Leeds etc. Ry. Co. v. Fearnley*, 4 Ex. 26; *Curtis' Case*, L. R., 6 Eq. 455. But a repudiation during infancy is good. *Newry etc. Ry. Co. v. Coombe*, 3 Ex. 565. But the repudiation at any time must be clear and specific. *Northwestern Ry. Co. v. McMichael*, 5 Ex. 114.

In *Lumsden's Case*, L. R., 4 Ch. 31, an infant held stock for six months after attaining majority, the stock having been transferred to him during infancy, and then sold a part of it. He was not allowed to repudiate his subscription. The court declares the original transaction was voidable and not void. For the delay necessary to create a ratification, see *Mitchell's Case*, L. R., 9 Eq. 363 (two years); *Ebbett's Case*, L. R., 5 Ch. 302 (ten months). But see *Hart's Case*, L. R., 6 Eq. 512, where a lapse of three years was held not to amount to an affirmation. See also *Cook Stock and Stockholders*, §§ 250 and 63.

Unpaid subscriptions of infants are not to be reckoned in determining whether the entire stock of a corporation has been subscribed for. *Phillips v. Covington and Cin. Bridge Co.*, 2 Met. (Ky.) 219.

In Canada, R. S. Ontario, ch. 152, five persons are allowed to form a corporation. Held, that where one of these five persons was a minor the company had no legal existence, and no subsequent ratification by him could

voidable are assignments for the benefit of creditors, and many others might be enumerated.¹ Where the law does call an act

validate his contract. *Hamilton etc. Ry. Co. v. Townsend*, 13 Ont. App. 534; s. c., 16 Am. & Eng. Corp. Cases, 645.

Where one subscribes for stock in the name of an infant he cannot thereby avoid liability, but is liable personally to the corporation or its creditors. And this is true when a transfer is made to an infant to avoid liability. *Castleman v. Holmes*, 4 J. J. Marsh. (Ky.) 1; *Roman v. Fry*, 5 J. J. Marsh. (Ky.) 634; *Castello's Case*, L. R., 8 Eq. 504; *Richardson's Case*, L. R., 19 Eq. 588; *Symon's Case*, L. R., 5 Ch. 298; *Mann's Case*, L. R., 3 Ch. 459 n. In this case it seems that stock standing in the name of a pledgee was on the payment of the debt transferred to a minor by direction of the pledgor, the pledgee having no knowledge of the minority. On the winding up of the company the pledgee was held liable. In *Weston's Case*, L. R., 5 Ch. 614, it was held that a transferor to an infant was liable even where he was entirely innocent of a fraudulent intent in the transaction and was not aware that the shares were being transferred to a minor. And see *Nickolls v. Merry*, L. R., 7 H. L. 530.

1. Assignment for Creditors.—A firm of which an infant was a member made an assignment for the benefit of creditors, one of whom sought to have the assignment declared void. The court say: "It cannot be doubted that the law would devote the assets of this firm to the discharge of the partnership obligations, whenever any court should be appealed to for that purpose, and I do not see that the supposed equity of an infant partner should in such case prevail against that of the creditors of the firm. . . . We see no substantial difference whether, in such a case, the property of the firm is subjected to the payment of the proper debts of the firm by the process of law or by the voluntary act of the insolvent debtors. In either case the result is precisely the same, and the infant is bound if he simply says nothing. If in any such case the defence of infancy is to be made, it must be made very distinctly by the infant himself, and it is not for any court in such case to make it for him. It is not too much to say that if an infant goes into a mercantile venture which

proves unsuccessful, he ought at least to be held so far that the assets acquired by the firm should be applied to the payment of the debts of the concern. If he has been cajoled into any waste of his capital it hardly seems equitable that the creditor of the firm should either directly or indirectly be called upon for reimbursement. The utmost exemption that he ought to claim in such a case is that he should not be made personally responsible for debts beyond what the assets of the firm are able to pay, and even then the infant himself should claim exemption.

"If the assignment was merely voidable it is entirely clear that it could be avoided only at the election of the infant, and that election could not be made until he came to be of full age, and at that period he fully ratified and confirmed it." *Yates v. Lyon*, 61 N. Y. 344, reversing s. c. in 61 Barb. (N. Y.) 205, and disapproving of the doctrine laid down in *Fox v. Heath*, 21 How. Pr. 384, which held that such a conveyance was absolutely void.

In *Soper v. Fry*, 37 Mich. 237, it was held that an infant's assignment is not void but only voidable, and that only by the infant or someone in his right.

In *Furlong v. Bartlett*, 21 Pick. (Mass.) 401, where the partner of a minor assigned the partnership property in trust for creditors, the infant was not allowed on reaching majority to recover from the assignee in trespass.

Other Voidable Acts.—Executed contracts are voidable. *Hill v. Anderson*, 5 S. & M. (Miss.) 216; *Robinson v. Weeks*, 56 Me. 102; *Adams v. Beall*, 67 Md. 53. Appeal from justice's decision. *Robbins v. Cutler*, 26 N. H. 173.

Judgments. *Trapnall v. State Bank*, 18 Ark. 53; *Walkenhorst v. Lewis*, 24 Kan. 420; *Wheeler v. Ahrenbeak*, 54 Tex. 535; *Kemp v. Cook*, 18 Md. 130. See § v, Actions By and Against Infants.

Contract of charter party. *Thompson v. Hamilton*, 12 Pick. (Mass.) 425.

Usurious contract. *Millard v. Hewlett*, 19 Wend. (N. Y.) 301.

Agreement to carry and deliver money. *West v. Penny*, 16 Ala. 186.

Agreement to convey. *Cassell v. Potter*, 23 Mich. 377.

Promise to pay a joint debt. *Kenne-*

of infant void, it often happens that reasons of public policy come in.¹

This privilege of the infant of avoiding his acts or contracts is personal to himself and cannot be taken advantage of by adults with whom he deals for their own benefit,² or by third persons in any collateral proceeding.³ The privilege being, however, for

dy *v. Doyle*, 10 Allen (Mass.) 161. Agreement as to a soldier's bounty. *Holt v. Holt*, 59 Me. 465.

An infant soldier's gift of his bounty and pay is voidable. *Holt v. Holt*, 59 Me. 465. But see *Welch v. Welch*, 103 Mich. 562.

1. Void Acts.—Certain transactions by infants have been treated by the courts as absolutely void where the general policy of the law requires that they should be treated as nulities. Thus a release executed by a minor to his guardian is regarded as void, for the law will not allow a guardian or other trustee to take advantage of his position to secure an advantage over the ward. *Fridge v. State*, 3 Gill & J. (Md.) 103. So the law will not allow an infant to bind himself to a future action by a bond with a penalty, for a ratification necessarily gives effect to an act to be performed perhaps long in the future. *Fisher v. Mowbray*, 8 East 330; *Baylis v. Dineley*, 4 M. & S. 477.

As the law discountenances speculation in interests likely to come from the death of relatives, the release of a minor of a legacy is *held* void. *Langford v. Frey*, 8 Humph. (Tenn.) 443; and the law will not stand by and see an infant's generosity and ignorance imposed upon to his detriment. *Cromse v. Clark*, 4 Md. Ch. 403; and see 1 Wharton on Contr., § 36. An infant cannot give a licence to cut timber on land owned in common by himself and another. *Richey v. Brown*, 58 Mich. 435.

2. Personal Privilege.—*Hastings v. Dollarhide*, 24 Cal. 195; *Johnson v. Rockwell*, 12 Ind. 76; *Arnous v. Les-sassier*, 10 La. 592; s. c., 29 Am. Dec. 470; *Hartness v. Thompson*, 5 Johns. (N. Y.) 160; *Gates v. Davenport*, 29 Barb. (N. Y.) 160; *Voorhies v. Wait*, 15 N. J. L. 343; *Patterson v. Lippincott*, 47 N. J. L. 457; *Brown v. Caldwell*, 10 S. & R. (Pa.) 114; *Rose v. Daniel*, 3 Brev. (S. Car.) 438; *Davies v. Turton*, 13 Wis. 185; *McGinn v. Shaeffer*, 7 Watts (Pa.) 412; *Boyden v. Boyden*, 9 Met. (Mass.) 425; *Putnam v. Hill*, 38 Vt. 85; *Towle v. Dresser*, 73 Me. 252.

An insurance company cannot repudiate a contract of insurance on the ground of the infancy of the insured. *Monaghan v. Agr. Fire Ins. Co.*, 53 Mich. 238.

In *Warwick v. Bruce*, 2 M. & S. 205, the defendant, an adult, agreed to sell to the plaintiff, a minor, all the potatoes then growing on three acres of land, to be dug and carried away by the plaintiff, and the infant paid £40 on the agreement and dug and carried away part of the potatoes and was prevented by the defendant from removing the balance. It was *held* that the infant was entitled to recover for this breach of the agreement.

Third persons, however, can protect themselves against assuming liabilities to infants, *e. g.*, an auctioneer is not bound to accept the bid of an infant. *Kinney v. Showdy*, 1 Hill (N. Y.) 544.

In a late Massachusetts case, *Stiff v. Keith*, 143 Mass. 224, it seems to be intimated that the adult may also rescind. A contract of bailment was made by a bailee with the agent of an undisclosed principal who was a minor. It was *held* that the bailee cannot rescind the contract without returning the goods. *HOLMES, J.*, says: "It is true that the minority of the principal and his consequent right to avoid, if known, would give a motive for not making a contract with him. But the greatest effect which could be attributed to that consideration would be to hold the contract voidable on that ground."

A bill will not lie by an infant for specific performance of an agreement to convey. *Flight v. Bolland*, 4 Russ. 298. See *Carrell v. Potter*, 23 Mich. 377; *Thompson v. Hamilton*, 12 Pick. (Mass.) 429.

3. *Beardsley v. Hotchkiss*, 96 N. Y. 201; *Holmes v. Rice*, 45 Mich. 142; *Doane v. Covell*, 56 Me. 527; *Alsworth v. Cordtz*, 31 Miss. 32; *Ward v. Steamboat Little Red*, 8 Mo. 358; *Rose v. Daniel*, 3 Brev. (S. Car.) 438; *Breck-enridge v. Ormsby*, 1 J. J. Marsh. (Ky.) 236; *Keane v. Boycott*, 2 H. Bl. 511; *Blake v. Supervisors*, 61 Barb. (N. Y.) 149; *Winchester v. Thayer*, 129 Mass. 129.

the benefit of the infant passes to his heirs or personal representatives.¹

The maker of a note cannot refuse payment to an indorsee because the indorsee is an infant. *Taylor v. Croker*, 4 Esp. 187; *Nightingale v. Withington*, 15 Mass. 272; *Hardy v. Waters*, 38 Me. 450; *Frazier v. Massey*, 14 Ind. 342.

Sureties and indorsers for, and all joint promisers with an infant are bound, even though the infant escapes liability. *Motteux v. St. Aubin*, 2 Wm. Bl. 1133; *Hartness v. Thompson*, 5 Johns. (N. Y.) 160; *Taylor v. Dansby*, 42 Mich. 82.

A stranger cannot impeach a conveyance by an infant. *Dominick v. Michael*, 4 Sandf. (N. Y.) 374.

In a suit to foreclose a mortgage given to secure a promissory note, the maker of the note may set up by way of defence the fact that he was a minor when he executed the same, but a subsequent lien holder cannot join in this defence. Only the minor himself can plead it. *Baldwin v. Rosier*, 1 McCrary (C. C.) 384.

Where an infant mortgagor has, in a suit against him and his vendee to foreclose, pleaded his infancy, he thereby avoids and renders his mortgage void *ab initio*, and a separate answer by the vendee, alleging such infancy and avoidance, is good. *Shrock v. Crowl*, 83 Ind. 243.

A creditor who attaches his debtor's land which had been conveyed by the latter while an infant, cannot avoid the deed on the ground of the infancy of the grantor. *Kendall v. Lawrence*, 22 Pick. (Mass.) 540.

In an action for enticing away the servant of the prosecutor, it is no defence that the servant was an infant, and not bound by his contract of service. *Murrell v. State*, 44 Ala. 367.

Where an infant and adult are sued as joint contractors and the minor pleads his infancy, the adult cannot avail himself of the plea. *Mason v. Denison*, 15 Wend. (N. Y.) 64.

1. *Person v. Chase*, 37 Vt. 650; *Wilson v. Porter*, 13 La. Ann. 407; *Dominick v. Michael*, 4 Sandf. (N. Y.) 374; *Bozeman v. Browning*, 31 Ark. 364; *Dinsmore v. Webber*, 59 Me. 103; *Austin v. Charlestown etc.*, 8 Met. (Mass.) 196; *Tefford v. Ringold*, 6 Ala. 544; *Parsons v. Hill*, 8 Mo. 135; *Counts v. Bates, Harp.* (S. Car.) 464; *Nolte v. Libbert*, 34 Ind. 163.

A conveyance by a minor made without consideration may be avoided by the heir of the minor, the latter having died before becoming of age. *Veal v. Fortson*, 57 Tex. 482; *Levering v. Levering*, 3 Md. Ch. 365; *Brown v. Brown*, L. R., 2 Eq. 481; *Harris v. Ross*, 86 Mo. 89; s. c., 56 Am. Rep. 411; *Ill. Land Co. v. Bonner*, 75 Ill. 315; *Sharp v. Robertson*, 76 Ala. 343.

But while privies in blood may take advantage of this privilege, the same right does not pass to those in privity of estate merely with the infant. *Whittingham's Case*, 8 Co. 43; *Hoyle v. Stowe*, 2 Dev. & Bat. (N. Car.) 323; *Harris v. Ross*, 112 Ind. 314; *Singer Manufacturing Co. v. Lamb*, 81 Mo. 221. So an assignee in insolvency cannot avoid an infant's conveyance. *Mansfield v. Gordon*, 144 Mass. 168. Nor his guardian. *Oliver v. Howdlet*, 13 Mass. 237; *Parks v. Maybee*, 2 U. C., C. P. 257; *Irving v. Crockett*, 4 Bibb (Ky.) 437. A few cases hold that privies in estate may avoid. *Beeler v. Bullitt*, 3 A. K. Marsh. (Ky.) 280; *Jackson v. Burchin*, 14 Johns. (N. Y.) 124.

C, while an infant, conveyed all his interest in land to his sister and died during infancy. His brother, B, of age, conveyed to D all the interest he had by inheritance from C. It was held that D was a privy in estate to B, and could stand in his shoes to avoid the deed from C to his sister. *Nelson v. Eaton*, 1 Redf. (N. Y.) 498. See also *Roach v. Williams*, 2 Mills Const. 202, where, though the point is not passed on, the opinion is expressed that where a female parcener had during minority joined in conveying land, and married during infancy, her right of disaffirmance devolved on her husband. So in *Shaw v. Boyd*, 5 S. & R. (Pa.) 312, it is stated that confirmation by the husband would bind both himself and wife during coverture. These cases seem to rest on a mistaken construction of the words "and by those who have the estate" in *Perkins*, § 12. See *Breckinridge v. Ormsby*, 1 J. J. Marsh. (Ky.) 248.

Littleton, 634, says: "And it hath been said that if two joyntenants being within age make a feoffment in fee, and one of the infants die and the other surviveth, inasmuch as both the infants

b. Trading and Partnership Contracts.—There is a presumption that an infant has not sufficient discretion to enter into a trading business, and he cannot bind himself, while an infant, by any contract having relation to trade.¹ An infant may be a partner, and bind the firm by his acts, but he incurs no liability while an infant, and is not responsible for the debts of the firm, and may, when he comes of age, or before, disaffirm the partnership agreement, and also the debts of the firm.² He cannot, however, as against his copartners, insist that in taking the partnership accounts he shall be credited with the profits and not be

might enter jointly in their lives, this right accrueth all to him which surviveth, and therefore hee that surviveth may enter into the whole." Coke, 8 Rep. 42 *b*, agrees with this, but adds: "In this case if one joyntenant had made a feoffment in fee and died, the right should not have survived, for the joynure was severed for a time." And see also Co. Litt. 188 *a* and 193 *a*. This doctrine has been very much limited in a late well considered case, where it was *held* that the rule applies only where it affirmatively appears that the infants executed the deed on the same day and as near as possible at the same time. Tucker v. Coleman, 4 New Zeal. L. R., Sup. Ct. 128.

1. Skinner v. Maxwell, 66 N. Car. 45; Houston v. Cooper, Penning. (N. J.) 633; Whitney v. Dutch, 14 Mass. 457; Kitchen v. Lee, 11 Paige (N. Y.) 107.

The doctrine of necessities is not extended to trading contracts, and an infant cannot be held to pay for goods furnished him to enable him to earn a living. Dilk v. Keighley, 2 Esp. 480. Whittingham v. Hill, Cro. Jac. 494; Whywall v. Champion, 2 Stra. 1083; Merriam v. Cunningham, 11 Cush. (Mass.) 40; Decell v. Lewenthal, 57 Miss. 331; s. c., 34 Am. Rep. 449 (farming materials).

Where an infant bought groceries to stock his store he was *held* to pay for only such part as he had personally consumed. Turberville v. Whitehouse, 12 Price 692. But otherwise if the purchase was made with the guardian's consent. Rundell v. Keeler, 7 Watts (Pa.) 237 (farming materials); Lowe v. Griffith, 1 Scott 458, 460 (rent of shop).

2. Lindley, Partn., p. 74. Mason v. Wright, 13 Met. (Mass.) 306; Folds v. Allardt, 35 Minn. 488; Osburn v. Farr, 42 Mich. 134; Van Winkle v. Ketcham, 3 Caines (N. Y.) 323; Murphy v. Yeomans, 29 Ont. C. P. 421; Woods v.

Woods, 3 Manitoba 33. Where the widow and tutrix of her minor children entered into a partnership with the adult heirs as administratrix of her deceased husband's succession, it was *held* that she could not make the minor heirs members of the firm, and they, after her death, could sue the firm for a debt due them. Cuilte v. Gassen, 14 La. Ann. 5, and cf. Stein v. Robertson, 30 Ala. 286.

In McGunn v. Hamlin, 29 Mich. 476, the plaintiff agreed to form a partnership with the defendant and his infant brother, but the latter never signed the partnership articles. It was *held* that the infant partner was not a necessary party to a suit for an accounting. See also Goode v. Harrison, 5 B. & Ald. 147; Dana v. Stearns, 3 Cush. (Mass.) 372.

Where land is bought by a firm an infant partner may sue to recover the purchase money. Sadler v. Robinson, 2 Stew. (Ala.) 520.

An infant who was a secret partner in a firm represented falsely that the ostensible partner was worthy of credit for their mutual profit. It was *held* that infancy was a defence to a suit for the price of the goods, although the vendor would have been entitled to rescind the sale on ground of fraud. Vinsen v. Lockard, 7 Bush (Ky.) 458. But it has been *held* in Maryland that the infant by the mere act of forming a partnership holds himself out as an adult, and practices a fraud which estops him from setting up his infancy in defence. Kemp v. Cook, 18 Md. 130. But this is not generally regarded as law. Bates on Partnership, § 142.

But while an infant acts as a partner he can bind the firm by his acts, and where he assigns firm property to pay a firm debt a third person cannot object. Avery v. Fisher, 28 Hun (N. Y.) 508; and see Bush v. Linthicum, 59 Md. 344; Keegan v. Cox, 116 Mass. 289.

debited with the losses;¹ and as against the creditors of the firm he has no higher rights to the firm property than the adult partners; his only right is immunity from personal liability.² If,

1. Lindley on Partn. *75.

Where, on the dissolution of a partnership between an adult and an infant, the former transferred his interest to the latter on condition that he should pay the firm debts, it was *held*, when the infant refused to do so on the ground of infancy, that if he elected to rescind the agreement on the ground of infancy, the adult had the right to have the firm property applied to the payment of the firm debts, just as if no agreement had been made. *Kitchen v. Lee*, 11 Paige (N. Y.) 107, and *cf. Dunton v. Brown*, 31 Mich. 182. And where the infant has drawn out a large share of his contribution to the capital, it was *held* that he must bear his proportion of the loss of capital on the failure of the firm. *Moley v. Brine*, 120 Mass. 324. The infant cannot repudiate the partnership and sue for his services or for money contributed. *Page v. Morse*, 128 Mass. 99; but in *Sparman v. Keim* the infant was allowed to rescind the partnership agreement and recover his investment, less what he had received. 83 N. Y. 245; s. c., 9 Abb. N. Car. 1. But if an infant pays a premium for entering a partnership, and then disaffirms the agreement before arriving at majority, he cannot recover back the premium paid. *Ex parte Taylor*, 8 De G. M. & G. 254. *Wilson v. Pearse*, Peake Add. Cases 196, where LORD KENYON is said to have *held* that a deposit paid by an infant upon an agreement to purchase the goodwill and stock of a public-house could not be recovered back by him on his refusal to complete the purchase. *Holmes v. Blogg*, 8 Taunt. 508; *Adams v. Beall*, 67 Md. 53. But where the infant receives no benefit from the partnership it was *held*, in *Corpe v. Overton*, 10 Bing. 352, that he could recover the money so paid.

In *Brown v. Hartford Fire Insurance Co.*, 117 Mass. 479, the infant partner in a firm was induced by a fraud of the agent of the insurance company to settle a claim for loss, and the firm received and divided the money. In a suit to rescind the settlement it was ruled that they must restore all they had received, although the infant was unable to return his share.

A and B, an infant, agreed to become copartners in business. No time was

specified in the agreement for the continuance of the partnership. After the partnership had continued for some time, A filed a bill for dissolution, the appointment of a receiver to take charge of the partnership assets, and to apply the same to the discharge of the partnership debts, and also for an injunction to restrain B from collecting or disposing of the assets, or contracting debts on account of the firm. B, by next friend, interposed the plea of infancy, and prayed that the bill be dismissed. Upon the filing of this plea, it was *held* that the plea of infancy was no bar to the dissolution of the partnership, the granting of the injunction, and the appointment of a receiver to take charge of, and wind up, the affairs of the firm by collecting the debts due to it, by taking possession of, and selling, its assets, and by applying the same to the payment of its debts, but that it was not competent for the court to pass a decree imposing any personal liability upon the infant defendant for the debts of the firm, or enforcing against him any of the terms or conditions of the partnership contract, or even compelling him to pay any of the costs of the proceedings. *Bush v. Linthicum*, 59 Md. 344. And where the infant files a bill to close the partnership and for a receiver, the court will distribute the firm assets in the usual way, regarding this action by the infant as an affirmation of all that has been done by the firm. *Shirk v. Schultz*, 113 Ind. 571.

2. Bates on Partnership, § 147; *Yates v. Lyon*, 61 N. Y. 344; *Bush v. Linthicum*, 59 Md. 344; *Furlong v. Bartlett*, 21 Pick. (Mass.) 401; *Pelletier v. Couture*, 147 Mass., Jan. 3, 1889. Where, in a suit against a firm, an infant partner pleads infancy, and judgment is entered against the other partners, it may be satisfied out of the property of the firm. *Whittemore v. Elliott*, 7 Hun (N. Y.) 518; *Gay v. Johnston*, 32 N. H. 167, and where the principal defendant in a garnishee (trustee) process is a firm, a verdict discharging one of the partners on the ground of infancy does not release the garnishee. *Bethel v. Chipman*, 57 Mich. 379. A minor, however, whose contribution to the capital of the firm was \$1000, but who

when an infant comes of age, he is desirous of retiring from the firm, he should express his determination speedily and unequivocally, for a person cannot retain a share in a partnership without its incidental obligations, and the doctrine of holding out may be sufficient to impose liability on an adult, although he may not long have attained his majority. A person who, before he comes of age, represents himself as a partner must, when he comes of age, take care to give notice that he has ceased to be a partner if he desires to avoid liability.¹

It is generally held that an infant cannot be adjudged insolvent.

had sold out his interest to his copartner for that sum, is entitled to an injunction to prevent a levy of execution on his property under a judgment got against the firm without his knowledge. *Van Syck v. Rorback*, 6 N. J. Eq. 234. And see *Young v. Huber*, 29 Grant Ch. (Ont.) 49; *Mason v. Denison*, 11 Wend. (N. Y.) 612.

The adult partner cannot set up the infancy of his partner in a suit on a firm debt. *David v. Birchard*, 53 Wis. 492.

Suits By and Against the Firm.—An infant partner must join in a suit brought by the firm. *Osburn v. Farr*, 42 Mich. 134; *Teed v. Elworthy*, 14 East 210; *Kell v. Nambly*, 10 B. & C. 20.

A dictum *contra* is found in *Phillips v. Pennywit*, 1 Ark. 59.

When a firm in which an infant is a partner is sued, it is the American rule to join all partners as defendants, and if the infant pleads his infancy the jury finds for the infant and against the adult partners. *Tuttle v. Cooper*, 10 Pick. (Mass.) 281; *Hartness v. Thompson*, 5 Johns. (N. Y.) 160; *Mason v. Denison*, 15 Wend. (N. Y.) 64; *Cutts v. Gordon*, 13 Me. 474; *Gay v. Johnston*, 32 N. H. 167; *Cole v. Pennell*, 2 Rand. (Va.) 174; *Kirby v. Cannon*, 9 Ind. 371; *Barlow v. Wiley*, 3 A. K. Marsh. (Ky.) 457. And the plaintiff may enter a *nolle prosequi* against the infant. *Woodward v. Newhall*, 1 Pick. (Mass.) 500; *Ex parte Nelson*, 1 Cow. (N. Y.) 417; *Da Costa v. Davis*, 24 N. J. L. 319; *Allen v. Butler*, 9 Vt. 122; *Kirby v. Cannon*, 9 Ind. 371; *Robertson v. Smith*, 18 Johns. (N. Y.) 459. But see *Connolly v. Hull*, 3 McCord (S. C.) 6. Where in an action on a contract the defendant pleads non-joinder of his copartner, a reply that such copartner is an infant is bad on demurrer. *Slocum v. Hooker*, 13 Barb. (N. Y.) 536; *Wamley v. Lindenberger*,

2 Rand. (Va.) 478. Where, however, the infant succeeds in such case on his plea of infancy, he is not entitled to costs. *Yamato Trading Co. v. Hoexter*, 44 Hun (N. Y.) 491; *Magauran v. Jamieson*, 2 Moll. 520.

In England, however, the practice seems to be to omit the infant entirely as a defendant. *Lindley on Partn.* 281. And if non-joinder is pleaded infancy is a good reply, and ratification by the infant would be a good rejoinder. *Burgess v. Merrill*, 4 Taunt. 468; *Jaffray v. Frebain*, 5 Esp. 47; *Boyle v. Webster*, 17 Q. B. 950. But it was formerly thought otherwise. *Gibbs v. Merrill*, 3 Taunt. 307; *Ex parte Henderson*, 4 Ves. 163. And see *Story on Partnership*, § 255.

1. *Lindley on Partnership* *76, *Partners on Partnership* *20.

In *Goode v. Harrison*, 5 B. & Ald. 147, an infant was a member of a firm, and after he had reached twenty-one did not either expressly affirm or disaffirm the partnership, and there was no proof that he did any act as partner after that age. It was held that it was his duty to give notice of his disaffirmance of the partnership on arriving at majority, and not having done so he was responsible to persons who had sold goods to the firm in the belief that he was still a partner.

Although an infant may become a partner, he cannot be held for contracts of the firm, individually, unless he affirms, or does that which amounts to an affirmation, after he attains his majority. *Bush v. Linthicum*, 59 Md. 344.

Where an infant partner on reaching majority ratifies the partnership he is liable for debts of the firm contracted during his infancy although he was ignorant of the existence of the debt at the time of ratification and refused to pay it later. *Miller v. Sims*, 2 Hill (S. Car.) 479. But see *Minock v. Shortridge*, 21 Mich. 304, where a firm in which an

or bankrupt, inasmuch as he cannot be a bankrupt for debts he is not obliged to pay.¹

infant was a partner purchased goods and gave a note in payment. After the goods were disposed of and the partnership closed after the majority of the infant, he refused to pay the note. It was *held* that ratification could not be inferred from incidental acts in face of an express repudiation, but the firm could be held for all goods remaining on hand when the infant came of age. And in *Dana v. Stearns*, 3 Cush. (Mass.) 372, the ruling in *Miller v. Sims* was said to go beyond any case within the knowledge of the court; and in *Crabtree v. May*, 1 B. Mon. (Ky.) 289, in a suit against a firm on a promissory note one partner pleaded infancy. The plaintiff replied that this defendant continued to act as a partner for over a year after he had reached twenty-one, and had not disaffirmed the note until the suit was brought. The replication was *held* bad without an averment that the defendant knew of the note.

A bill for rescission by one who was a minor when the partnership was formed, filed six years after he became of age, was dismissed on the ground of laches in analogy to the statute of limitations. *Whelen v. Harrison*, 40 Leg. Int. (Pa.) 170. See further Ratification, note 24.

1. Bankruptcy.—O'Brien *v. Currie*, 3 C. & P. 283; *Re Rainys*, 3 Ir. L. R., Ch. 459; *Belton v. Hodges*, 9 Bing. 365, holding the commission void and not voidable. HOLT, C. J., says: "Though the debts of an infant are only voidable by him at his election, yet no man can be bankrupt for debts which he is not obliged to pay." *Rex v. Cole*, 1 Ld. Raym. 443; *Ex parte Sydebotham*, 1 Atk. 146; *Stevens v. Jackson*, 4 Camp. 164; Lord Eldon in *Ex parte Adam*, 1 Ves. & B. 494; *Ex parte Moule*, 14 Ves. 602, and joint commission of bankruptcy against a firm, one member of which is an infant, will be superseded. There should be separate commissions. *Ex parte Henderson*, 4 Ves. 163; *Ex parte Barwis*, 6 Ves. 601. But under 12 and 13 Vict., ch. 106, § 233 (now repealed), no exception being made as to infants in the statute, it was *held* that an adjudication of bankruptcy would bind an infant unless it was annulled on petition of the infant within the time limited by the statute. *Ex parte West*, 2 De G. M. & G. 198; s. c., 22 L. J. B. Cas. 71, and in 1861 it

was *held* that an infant might be adjudged insolvent. *In re Smedley*, 10 L. T. R. 432. But since the passage of the Infant's Relief act, making contracts of infants wholly void, it is now settled that an infant cannot be a bankrupt. *Reg. v. Wilson*, 5 Q. B. Div. 28; *Ex parte Jones*, 18 Ch. Div. 109; *Ex parte Kibble*, 10 Ch. App. 373.

In America the question is somewhat doubtful, but the weight of opinion seems to be in accord with the English doctrine. *Winchester v. Thayer*, 129 Mass. 129; *Ex parte Cotton*, 6 Law Rep. (Conn.) 546. And see *Butler v. Breck*, 7 Met. (Mass.) 164. It was decided in *In re Book*, 3 McLean (C. C.) 317, that an infant was entitled to the benefit of the bankrupt act of 1841. But in *In re Derby*, 8 Nat. Bk. Reg. 106, the contrary was *held* by BLATCHFORD, J., of the subsequent act of 1867. The court said in this case: "The general contracts of an infant having no force if disaffirmed by him after attaining his majority, it is idle for him to set forth in a voluntary case, commenced during his infancy, a schedule of his creditors, and idle for them to prove their debts during his infancy, for the whole proceedings must be in vain if the debts are disaffirmed by him after he attains his majority, and it does not comport with the proprieties of a court of justice that it should solemnly entertain proceedings brought by an infant bankrupt voluntarily, with the surrender of his property to the court and its granting of protection thereon, and its injunctions against pending suits, and then permit him afterwards to demand the restoration of his property and the virtual dismissing of the proceedings, against the will of the creditors set forth in the schedule, and who have suffered perhaps from the effects of the injunctions of the bankruptcy court, on the ground that, having arrived at full age, he disaffirms the debts so set forth.

"So, in an involuntary case, the property of the infant bankrupt would be taken by the court, injunctions would, after adjudication, be taken against pending suits, a schedule of his creditors would be furnished by the bankrupt and their debts would be proved to no purpose, for his disaffirmance of the debts after becoming of age would

c. Time for Avoidance.—When an infant has conveyed real estate, he cannot affirm or avoid his conveyance on the ground of infancy until he has arrived at the age of majority;¹ but in other transactions, especially where personal property or executory contracts are involved, the infant may avoid at any time.² This distinction is for the infant's benefit, to enable him to re-

necessitate the restoration to him of his property, without any relief to the creditors." The court also holds that the debtor cannot ratify the proceedings.

In *Farris v. Richardson*, 6 Allen (Mass.) 118, the court say: "There is certainly fair reason to doubt whether the legislature intended to include infants among those who are entitled to the benefits or subject to the duties and limitations created by the insolvent laws. A discharge in insolvency would not relieve them from debts incurred for necessities, and from all other debts they can be relieved by plea and proof of infancy."

Equity, however, will not interfere to assist the infant where he has held himself out as an adult, but leave him to his action at law. *Ex parte Watson*, 16 Ves. 265; *Ex parte Bates*, 2 Mont. D. & D. 337, and *cf. Ex parte Lees*, 1 Deac. 705. And creditors will be entitled to prove against his estate if he becomes bankrupt after twenty-one. *Ex parte Unity Banking Assn.*, 3 De G. & J. 63.

But a minor's interest in the property of a firm of which he had been a member is subject to a warrant of insolvency properly issued against the firm, there being firm debts unpaid. *Pelletier v. Conture*, 148 Mass., Jan. 3, 1889.

Where an infant was arrested on an execution issued against him on a judgment for assault and battery, he was allowed to assign his property under the insolvent law to secure his release. *People v. Mullin*, 25 Wend. (N. Y.) 698.

Where the infant, who is in appearance of age, fraudulently holds himself out as of age, equity will grant relief. The undertaking of the infant does not become a debt but a liability to pay a sum of money, and as under the English Bankruptcy act of 1883, liabilities are provable, the defrauded creditor can on the majority of the infant take proceedings in bankruptcy and prove for the money or the amount advanced. *Ex parte Jones*, 18 Ch. Div. 109; s. c., 15 L. J., Ch. 673. But

it seems that the personal appearance of the infant must be such as to lend color to the deception. *Maclean v. Dummett*, 22 L. T. R. 710.

1. *Welch v. Bunce*, 83 Ind. 382; *McCormic v. Leggett*, 8 Jones L. (N. Car.) 425; *Baker v. Kennett*, 54 Mo. 82, and *cf. Schneider v. Staihr*, 20 Mo. 269; *Hastings v. Dollarhide*, 24 Cal. 195; *Emmons v. Murray*, 16 N. H. 385; *Cummings v. Powell*, 8 Tex. 80; *Tillinghast v. Holbrook*, 7 R. I. 230; *Walsh v. Powers*, 43 N. Y. 23; *Slaughter v. Cunningham*, 24 Ala. 260; s. c., 60 Am. Dec. 463; *Allen v. Poole*, 54 Miss. 323; *Tucker v. Moreland*, 10 Pet. (U. S.) 58; *Sims v. Everhardt*, 102 U. S. 300.

The infant may, however, enter during infancy and take the profits. *Bool v. Mix*, 17 Wend. (N. Y.) 119, or may apply by his guardian for a receiver to collect the rents and profits. *Matthewson v. Johnson*, Hoff. Ch. (N. Y.) 560. An infant may, however, avoid during infancy a mortgage given by him, and defending an ejectment suit by the mortgagee is a disaffirmance. *Gilchrist v. Ramsay*, 27 U. C., Q. B. 500.

2. *Grace v. Hale*, 2 Humph. (Tenn.) 27; *Adams v. Beall*, 67 Md. 53; *Cogley v. Cushman*, 16 Minn. 397; *Hoyt v. Wilkinson*, 57 Vt. 404; *Towle v. Dresser*, 73 Me. 252; *Rice v. Boyer*, 108 Ind. 472; *Childs v. Dobbins*, 55 Ia. 205; *Briggs v. McCabe*, 27 Ind. 327; *Bailey v. Barnberger*, 11 B. Mon. (Ky.) 113; *Shipman v. Horton*, 17 Conn. 481; *Riley v. Mallory*, 33 Conn. 201; *Carr v. Clough*, 26 N. H. 280; *Kitchen v. Lee*, 11 Paige (N. Y.) 107; *Willis v. Twambly*, 13 Mass. 204; *Price v. Furman*, 27 Vt. 268; *Monumental Bld'g Assn. v. Herman*, 33 Md. 128; *Stafford v. Roof*, 9 Cow. (N. Y.) 626; *overruling s. c.*, 7 Cow. 179. But see *Farr v. Sumner*, 12 Vt. 28, where the court say: "The contract of an infant executed in certain cases is not void, but voidable only, and in general he cannot while an infant, unless in case of evident necessity, disaffirm a contract made by him, as the same want of discretion which prevents him from mak-

cover personal property before it is lost, or to avoid immediate consequences of his contracts, while land may be recovered at any time.

d. Infants' Relief Act.—By a recent statute in England, a large number of contracts entered into by infants are declared to be absolutely void, and it is immaterial whether or not they would be prejudicial to the infant.¹

2. Ratification and Avoidance.—*a. Contracts.*—While an infant is entitled to avoid all contracts except those of the classes described in the following section, he may, after arriving at full age, waive his privilege of avoidance, and by acts, words or writings, ratify or affirm his voidable contracts, so that he will be bound by them. What acts or words will amount to such a waiver or ratification is a question upon which the law is not clearly settled. One line of authorities holds that an infant's contract imposes no legal liability on him until ratified after full age has been attained, and such ratification must have all the

ing a binding contract would prevent him from avoiding one which might be beneficial to him. He is incapable in the latter as in the former case of judging what is for his benefit." See also *Corey v. Burton*, 32 Mich. 30; *Armistage v. Widoe*, 36 Mich. 124; also *contra*.

The infant's privilege of avoiding acts performed with judicial solemnity, and constituting matters of record is still more limited, in point of time, than his privileges in avoiding matters not judicial. The former must be avoided by the infant himself, and during his minority, and by some act of record, as by a writ of error, or an *audita querela*. *Tyler*, Inf. Cov. (2nd ed.) 67; *Tucker v. Moreland*, 10 Pet. (U. S.) 71; *Breckenridge v. Ormsby*, 1 J. J. Marsh. (Ky.) 252.

1. 37 & 38 Vict., ch. 62, 1874. It is as follows: Sect. 1. "All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied (other than contracts for necessities), and all accounts stated with infants shall be absolutely void, provided always that this enactment shall not invalidate any contract into which an infant may by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable."

Sect. 2. "No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full

age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."

Sect. 3. "This act may be cited as the Infants' Relief act, 1874."

Eversley, Dom. Rel. 814, in commenting on this act, says that if the effect of section 1 is to make the contracts described *absolutely void*, then section 2 is superfluous; and *Pollock*, Contr. 63, says: "it is difficult to see what result is obtained in first section which is not equally well or better obtained by the second. At common law the infant was not bound by any of the contracts specified in the first section, unless he chose to bind himself at full age; by the second section he cannot so henceforth bind himself. No more complete protection can be imagined, and the first section appears superfluous. Perhaps the first section may be read as giving a popular exposition of the chief practical effects of the second one;" and elsewhere, p. 62, he adds: "The operation of the present act seems to be to reduce all voidable contracts of infants ratified at full age, whether the ratification be formal or not, to the position of agreements of imperfect obligation; that is, which cannot be directly enforced, but are valid for all other purposes."

A promise to marry is within the act. *Coxhead v. Mullis*, L. R., 3 C. P. D. 439; but see *Northcote v. Daughy*, 4 C. P. D. 385; *Ditcham v. Worrall*, 5 C. P. D. 410.

elements of a new contract except a new consideration. There must be an express promise or such acts after the infant becomes of age as practically lead to the conclusion that he intended to ratify the contract and pay the debt.¹ Such a debt is regarded as standing on the same footing as a debt that has been destroyed by a discharge in bankruptcy, and not as one that is barred by the statute of limitations.²

The other line of cases lays down the rule that the contracts of infants are only suspended during minority, and may be ratified on full age upon the same principles and for the same reasons and by the same means as a debt barred by the statute of limitations may be revived.³ Therefore, a new promise, positive and precise, equivalent to a new contract, is not essential, but as the words "ratify" and "confirm" necessarily import that there is something in existence to which a ratification or confirmation can attach, any words or acts by the infant after arriving at full age that clearly recognize the existence of the contract as a binding

1. Express Promise.—*Proctor v. Sears*, 4 Allen (Mass.) 95.

"Such a ratification may be shown by proof of an express promise to pay the debt made by the infant after he becomes of age, or by proof of such acts of the infant after he becomes of age, as fairly and justly lead to the inference that he intended to ratify the contract and pay the debt." *Tobey v. Wood*, 123 Mass. 88; s. c., 25 Am. Rep. 27; *Catlin v. Haddox*, 49 Conn. 492; s. c., 44 Am. Rep. 249; *Tibbits v. Gerrish*, 25 N. H. 41; s. c., 57 Am. Dec. 307; *Fetrow v. Wiseman*, 40 Ind. 148; *Edmunds v. Mister*, 58 Miss. 765; *Harner v. Dipple*, 31 Ohio St. 72; *Turner v. Gaither*, 83 N. Car. 357; s. c., 35 Am. Rep. 574; *Hodges v. Hunt*, 22 Barb. (N. Y.) 150. *Hoit v. Underhill*, 9 N. H. 436.

A merely verbal promise is sufficient. *West v. Penny*, 16 Ala. 186. *Martin v. Mayo*, 10 Mass. 137.

Where a minor after becoming of age offered to pay a certain sum in settlement of a claim made against him for breach of contract, it was *held* to be no acknowledgment of the contract. *Bennett v. Collins*, 52 Conn. 1. A promise to pay a part of the debt is binding only as to that part. *Egderly v. Shaw*, 25 N. H. 514; s. c., 34 Am. Dec. 514. But see *Little v. Duncan*, 9 Rich. L. (S. Car.) 55; *Stokes v. Brown*, 4 Chand. (Wis.) 39.

Where the infant after majority said: "Yes, I owe the debt and you will get your pay, and I suppose that is all you want," but refused to give a note in settlement, it was *held* that there was no

ratification. *Hale v. Gerrish*, 8 N. H. 374. "All that is justly due you shall be paid." *Wright v. Steele*, 2 N. H. 51. And see *Ford v. Phillips*, 1 Pick. (Mass.) 203; *Thompson v. Lay*, 4 Pick. (Mass.) 48. "I will pay it as soon as I can make it, but I cannot do it this year. I understand that the holder is about to sue it, but she better not." *Held* an affirmation. *Babo v. Hansell*, 2 Bail. (S. Car.) 114. But a conditional promise is not actionable without proof that the condition is fulfilled. *Proctor v. Sears*, 4 Allen (Mass.) 95; *Everson v. Carpenter*, 17 Wend. (N. Y.) 419; *Chandler v. Glover*, 32 Pa. St. 509.

Where an infant enters into an executory contract, express confirmation or a new promise after coming of age, must be shown in order to bind him; but where the contract is executed, ratification may be inferred from circumstances, and any acknowledgment of liability, or holding the property and treating it as his own, will amount to such ratification. *Petty v. Rousseau*, 94 N. Car. 355.

2. "It stands not upon the footing of a debt barred by the statute of limitations and afterwards revived by a new promise, because in such a case there has always been an existing unextinguished right, since the limitation affects only the remedy and not the right; but it is rather like a debt wiped out by a discharge in bankruptcy." *Edmunds v. Mister*, 58 Miss. 765; *Tibbits v. Gerrish*, 25 N. H. 41; s. c., 57 Am. Dec. 307; *Wilcox v. Roath*, 12 Conn. 550.

3. The contracts of an infant which

obligation will constitute a ratification.¹ This latter rule seems more consonant with principle and with the tendency of the modern cases holding that the infant is sufficiently protected by a right to avoid his contracts, which are valid until avoided. In all jurisdictions, however, acts prejudicial to the adult party, or

are only suspended during his minority may be revived and ratified by him on arriving at age, upon the same principles and for the same reasons and by the same means as a debt barred by the statute of limitations may be revived and restored to its pristine vigor and efficacy. *Henry v. Root*, 33 N. Y. 526.

1. New York Doctrine.—He (the adult) may declare on the original contract, and show the new promise like any other ratification in avoidance of the plea of infancy. This results necessarily from the fact that the contract is voidable only and not void. It is valid until disaffirmed. No ratification is needed to make it binding. Disaffirmance is needed to invalidate it. The plaintiff may therefore sue upon it, and if the defendant pleads infancy, the plaintiff may avoid the plea by showing a promise or other act of ratification by which the defendant has deprived himself of the right to avoid the contract. In such a case, the only effect of ratification is to prevent the defendant from disaffirming the contract sued on, which being valid until disaffirmed, clearly forms the basis of recovery, the ratification forming matter of confession and avoidance to the plea of infancy. *Stern v. Freeman*, 4 Met. (Ky.) 309; *Henry v. Root*, 33 N. Y. 526; *Ackerman v. Runyon*, 1 Hilt. (N. Y.) 169; *Vaughan v. Parr*, 20 Ark. 600; *Thomasson v. Boyd*, 13 Ala. 419; *Curtin v. Patton*, 11 S. & R. (Pa.) 305; *Best v. Givens*, 3 B. Mon. (Ky.) 72; *Hatch v. Hatch*, 13 Atl. Rep. (Vt.) 791.

There must be after he attains maturity, and with a full knowledge of his rights, one of three things, viz: acquiescence from which assent may be fairly inferred, an adequate benefit enjoyed which has grown directly or indirectly out of the contract, some direct act of express assent. *Norris v. Vance*, 3 Rich. (S. C.) 164.

Ratification always resolves itself into a question of intention. *Durfee v. Abbott*, 61 Mich. 471.

Slight words importing a recognition and confirmation of the contract have been left to the jury to consider. In a suit on a note, there was evidence that

the defendant said that he knew very little about the matter, as the transaction was mostly managed by another person; that he thought the note had been paid or partly paid, and that his uncle would be there the next month and then it would be settled. It was held proper to submit this evidence to the jury on the question of ratification. *Bay v. Gunn*, 1 Den. (N. Y.) 108.

Ratification has been defined to be "any act or declaration which recognizes the existence of the promise as binding; as in the case of an agency, anything which recognizes as binding an act done by an agent, or a party who has acted as agent, is an adoption of it. Any written instrument signed by the party which in the case of adults would have amounted to the adoption of the act of party acting as agent, will in the case of an infant who has attained his majority amount to a ratification." *Harris v. Wall*, 1 Exch. 122; *Rowe v. Hopwood*, L. R., 4 Q. B. 1.

"Ratification," says Baron Parke, "is an admission that the party is *liable and bound* to pay the debt arising from a contract which he made when an infant." *Mawson v. Blane*, 10 Exch. 206.

It has also been laid down that "a ratification necessarily has reference to the past, and as applied to promises made by the person ratifying, a ratification is simply an intentional recognition of some previous promise made by him, and an adoption and confirmation of such promise with the intention of rendering it binding. In other words, a ratification of a voidable promise is a recognition of it and an election not to avoid it but to be bound by it." *Ditcham v. Worrall*, 5 C. P. D. 410; *Eversley*, Dom. Rel., § 841.

If there is any evidence of ratification it is for the jury to determine whether there is an affirmation or not. *Irvine v. Irvine*, 9 Wall. (U. S.) 617, 628.

An indication to abide by the award of arbitrators may be held a ratification. *Jones v. Phoenix Bank*, 8 N. Y. 228; *Barnaby v. Barnaby*, 1 Pick. (Mass.) 221. But see *Benham v. Bishop*, 9 Conn. 330.

which evince an intention to retain the advantages of the contract, are usually construed into a ratification.¹

Two principles seem to be in conflict; one, that an infant shall be protected against his own imprudence while under a disability; the other, that creditors ought not to be cheated. The decisions vary according as one principle or the other predominates with the court.

Where a new promise on attaining majority is requisite, it

Permitting suit by default may be an affirmance. *Terry v. McClintock*, 41 Mich. 492.

In *California* mere retention of the consideration constitutes an affirmance. *Hastings v. Dollarhide*, 24 Cal. 195. But see *Benham v. Bishop*, 9 Conn. 330.

Remaining in the service of his employer one month after coming of age may be a ratification. *Forsyth v. Hastings*, 27 Vt. 646.

Declarations to a stranger do not constitute a ratification. *Chandler v. Glover*, 32 Pa. St. 509. And a record referring to personalty cannot be used as an affirmance of a conveyance of realty. *Ill. Land Co. v. Bonner*, 75 Ill. 315. A ratification in a writing addressed to a third person is evidence, where the statute requires a ratification in writing. *Stern v. Freeman*, 4 Met. (Ky.) 309.

1. Constructive Ratification.—Silence for an unreasonable time after attaining majority in connection with a use, retention or disposition in any way of the consideration received by the infant constitutes a sufficient ratification to bind the infant. *Lawson v. Lovejoy*, 8 Me. 405; *Boyden v. Boyden*, 9 Met. (Mass.) 519; *Cheshire v. Barrett*, 4 McCord (S. Car.) 241; *Boody v. McKenney*, 23 Me. 517; *Robinson v. Hoskins*, 14 Bush (Ky.) 393; *Deason v. Boyd*, 1 Dana (Ky.) 45; *Alexander v. Heriot*, Bail. Ch. (S. Car.) 223; *Belton v. Briggs*, 4 Dessaus. (S. Car.) 465; *Delano v. Blake*, 11 Wend. (N. Y.) 85; *Irvine v. Irvine*, 9 Wall. (U. S.) 617; *Cresinger v. Welch*, 15 Ohio 156; *Shropshire v. Burns*, 46 Ala. 108; *Owens v. Phelps*, 95 N. Car. 286; *Huth v. Carondelet R. Co.*, 56 Mo. 202; *Price v. Winter*, 15 Fla. 66; *Corwin v. Shaup*, 76 Ill. 246; *Ilhey v. Padgett*, 3 S. E. Rep. (S. Car.) 468; but see *Burdett v. Williams*, 30 Fed. Rep. (Conn.) 697.

But mere silence is not usually a confirmation. *Wallace v. Latham*, 52

Miss. 291; *Prout v. Wiley*, 28 Mich. 164; *Gillespie v. Bailey*, 12 W. Va. 70; *Keil v. Healey*, 84 Ill. 104; s. c., 25 Am. Rep. 434; *Davis v. Dudley*, 70 Me. 236, and see *Tobey v. Wood*, 123 Mass. 88; *Todd v. Clapp*, 118 Mass. 495; *Tyler v. Fleming*, 35 N. W. Rep. (Mich.) 902.

Non-assertion of rights when the courts are closed during a war is not a confirmation. *Thompson v. Strickland*, 52 Miss. 574.

Disaffirmance.—A few cases require express repudiation by the infant within a reasonable time after majority to free himself from liability. *Holmes v. Blogg*, 8 Taunt. 39; *Richardson v. Boright*, 9 Vt. 368; *Kline v. Beebe*, 6 Conn. 494; *Scott v. Buchanan*, 11 Humph. (Tenn.) 468; *Hastings v. Dollarhide*, 24 Cal. 195. In an English case a plea of repudiation after arriving at full age was held bad for want of an averment that it was made within a reasonable time. *Dublin etc. R. Co. v. Black*, 22 L. J., N. S. (Ex.) 94.

Express acts of repudiation of course free the infant from liability. *Scranton v. Stewart*, 52 Ind. 68; *McGill v. Woodward*, 3 Brev. (S. Car.) 401; *Hill v. Anderson*, 5 Sm. & M. (Miss.) 216; *Aldrich v. Grimes*, 10 N. H. 194; *Willis v. Twambly*, 13 Mass. 204; *Tunison v. Chamblin*, 88 Ill. 378; *Baker v. Kennett*, 54 Mo. 82.

Suing to set aside a transaction is a disaffirmance. *Gillespie v. Bailey*, 12 W. Va. 70; *St. Louis etc. R. Co. v. Higgins*, 44 Ark. 293; *Bagley v. Fletcher*, 44 Ark. 153; *House v. Alexander*, 105 Ind. 109.

Where a sale has been disaffirmed and the property returned by the infant, he cannot afterwards change his mind and affirm the sale. *Edgerton v. Wolf*, 6 Gray (Mass.) 453. Evidence of disaffirmance may be met by proof of prior affirmance. *Scranton v. Stewart*, 52 Ind. 69. *Schouler, Dom. Rel.*, § 437, in attempting to give a summary of the doctrine of ratification, says:

must be made to the party with whom the infant contracted, or his agent.¹ It is not necessary to the validity of the ratification that the person lately an infant should be aware of his right to avoid his contract; ignorance of the law gives him no excuse.²

"The writer makes no attempt to reconcile the numerous *dicta* of the courts on this important subject. They are irreconcilable. If American decisions themselves may be regarded as pointing out a general rule, it seems to be this: that a mere acknowledgment that a certain transaction constitutes a debt is insufficient to bind him lately an infant; but that an acknowledgment to the extent that he justly owes that debt, with equivocal expressions as to some future payment, may or may not be considered sufficient, though the better opinion is in favor of their sufficiency; that acts or omissions on his part, which are prejudicial to the adult party's interest, or evince his own intention to retain the advantages of a contract made during infancy, may be, especially when a reasonable time has elapsed, construed into a ratification, the presumption of honorable motives being fair and reasonable under the circumstances; and finally, that a distinct unequivocal promise, verbal or written, made after attaining majority, is always sufficient; this apparently superseding the former promise altogether. In cases of doubt, moreover, it would seem to be better to treat the evidence presented as constituting facts for the consideration of the jury, rather than a question of law for the court to pass upon."

1. *Bigelow v. Grannis*, 2 Hill (N. Y.) 120; *Goodsell v. Myers*, 3 Wend. (N. Y.) 479; *Mayer v. McLure*, 36 Miss. 389. It is not necessary that the agent should disclose his authority. *Hait v. Underhill*, 10 N. H. 220.

Affirmance by an agent is good where the agent has authority. *Carrell v. Potter*, 23 Mich. 377; and see *Orvis v. Kimball*, 3 N. H. 314.

2. **Ignorance of Rights.**—*Anderson v. Soward*, 40 Ohio St. 325; s. c., 48 Am. Rep. 687; *Clark v. Van Court*, 100 Ind. 113; s. c., 50 Am. Rep. 774; *Ring v. Jamison*, 66 Mo. 424; *Taft v. Sargeant*, 18 Barb. (N. Y.) 320; *Morse v. Wheeler*, 4 Allen (Mass.) 570, where the court say: "If such knowledge be necessary to the ratification of an infant's promise after coming of age, why is it not necessary in those cases of ratification, not

by promise, but by acts done or omitted? We see no difference in principle between the cases." But see *Owen v. Long*, 112 Mass. 403.

Where a trustee for infants made an unauthorized sale of land and the *cestuis* after twenty-one were induced, in ignorance of these rights, to give a confirmatory deed, equity will relieve them from their mistake. *Wilson v. Md. Life Ins. Co.*, 60 Md. 150.

There is a line of cases *contra* to the text, all resting on a dictum in *Harmer v. Killing*, 5 Esp. 102; *Hinely v. Margaritz*, 3 Barr (Pa.) 428; *Curtin v. Patton*, 11 S. & R. (Pa.) 305; *Reed v. Boshears*, 4 Sneed (Tenn.) 118; *Norris v. Vance*, 3 Rich. (S. Car.) 164; *Chambers v. Wherry*, 1 Bail. (S. Car.) L. 28; *Petty v. Roberts*, 7 Bush (Ky.) 410; *Thing v. Libbey*, 16 Me. 57.

Wharton on Contracts, § 57, says: "It is true that there have been intimations that a ratification will not be recognized by the courts unless made with a knowledge of the consequences. If by this is meant that loose talk by a person just coming of age, or concessions induced by misstatements or suppressions of the other side, will not be regarded as ratification, the conclusion may be accepted as true. But to say that a knowledge of the legal consequences of a ratification is necessary to validate a ratification, not only interposes a condition it would be difficult to establish, and which would often be made dependent on the testimony of the party himself long afterwards when his views may have changed, but would invalidate all ratifications, since there is no ratification all of whose legal consequences can be foreseen." Citing the above cases; but it has been recently said that "there must be an express confirmation or new promise voluntarily and deliberately made with a knowledge that there is no existing legal liability." *Turner v. Gaither*, 83 N. Car. 357; s. c., 35 Am. Rep. 574; *Baker v. Kennett*, 54 Mo. 82.

The ratification must be voluntary, however and is not good if made under the terror of arrest. *Ford v. Phillips*, 1 Pick. (Mass.) 202.

The ratification, however, must in all cases be made before suit is brought¹.

Much of the discussion on what constitutes a ratification is now ended in some jurisdictions by a statute requiring the ratification to be in writing and signed by the party to be charged before an action can be brought on the contract made during infancy.² In Iowa, the infant is required by statute to disaffirm within a reasonable time after majority.³

b. Conveyances.—A conveyance by an infant is valid until it is avoided by him after arriving at full age,⁴ and he is entitled to exercise his right of avoidance at any time within the term of the statute of limitations after his majority. Mere delay in taking advantage of this privilege will not work as a waiver or ratification;⁵ but acts of the infant after arriving at full age incon-

1. *Ford v. Phillips*, 1 Pick. (Mass.) 202; *Freeman v. Nichols*, 138 Mass. 313; *Merriam v. Wilkins*, 6 N. H. 432; *Thing v. Libbey*, 16 Me. 55; *Hale v. Gerrish*, 8 N. H. 374; *Thornton v. Illingworth*, 2 B. & C. 824.

2. *Lord Tenterden's Act*.—"No action shall be maintained to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification, after full age, of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing, signed by the party to be charged therewith." Stat. 9 Geo. 4, ch. 14, § 5 (1828). This statute has been substantially re-enacted in Maine, New Jersey, Virginia, West Virginia, Kentucky, Missouri, Arkansas, South Carolina and Mississippi. *Thurlow v. Gilmore*, 40 Me. 378. A written acknowledgment to a third person is sufficient evidence. *Stern v. Freeman*, 4 Met. (Ky.) 309. See *Mawson v. Blane*, 10 Exch. 206.

3. *Wright v. Germain*, 21 Iowa 585. What is a reasonable time depends upon circumstances. *Jones v. Jones*, 46 Iowa 466. Six months has been held to be an unreasonable time. *Hoover v. Kinsey*, 55 Iowa 668.

But the infant may disaffirm before coming of age as well as within a reasonable time after, notwithstanding the code. *Murphy v. Johnson*, 45 Iowa 57; *Childs v. Dobbins*, 55 Iowa 570. See also note 15.

For statute in Pennsylvania, see *Soullier v. Kern*, 69 Pa. St. 16.

4. "Deeds made by a minor are not void, but only voidable. Their validity does not depend on a ratification after

the minor attains his age, but to avoid them he must by some act, clear and unmistakable in its character, disaffirm their validity. Notice that he disaffirms, followed by acts of ownership or such as indicate a claim of title against the conveyance intended to be disaffirmed, such as possession, suit to regain possession or to cancel the deed, payment of taxes, selling, leasing or offering to sell or lease, improving the premises, or such like acts." *Tunison v. Chamblin*, 88 Ill. 378; *Singer Manufacturing Co. v. Lamb*, 81 Mo. 221; *Uecker v. Koehn*, 21 Neb. 559; *Palmer v. Miller*, 25 Barb. (N. Y.) 399.

5. "We think the preponderance of authority is that in deeds executed by infants, mere inertness or silence continued for a period less than that prescribed by the statute of limitations, unless accompanied by affirmative acts manifesting an intent to assent to the conveyance, will not bar the infant's right to avoid the deed. And those confirmatory acts must be voluntary." *Sims v. Everhardt*, 102 U. S. 300; *Wells v. Seixas*, N. Y. 24 Fed. Rep. 82; *Irvine*, 9 Wall. (U. S.) 617; *Huth v. Carondelet etc. R. Co.*, 56 Mo. 202; *Durfee v. Abbott*, 61 Mich. 471; *McMurray v. McMurray*, 66 N. Y. 175; *Green v. Green*, 69 N. Y. 553; *Jackson v. Burchin*, 14 Johns. (N. Y.) 124; *Voorhies v. Voorhies*, 24 Barb. (N. Y.) 150; *Smith v. Sackett*, 5 Gilm. (Ill.) 534; *Kountz v. Davis*, 34 Ark. 590; *Vaughan v. Parr*, 20 Ark. 600; *Drake v. Ramsay*, 5 Ohio 251; *Boody v. McKenney*, 23 Me. 517; *Davis v. Dudley*, 70 Me. 236; *Urban v. Grimes*, 2 Grant (Pa.) 96; *Moore v. Abernethy*,

sistent with the assertion of the privilege, or which fairly indicate that he intends to ratify the deed, will prevent him from disaffirming the conveyance.¹ There is also a line

7 Blackf. (Ind.) 442; Gillespie v. Bailey, 12 W. Va. 70; Wallace v. Latham, 52 Miss. 291; Prout v. Wiley, 28 Mich. 164; Birch v. Linton, 78 Va. 584; s. c., 49 Am. Rep. 381; French v. McAndrew, 61 Miss. 187; Foster v. Lee, 2 Hannay (N. B.) 486.

Where a minor, sixteen years of age, claiming a remainder interest in realty, joined in quit-claiming all interest therein, together with her brother, who was also a remainderman, and of age, the quit-claim being in general terms endorsed on the back of a deed of the life-tenant, their mother, and attested by their father, after a lapse of twenty years from her reaching majority, during which valuable improvements were made on the land by a *bona fide* purchaser, such claimant in remainder could not recover the land. In such a case ignorance of what she had done would be no protection against prescription. Nathans v. Arkwright, 66 Ga. 179.

Acquiescence after majority in a settlement of boundaries binds all parties. George v. Thomas, 16 Tex. 74; Brown v. Caldwell, 10 S. & R. (Pa.) 114.

1. The cases generally show a repugnance to setting aside a solemn deed at the caprice of an infant. So it is said that: "A deed will be confirmed by any deliberate act after twenty-one, by which the infant takes a benefit, or recognizes its validity." McCormic v. Leggett, 8 Jones L. (N. Car.) 425; Irvine v. Irvine, 9 Wall. (U. S.) 617; Phillips v. Green, 5 Mon. (Ky.) 344; Scott v. Buchanan, 11 Humph. (Tenn.) 468.

Where the infant, after arriving at full age, saw the purchaser make valuable improvements on the estate, he is estopped to avoid the deed afterwards. Wallace v. Lewis, 4 Harr. (Del.) 75; Allen v. Poole, 54 Miss. 323; Davis v. Dudley, 70 Me. 236; Bostwick v. Atkins, 3 Comst. (N. Y.) 53. But see Brantley v. Wolf, 60 Miss. 420. And the grantees will be allowed the value of the improvements even where the infant is permitted to disaffirm. Wilie v. Brooks, 45 Miss. 542; Rundle v. Spencer, 34 N. W. Rep. (Mich.) 548.

Where the minor has done no act

from which a dissent or disaffirmance might be inferred for three or four years after twenty-one, but where he admitted that he had sold the land, said he was satisfied, offered to exchange other lands for it, and saw the purchaser putting on improvements without objection, *held* these were sufficient acts from which to infer a confirmation. Wheaton v. East, 5 Yerg. (Tenn.) 41. But mere declarations or promises to make a deed of affirmance will not constitute an affirmance. Clamorgan v. Lane, 9 Mo. 446. And see Davidson v. Young, 38 Ill. 145; *Contra*, Houser v. Reynolds, 1 Hayw. (N. Car.) 143; Ferguson v. Bell, 17 Mo. 347. Accepting the fruits and silence for fourteen years is an affirmance of the deed. Ihley v. Padgett, 3 S. E. Rep. (S. Car.) 468. And irregularities in a sale are ratified by long silence. Jamison v. Smith, 35 La. Ann. 609.

Mortgages.—Where an infant mortgaged land and after majority conveys the land subject to the mortgage, he thereby ratifies his mortgage. Boston Bank v. Chamberlain, 15 Mass. 220; Lynde v. Budd, 2 Paige (N. Y.) 191; Phillips v. Green, 5 Mon. (Ky.) 344; Losey v. Bond, 94 Ind. 67; Allen v. Poole, 54 Miss. 323; Story v. Johnson, 2 Y. & C. Ex. 607. But a warranty deed in fee without reservation of the mortgage will disaffirm the mortgage. Dixon v. Merritt, 21 Minn. 196; Allen v. Poole, 54 Miss. 323; but see Palmer v. Miller, 25 Barb. (N. Y.) 399. But a warranty deed made before majority, nor a quit claim deed after majority, will not have that effect. Singer Manufacturing Co. v. Lamb, 81 Mo. 221.

Where the infant buys land and gives a mortgage back to secure the purchase money the two deeds constitute one transaction, and one deed cannot be ratified or avoided without producing the same effect on the other. Dana v. Coombs, 6 Greenl. (Me.) 89; s. c., 19 Am. Dec. 194; Ottman v. Moak, 3 Sandf. Ch. (N. Y.) 431; Hubbard v. Cummings, 1 Greenl. (Me.) 11; Uecker v. Koehn, 21 Neb. 559; Cogley v. Cushman, 16 Minn. 397; Richardson v. Borigt, 9 Vt. 368; Bigelow v. Kinney, 3 Vt. 353; Skinner v. Maxwell, 66 N. Car. 45; Heath v. West, 28 N. H. 101;

of cases requiring an infant to disaffirm his conveyance within a reasonable time after arriving at majority;¹ and the same

Robbins v. Eaton, 10 N. H. 561; *Young v. McKee*, 13 Mich. 552; and see *Walsh v. Powers*, 43 N. Y. 23; s. c., 3 Am. Rep. 654.

The ratification relates back to delivery so as to cut out intermediate voluntary conveyances. *Palmer v. Miller*, 25 Barb. (N. Y.) 399.

An infant mortgaged his property and when he came of age made a will directing the payment of his just debts. *Held*, this was an affirmation of the mortgage, although that instrument was not mentioned in the will. *Merchants' Fire Ins. Co. v. Grant*, 2 Edw. Ch. (N. Y.) 544.

An act showing a clear intention not to be bound by a mortgage is a disaffirmance. *State v. Plaisted*, 43 N. H. 413.

Unsecured notes for the purchase price have been equitably enforced, and the court refused to permit a disaffirmance of the notes and the retention of the land. *Weed v. Beebe*, 21 Vt. 495.

Revocation of Easement.—A sewer having been constructed through defendant's lot, at the joint expense of himself and plaintiff (who owned the adjoining upper lot), under a written agreement entered into while defendant was an infant, his disaffirmance of the contract on attaining his majority would operate as a revocation of the easement created by it; and plaintiff's continued use of the sewer, after such disaffirmance and revocation, would be a nuisance, which defendant might abate by obstructing the sewer. *McCarthy v. Microsi*, 72 Ala. 332; s. c., 47 Am. Rep. 418.

Exchange of Land.—Where an infant exchanges land, and sells or retains the land thus acquired after majority, he cannot disaffirm the exchange. *Williams v. Mabey*, 7 N. J. Eq. 500; *Ellis v. Alford*, 64 Miss. 8; *Williams v. Brown*, 34 Me. 594.

1. Reasonable Time.—"In every case of a right to disaffirm, the party holding it is required, out of regard to the rights of those who may be affected by its exercise, to act upon it within a reasonable time. There is no reason for allowing greater latitude where the right exists because of infancy at the time of making the contract. A reasonable time after majority within which to act is all that is essential to

the infant's protection. That ten, fifteen or twenty years, or such other time as the law may give for bringing an action, is necessary as a matter of protection to him is absurd . . .

Reason, justice to others, public policy (which is not subserved by cherishing defective titles), and convenience, require the right of disaffirmance to be acted upon within a reasonable time. What is a reasonable time will depend on the circumstances of each particular case, and may be either for the court or for the jury to determine. Where, as in this case, there is mere delay, with nothing to explain or excuse it, or show its necessity, it will be for the court." *Goodnow v. Empire Lumber Co.*, 31 Minn. 468; s. c., 47 Am. Rep. 798; *Bingham v. Barley*, 55 Tex. 281; s. c., 40 Am. Rep. 801; *O'Dell v. Rogers*, 44 Wis. 136; *O'Brien v. Gaslin*, 20 Neb. 347; *Ward v. Laferty*, 19 Neb. 429; *Rainsford v. Rainsford*, Spears Ch. (S. Car.) 385; *Kline v. Beebe*, 6 Conn. 494; *Wallace v. Lewis*, 4 Harr. (Del.) 80; *Hastings v. Dollarhide*, 24 Cal. 195; *Scott v. Buchanan*, 11 Humph. (Tenn.) 468; *Featherston v. McDonnell*, 15 Ont. C. P. 162; *Harris v. Cannon*, 6 Ga. 382; *Bigelow v. Kinney*, 3 Vt. 353; *Hartman v. Kendall*, 4 Ind. 403; *Cork etc. Ry. Co. v. Cazenove*, 10 Q. B. 935; *Northwestern Ry. Co. v. McMichael*, 5 Exch. 114; *Jones v. Butler*, 30 Barb. (N. Y.) 641; *Petty v. Roberts*, 7 Bush (Ky.) 410.

The possession of real estate by a widow, under right of dower, is no excuse for the failure of a minor heir, to whom the fee belongs, to disaffirm a deed made thereto within a reasonable time after arriving at full age. *Long v. Williams*, 74 Ind. 113.

A deed cannot be disaffirmed twelve years after the infant's majority. *Gerse v. Taylor*, 3 New Zeal. L. R. (Ct. App.) 265, which doubts whether the American cases *contra* are in accord with English law and equity. See *Sims v. Everhardt*, 102 U. S. 300, where the court say: "There appears to be a greater number of cases which hold that silence during a much less period of time [than the period of the statute of limitations] will be held to be a confirmation of a voidable deed. But they rely upon *Holmes v. Blogg*, 8 Taunt. 35, which was not a case of an

result is produced by a statute in some jurisdictions.¹

A purchaser for value of land conveyed by an infant will hold it against a subsequent deed of the infant of which he has no legal notice.²

A person may, of course, avoid a conveyance made during infancy by entry upon the premises or by express notice of disaffirmance followed by a deed to a third person; but in many States a doctrine has grown up that a mere conveyance to a third person works a disaffirmance, and the original grantee may be summarily ejected by such third person.³

infant's deed, or subsequent cases decided upon its authority, or they rest in part upon other circumstances than mere silent acquiescence, such as standing by without speaking while the grantee has made valuable improvements, or making use of the consideration for the deed."

Forgetfulness of a deed made in infancy is no excuse for delay. *Tunison v. Chamblin*, 88 Ill. 378.

A bill for the specific performance of a contract of an infant to sell real estate should not be brought until a reasonable time after the infant arrives at majority. *Carrell v. Potter*, 23 Mich. 377; *Griffis v. Younger*, 6 Ired. Eq. (N. Car.) 520; *Petty v. Roberts*, 7 Bush. (Ky.) 410; *Walker v. Ellis*, 12 Ill. 470; and see *Mustard v. Wohlford*, 15 Gratt. (Va.) 329.

1. Such statutes exist in *Dakota, California, Iowa, Kansas, Washington Territory and Georgia*. *Wright v. Germain*, 21 Iowa 585.

What is a reasonable time after majority, under section 2238 of the Code, within which an infant may disaffirm a contract made in infancy, depends upon the circumstances of each case. But as the plaintiff in this case did not attempt to disaffirm his conduct except by bringing this action, and did not bring this action until three years and eight months after attaining her majority, and three months after being legally advised that she could disaffirm, *held*, that the action was not brought within a reasonable time. The fact that she was informed by persons not qualified to give legal advice that she could not bring her action until her infant brother became of age, was not, in the eye of the law a sufficient reason for the delay. *Green v. Wilding*, 59 Iowa 679; s. c., 44 Am. Rep. 696.

In *Illinois* the court adopts the rule of the statute in other cases of disability, and requires a disaffirmance within two

years. *Blankenship v. Stout*, 25 Ill. 116, 132.

2. An infant conveyed land and on attaining his majority ratified the conveyance. He afterwards conveyed to a third person, who had notice of the deed made during infancy but no notice of the ratification. *Held*, that the last named purchaser held the land. "If the ratification of a deed made in infancy is by a written instrument, such instrument is within the policy of the registry laws; if by acts *in pais*, notice of such acts must be brought home to the subsequent purchaser." *Black v. Hills*, 36 Ill. 376; s. c., 87 Am. Dec. 224; *Holbrook v. Dickenson*, 56 Ill. 500. And see *Weaver v. Carpenter*, 42 Iowa 343; *Mustard v. Wohlford*, 15 Gratt. (Va.) 329.

3. **Revocation by Deed.**—A woman who had given a deed of land when she was a minor deeded it again to another person after she became of age. *Held*, that the later grantee could eject an occupant whose title was derived from the former one; and that the record of the latter deed was a sufficient revocation of the earlier one without making re-entry. *Haynes v. Bennett*, 53 Mich. 15; *Lozey v. Bond*, 94 Ind. 67; *Dawson v. Helmes*, 30 Minn. 107; *Eureka Co. v. Edwards*, 71 Ala. 248; s. c., 46 Am. Rep. 314; *Youse v. Norcoms*, 12 Mo. 549; s. c., 51 Am. Dec. 145; *Peterson v. Laik*, 24 Mo. 541; *Corbett v. Spencer*, 30 N. W. Rep. (Mich.) 385; *Tucker v. Moreland*, 10 Pet. (U. S.) 58; *Black v. Hills*, 36 Ill. 376; *Hughes v. Watson*, 10 Ohio 127; *Cresinger v. Welch*, 15 Ohio 156; *Hastings v. Dollarhide*, 24 Cal. 195; *Hoyle v. Stowe*, 2 Dev. & Bat. (N. C.) 320; *McGan v. Marshall*, 7 Humph. (Tenn.) 121; *Mustard v. Wohlford*, 15 Gratt. (Va.) 329; *Pitcher v. Laycock*, 7 Ind. 398.

The disaffirmance may be made by a quit claim deed. *Bagley v. Fletcher*, 44 Ark. 153.

This subsequent conveyance will not act as a disaffirmance of the prior deed unless it is so inconsistent with it that the two cannot stand together.¹

A conveyance to an infant will be held to be affirmed if he continues in possession of the land, or exercises acts of ownership over it, after majority, in a way that indicates his intention to ratify the transaction.²

A mortgage made after the infant has reached full age is not necessarily a disaffirmance of a prior conveyance and a mortgagee of the first grantee may foreclose and take the premises on a bill joining the infant and his mortgagee as defendants. *Buchanan v. Griggs*, 18 Neb. 121.

Bond for a deed given by the infant to A. Later a conveyance to B during minority. On reaching majority the infant gave a deed to A. *Held*, a disaffirmance of the deed to B. *Valdingham v. Johnson*, 3 S. W. Rep. (Ky.) 173.

These cases seem to be all based on a few early New York cases where wild land was involved. It was there held that entry was unnecessary to complete a disaffirmance. *Jackson v. Carpenter*, 11 Johns. (N. Y.) 539; *Jackson v. Burchin*, 14 Johns. (N. Y.) 124. But the New York courts have limited the effect of the rule to lands that are wholly vacant or are in possession of the infant. In all other cases an entry must be made. *Dominick v. Michael*, 4 Sandf. (N. Y.) 374, 421; *Boal v. Mix*, 17 Wend. (N. Y.) 119. And the entry must be set forth in the pleading. *Voorhies v. Voorhies*, 24 Barb. (N. Y.) 150.

In *Georgia* the subsequent deed gives no immediate right as against adverse possession. *Harrison v. Adcock*, 8 Ga. 68. And see *Moore v. Abernathy*, 7 Blackf. (Ind.) 442; *Worcester v. Eaton*, 13 Mass. 371; *Roberts v. Wiggins*, 1 N. H. 73.

In the New England States a writ of entry is equivalent to an actual entry. *Chadbourne v. Rackliff*, 30 Me. 354.

It seems that the grantor must be in actual or constructive possession and not be estopped by laches from asserting his right. *Riggs v. Fisk*, 64 Ind. 100.

The American doctrine in the *New York* case is examined at length in the case of *Johnson v. McKay*, 2 New Zeal. L. R. (Sup. Ct.) 156, and distinctly repudiated, and it was held that a subsequent deed by an infant on coming

of age will not act as a disaffirmance of his prior deed unless he has made an entry to revest possession. *Citing Slaton v. Brady*, 14 Ir. C. L. Rep. 61.

Schouler, Dom. Rel., § 440, says: "The New York courts have latterly been disposed to retrace their steps; reluctance to do injury to others, doubtless, contributing to increase the strictness of the requirements on the infant's part. The present rule appears to be that, unless the lands were wholly vacant or the infant remained in possession, he must make an entry or do some other act of equal notoriety before he can pass title by a second conveyance. There is no authority in the New England States to oppose this latter doctrine, nor do we find any in the other Middle States."

1. Inconsistent Deeds.—*Leitensdorfer v. Hempstead*, 18 Mo. 269; *McGan v. Marshall*, 7 Humph. (Tenn.) 121.

A quit-claim deed made after attaining majority will not have the effect to disaffirm a mortgage made during minority, as the two instruments are consistent with each other, and can stand together, the quit-claim deed only purporting to convey the estate remaining in the grantor at the time of its execution. *The Singer Manufacturing Co. v. Lamb*, 81 Mo. 221; *Breckenridge v. Ormsly*, J. J. Marsh. (Ky.) 236. See *contra*, *Bagley v. Fletcher*, 44 Ark. 153.

C, the vendee from an infant, mortgaged to A, and later conveyed in fee to B. The infant on attaining full age quit-claimed to B, who tried to set this deed up against a foreclosure suit by A. *Held*, that the quit-claim operated as a confirmation of the original conveyance to C. *Eagle Fire Co. v. Lent*, 6 Paige (N. Y.) 635.

2. *Armfield v. Tate*, 7 Ired. L. (N. Car.) 258; *Henry v. Root*, 33 N. Y. 526; *Holmes v. Blogg*, 8 Taunt. 508; *Dewey v. Burbank*, 77 N. Car. 259; *Dana v. Combs*, 6 Me. 89; *Callis v. Day*, 38 Wis. 643; *Boody v. McKenney*, 23 Me. 517; *Hubbard v. Cummings*,

c. Restoration of Consideration on Disaffirmance.—Where the infant has received the whole or a part of the consideration under a contract, and then elects to disaffirm, the cases are not agreed as to how far he will be required to restore the consideration. There is an effort on the one hand to hold the infant to common honesty, and on the other not to deprive him of his full legal right of disaffirmance. Where the contract is executory on the infant's part, and he refuses to perform it, he may set up his infancy in defence of a suit against him. The better opinion is, in such cases, that if he retains the consideration, or has parted with it after he has reached his majority, he will be held to have ratified the contract, and cannot maintain his defence successfully without a return of the consideration.¹ Other cases place no restrictions on the right of the infant to avail himself of his defence, but give a right of action to the adult to recover that part of the consideration retained by him after reaching majority.²

1 Greenl. (Me.) 11; *Boyden v. Boyden*, 9 Met. (Mass.) 519; *Robbins v. Eaton*, 10 N. H. 561; *Cheshire v. Barrett*, 4 McCord (S. Car.) 241; *Lynde v. Budd*, 2 Paige (N. Y.) 101; *Middleton v. Hoge*, 5 Bush (Ky.) 478; *Phillips v. Green*, 5 Mon. (Ky.) 344. This is true also of a lease. *Baxter v. Bush*, 29 Vt. 465. An infant bought land, the price to be paid in instalments. He paid three instalments after arriving at majority and then desired to disaffirm the purchase. Held, he could not do so, the land having decreased in value. *Hook v. Donaldson*, 9 Lea (Tenn.) 56.

Rent.—The plea of infancy is a good defence to an action on a written obligation given for the rent of land, when the action is commenced before the infant has attained his majority and before the expiration of the term. *Flexner v. Dickerson*, 72 Ala. 318.

1. Restoration of Consideration.—If the infant, after he arrives at age, is shown to be possessed of the consideration paid him, whether it be property, money or choses in action, and either disposes of it so that he cannot restore it, or retains it for an unreasonable length of time after attaining his majority, this amounts to an affirmation of the contract. So likewise if it be shown that he has the power to restore the thing that he received, he cannot be allowed to rescind without first making restitution. *Manning v. Johnson*, 26 Ala. 446; s. c., 62 Am. Dec. 734; *Bingham v. Bailey*, 55 Tex. 281; *Harris v. Musgrove*, 59 Tex. 401; *Womack v. Womack*, 8 Tex. 397; *Wille v. Brooks*, 45 Miss. 542;

Brantley v. Wolf, 60 Miss. 420; *Taft v. Pike*, 14 Vt. 405; s. c., 39 Am. Dec. 228; *Bailey v. Barnberger*, 11 B. Mon. (Ky.) 113; *Strain v. Wright*, 7 Ga. 568; *Thomason v. Phillips*, 73 Ga. 140; *Tipton v. Tipton*, 3 Jones L. (N. Car.) 552; *Ruchizky v. De Haven*, 97 Pa. St. 202; *Towle v. Dresser*, 73 Me. 252; *Bartlett v. Cowles*, 15 Gray (Mass.) 445; *Stout v. Merrill*, 35 Iowa 47 (statute); *Carr v. Clough*, 26 N. H. 280; *Chandler v. Simmons*, 97 Mass. 508; *Philpot v. Sandwich Manufacturing Co.*, 18 Neb. 54.

Where, however, the consideration received by the infant has been taken from him, rightly or wrongly, upon an execution against a third person he is not obliged, as a condition precedent to disaffirming the contract, to take any steps to recover the property taken from him. *Lemmon v. Beaman*, 45 Ohio St. 505.

A purchaser of chattels who gives a mortgage back for the purchase money cannot disaffirm the mortgage and hold the chattels free. *Curtiss v. McDougal*, 26 Ohio St. 66; *Knaggs v. Green*, 48 Wis. 601; *Skinner v. Maxwell*, 66 N. Car. 45; *Heath v. West*, 28 N. H. 101.

2. Retention of Consideration.—Having disaffirmed the contract, the law imposes on her no legal obligation to repay the purchase money. That is implied in the proposition that she may disaffirm without restoring or offering to restore the purchase money. If an infant disaffirm a contract after coming of age, he must do it *in toto*; that is to say, if he has property in his hands acquired by the contract, the other

In neither case, however, is the *quondam* infant held for the consideration where he has parted with it during infancy, but only for such part as remains *in specie* after majority.¹

Where the contract has been executed by the infant, and he seeks by action to recover property he has conveyed, he will be held in a court of equity to do equity before the court will interpose in his behalf, and restoration of the consideration where it is retained after majority is a condition precedent to a decree in

party may reclaim it. But if the property has passed from his hands, or if he has received money, the law imposes no obligation on him to account for the property or to repay the money upon his disaffirmance of the contract. It is not necessary that the other party should be placed *in statu quo*. *Dill v. Bowen*, 54 Ind. 204; *Carpenter v. Carpenter*, 45 Ind. 142; *White v. Branch*, 51 Ind. 210; *St. Louis etc. R. Co. v. Higgins*, 44 Ark. 293; *Wiser v. Lockwood*, 42 Vt. 720. And see *House v. Alexander*, 105 Ind. 109; s. c., 55 Am. Rep. 189; *Corey v. Burton*, 32 Mich. 30; *Miller v. Smith*, 26 Minn. 248.

Where a guardian, under a void decree, sells the land of his ward, and appropriates the purchase money to his own use, the ward will not be required to restore to the purchaser the price paid by him as a condition precedent to having the sale set aside. *Reynolds v. McCurry*, 100 Ill. 356; *Moore v. Appleby*, 36 Hun (N. Y.) 368.

A ward may, after he becomes of age, disaffirm a contract which he made, while an infant, with his guardian, without restoring, or offering to restore, the property which he purchased and received under the contract; but where, after majority and without fraud or undue influence, such ward executes to his guardian a receipt for the value of the property received by him, such act is a valid ratification of the contract, even if such ward was ignorant of the fact that he had a right to disaffirm. *Clark v. Van Court*, 100 Ind. 113; s. c., 50 Am. Rep. 774; *Fetrow v. Wiseman*, 40 Ind. 148, disapproved.

In a suit by an infant to recover for a fraud practised upon him, it is no defence that the consideration has not been returned. *Shuford v. Alexander*, 74 Ga. 293.

Where the *quondam* infant refuses to pay for property purchased, some cases hold that the title reverts in the adult. *Kitchen v. Lee*, 11 Paige (N. Y.) 107; *Strain v. Wright*, 7 Ga. 568. And he may

replevy the goods. *Burnett v. McLaughlin*, 13 Ill. App. 349; *Nolan v. Jones*, 53 Iowa 387; *Badger v. Phinney*, 15 Mass. 359.

1. **Wasted Consideration.**—*Chandler v. Simmons*, 97 Mass. 508; *Bartlett v. Drake*, 100 Mass. 174; s. c., 1 Am. Rep. 101; *Walsh v. Young*, 110 Mass. 396; *Green v. Green*, 69 N. Y. 553; s. c., 25 Am. Rep. 233; *Dill v. Bowen*, 54 Ind. 204; *Abernathy v. Phillips*, 82 Va. 769 ("consideration remaining in kind"); *Brantley v. Wolf*, 60 Miss. 420; *Browner v. Franklin*, 4 Gill (Md.) 463; *Shurtleff v. Millard*, 12 R. I. 272; *Reynolds v. McCurry*, 100 Ill. 356; *Betts v. Carroll*, 6 Mo. App. 518; *Manning v. Johnson*, 26 Ala. 446; *Jenkins v. Jenkins*, 12 Iowa 195; *Carpenter v. Carpenter*, 45 Ind. 142; *Carr v. Clough*, 26 N. H. 280; s. c., 59 Am. Dec. 345; *Richardson v. Linney*, 7 B. Mon. (Ky.) 571; *Thing v. Libbey*, 16 Me. 55.

It must be shown that the consideration, if money, is retained *in specie*. *Miller v. Smith*, 26 Minn. 248; s. c., 37 Am. Rep. 407.

Testimony that the article returned is depreciated in value is inadmissible either to defeat the action or in mitigation of damages. *Price v. Furman*, 27 Vt. 268; but see *Bartholemew v. Finnemore*, 17 Barb. (N. Y.) 428, where it was held that no rescission of the contract was possible where a horse had been injured by the infant and his value lessened.

Section 2238 of the Iowa Code, which provides that a minor is bound by his contract unless he disaffirms it, "and restores to the other party all money or property received by him by virtue of his contract, and remaining within his control," only requires a return of the identical money or property, and not the payment of other money or property which he may have at the time of disaffirmance. *Hawes v. B. C. R. & N. Ry. Co.*, 64 Iowa 315.

The New Hampshire doctrine is much more strict, and requires the in-

his favor; but where the *quondam* infant is pursuing a legal right, a court of law can impose no equitable conditions, and cannot compel a restoration of the consideration;¹ but here again the courts in some jurisdictions require the infant to place the other party *in statu quo*, so far as may be.²

d. Contracts for Service.—An infant who contracts to serve for a given time at a definite rate may at any time during minor-

fant to place the other party *in statu quo* before he can rescind. He must restore the consideration in specie or account for what is lost. *Hall v. Butterfield*, 59 N. H. 354; s. c., 47 Am. Rep. 209; *Heath v. Stevens*, 48 N. H. 251; see also *Cheshire v. Barrett*, 4 McC. (S. Car.) 241; *Bingham v. Barley*, 55 Tex. 281.

Where an infant assigned a policy of insurance on his life, he was allowed to avoid the assignment by paying the assignee the premiums necessary to keep the policy alive before avoidance. *City Savings Bank v. Whittle*, 63 N. H. 587.

1. Infant Plaintiff at Law.—*Pitcher v. Laycock*, 7 Ind. 398; *Miles v. Lingerman*, 24 Ind. 385; *Cresinger v. Welch*, 15 Ohio 156; *Bedinger v. Wharton*, 27 Gratt. (Va.) 857; *Green v. Green*, 69 N. Y. 553; *Dawson v. Helmes*, 30 Minn. 107; *Self v. Taylor*, 33 La. Ann. 769; *Reynolds v. McCurry*, 100 Ill. 356; *Kerr v. Bell*, 44 Mo. 120; *Hillyer v. Bennett*, 3 Edw. Ch. (N. Y.) 222; but see *Stuart v. Baker*, 17 Tex. 417; *Vogelsang v. Null*, 67 Tex. 465; *Shaw v. Boyd*, 5 S. & R. (Pa.) 309; 9 Am. Dec. 368.

The whole doctrine is summed up as follows in *Eureka Co. v. Edwards*, 71 Ala. 248; s. c., 46 Am. Rep. 314: "A distinction is taken in the books between executory and executed contracts made by infants. In the former class of cases, if the infant on coming of age disaffirms the contract; then the adult purchaser or contractor will be forced to become the actor to have the contract performed. In such cases the infant, or *quondam* infant, is under no conditions or limitations in asserting the invalidity of the contract. Being voidable, and he making timely election to avoid it, by pleading his minority, his defence, if sustained by proof, will prevail. He need not tender back anything he may have received or acquired under the contract. The most that can be required of him is that if he retained and held all or any part of what he had received under the con-

tract until he reached the age of twenty-one, then on demand or suit he can be held to account for it. The rule is different where the contract has been executed. Then the *quondam* infant, or anyone asserting a claim in his right, must become the actor, and coming into court in quest of equity, he must do or offer to do equity, as a condition on which relief will be decreed him. This is the difference between asking and resisting relief . . . But it is only in equity this principle obtains. If the suit be at law, the tender need not ordinarily be made as a condition of recovering the property. But if the suit be in equity, and if the money or other valuable thing be *in esse* and in possession of the party seeking relief, or in him from whom the right to sue is derived, the bill, to be sufficient, must tender, or offer to produce or pay, as the case may be. Not so if the infant has used or consumed it during minority;" and see *Goodman v. Winter*, 64 Ala. 410.

2. Avoidance of Partnership.—An infant cannot recover partnership property after rescinding the partnership, so as to prejudice the firm. *Skinner v. Maxwell*, 66 N. Car. 45; *Sadler v. Robinson*, 2 Stew. (Ala.) 520.

An adult partner assigned all the firm property in trust for creditors. The infant assented, but on reaching full age sued the assignee in trespass. It was held that the action would not lie, and the court expresses a doubt whether the infant would be entitled to anything more than a share of the surplus after paying the firm debts, even if the firm were solvent. *Furlong v. Bartlett*, 21 Pick. (Mass.) 401. So if the infant contributes money to the assets of the firm and does work for it, he cannot on rescission sue the adult partner for the money contributed or for the value of the work done. *Page v. Morse*, 128 Mass. 99. And see *Dunton v. Brown*, 31 Mich. 182.

Use and Occupation.—Where a vendee of land is sued for use and occupation, he may offset valuable improve-

ity avoid the contract and claim compensation for the services rendered.¹ There is a strong inclination in the courts to allow the employer part payments, and to set up a counter claim for board and necessities furnished, even to the extinction of the infant's claim.² Whether the employer can also claim an offset for the damage caused by the breach is a question upon which the authorities are divided.³ If the infant continues in service

ments made by him, and equity favors a fair adjustment of rents, damages and improvements. *Weaver v. Jones*, 24 Ala. 420; *Petty v. Roberts*, 7 Bush (Ky.) 410. And see *French v. McAndrew*, 61 Miss. 187.

An infant landlord cannot demand rents over again on reaching full age. *Parker v. Elder*, 11 Humph. (Tenn.) 546.

A minor signed an instrument in writing, acknowledging the receipt of a vehicle from H, for the use of which he agreed to pay \$50 per month, and when the payments amounted to \$675, with interest, the vehicle was to become his property. The vehicle was delivered to him on payment of \$175, and he used it in his business. About a month after the agreement was signed the minor offered to return the vehicle to H, and demanded back the money he had paid. H refused to receive it, and the minor brought an action against him to recover the money he had paid, but continued to use the vehicle in his business for about two weeks after the date of his writ, when H took possession of it. *Held*, that the action could be maintained, and that the defendant was not entitled to recoup for the use of the vehicle while in the possession of the minor. *McCarthy v. Henderson*, 138 Mass. 310.

1. "The contract which the defendants seek to make binding on the plaintiff is merely an executory contract for the plaintiff's services. The law gives him the privilege of judging whether it is beneficial or not, and of avoiding it if he elect. Having avoided it, he is entitled to recover a *quantum meruit*, in the same manner as if he had worked for the defendants without any contract between them." *Gaffney v. Hayden*, 110 Mass. 137; *Van Pelt v. Corwine*, 6 Ind. 363; *Doane v. Covell*, 56 Me. 527; *Judkins v. Walker*, 17 Me. 38; *Brown v. Whittemore*, 44 N. H. 369; *Lufkin v. Mayall*, 25 N. H. 82; *Hudson v. Worden*, 39 Vt. 382; *Ray v. Haines*, 52 Ill. 485; *Davies v. Turton*, 13 Wis. 185; *Medbury v. Watrous*, 7 Hill (N. Y.)

110; *Moses v. Stevens*, 2 Pick. (Mass.) 332; *Spicer v. Earl*, 41 Mich. 191; *Francis v. Felmit*, 4 Dev. & Bat. (N. Car.) 498; *Nashville etc. R. Co. v. Elliott*, 1 Coldw. (Tenn.) 611. But see *Wilhelm v. Hardman*, 13 Md. 140. A few early cases *contra*. *Weeks v. Leighton*, 5 N. H. 343; *Harney v. Owen*, 4 Blackf. (Ind.) 337; *McCoy v. Huffman*, 8 Cow. (N. Y.) 84, have been overruled.

2. *Hoxie v. Lincoln*, 25 Vt. 206; *Stone v. Dennison*, 13 Pick. (Mass.) 1; *Squier v. Hydliff*, 9 Mich. 274; *Wilhelm v. Hardman*, 13 Md. 140; *Roundy v. Thatcher*, 49 N. H. 526.

The agreement of hiring should always be looked to, whether the infant's services were to be paid for in money or by board and education. *Mountain v. Fisher*, 22 Wis. 93. And see *Garner v. Board*, 27 Ind. 323; *Breed v. Judd*, 1 Gray (Mass.) 455.

Where an infant is taken into the family and supported there is no presumption that payment is to be made for services rendered. *Thorp v. Bateman*, 37 Mich. 68; *Defrance v. Austin*, 9 Pa. St. 309. But see *Wright v. McLarinan*, 92 Ind. 103.

Where in an action by an infant to recover for domestic services rendered, an answer that the decedent furnished such infant with boarding, clothing, books, etc., while she was a member of the decedent's family, etc., is insufficient upon demurrer. The law implies no promise upon the infant's part to pay the decedent for boarding, clothing, books, etc., while she remained a member of the family.

3. "He [the infant] is entitled to recover what his services are reasonably worth, taking into consideration the injury to the other party, and if under all the circumstances his services are worth nothing, he cannot recover. . . . The court are inclined to adopt this rule, and although I have great doubt whether it is not infringing the general rule of law on the subject of contracts with infants, yet I more readily yield my assent to this course on principles of policy when I reflect that so many

after he becomes of age on the same terms, he will be held to have ratified the contract.¹

The parent is entitled to his child's services during minority, and usually he must assent to any contract of hiring between his child and a third person; but if the parent makes no objection, the third person can take no advantage of the want of assent.²

e. Infant Married Women.—Where the disability of coverture is added to that of infancy, the infant may disaffirm at any time during coverture, no matter how long that may continue, and for

minors are emancipated by their parents . . . and become adults for the purpose of making contracts and remain infants to avoid them. It would be unsafe for the community unless some such principle were adopted." *Thomas v. Dike*, 11 Vt. 273; *Hoxie v. Lincoln*, 25 Vt. 206; *Lowe v. Sinklear*, 27 Mo. 308; *Ray v. Haines*, 52 Ill. 485; *Judkins v. Walker*, 17 Me. 38; s. c., 35 Am. Dec. 229; *Moses v. Stevens*, 2 Pick. (Mass.) 332. See *contra* *Whitmarsh v. Hall*, 3 Den. (N. Y.) 375, where the court say: "I think that the infant plaintiff in such action is entitled, by well settled principles of law, to recover such sum for his services as he would be entitled to if there had been no express contract made. A recovery is allowed on the assumption that there is no express contract." *Widrig v. Taggart*, 51 Mich. 103.

An infant agreed to work for at least six months, giving two weeks' notice on leaving. On his leaving before the six months had expired, without giving notice, it was held that he could recover for wages without deduction for damages from the breach. *Derocher v. Continental Mills*, 58 Me. 217; s. c., 4 Am. Rep. 286. And see *Meeker v. Hurd*, 31 Vt. 639 (*semble acc.*).

In a Michigan case it was said that where the fact of infancy was not known when the contract was made, and the contract was reasonable, the infant cannot repudiate the contract and sue on a *quantum meruit*. *Spicer v. Earl*, 41 Mich. 191; s. c., 32 Am. Rep. 152.

The infant cannot be sued for breach of contract. *Frazier v. Rowan*, 2 Brev. (S. Car.) 47. But in a suit for necessities he may set off the value of his labor. *Francis v. Felmit*, 4 Dev. & Bat. (N. Car.) 498.

Where a minor has performed work and labor for another under invalid articles of indenture, the performance by the adult of his covenants therein

is no bar to a recovery by the infant for such service, and, in an action therefor, an answer setting up such articles, and alleging performance of the covenants by the defendant, is insufficient on demurrer. *Kerwin v. Myers*, 71 Ind. 359.

1. "We have no hesitation in saying that if evidence of the affirmation of the contract were required, the jury ought to have found it in this case in the fact of the service being continued without demand for increased wages after the infant came of age." *Spicer v. Earl*, 41 Mich. 191; *Forsyth v. Hastings*, 27 Vt. 646.

2. One qualification of this right is that it dies with the death of the father. The son being emancipated by the death of the father, his obligation to perform the contract made for him by the father is at an end; certainly after he has arrived at years of discretion. *Barnes v. Barnes*, 50 Conn. 572; *Waugh v. Emerson*, 79 Ala. 295.

Where one contracts with an infant to pay him for personal services, he is not at liberty, after the services have been rendered, and after the infant has become of age, to refuse to pay him because he was at the time of contracting an infant without a guardian, when it appears that there was no one entitled to receive his wages. *Gates v. Davenport*, 29 Barb. (N. Y.) 160. The employer cannot make a new contract with the infant to supersede the first, except by consent of the father or person making the first contract. *McDonald v. Montague*, 30 Vt. 357. But the contract of hiring is not void because there is no assent by the parent, if he makes no objection. *Nashville etc. R. Co. v. Elliott*, 1 Coldw. (Tenn.) 611; *Burdsall v. Waggoner*, 4 Colo. 261; *Schoonover v. Sparrow*, 37 N. W. Rep. (Minn.) 949; *O'Neil v. Chicago, Mil. etc. Ry.* 33 Minn. 489.

The father is, however, bound by his

a reasonable time thereafter.¹ While the wife continues covert, acts that would constitute a ratification in ordinary cases may not always be set up against her, but she may be estopped from disaffirmance by her own acts.²

f. Affirmance by a Court of Equity.—Chancery has power to elect for an infant in a case properly brought before the court, whether to affirm or disaffirm a transaction to which the infant is a party.³

son's contract to the extent that his claim depends on the son's performance. *Rogers v. Steele*, 24 Vt. 513. And see *Roundy v. Thatcher*, 49 N. H. 526.

1. *Wilson v. Branch*, 77 Va. 65; s. c., 46 Am. Rep. 709; *Birch v. Linton*, 78 Va. 584; *Sims v. Smith*, 86 Ind. 577; *Scranton v. Stewart*, 52 Ind. 68; *Sims v. Bardoner*, 86 Ind. 87; s. c., 44 Am. Rep. 263; *McMorris v. Webb*, 17 S. Car. 558; s. c., 43 Am. Rep. 629; *Goodnow v. Empire Lumber Co.*, 31 Minn. 468; s. c., 47 Am. Rep. 798; *Sims v. Everhardt*, 102 U. S. 300.

It is a question of fact whether the disaffirmance of a deed made by an infant *feme covert* was unreasonably delayed after she had reached her majority; and in an action by her to recover real estate so conveyed, a cross complaint by the defendant to quiet the title thereto on account of such delay should, besides alleging the lapse of time and circumstances, aver that the delay had been unreasonable. *Stringer v. Northwestern Mut. Life Ins. Co.*, 82 Ind. 100.

Statutes giving married women the right to convey do not affect the incapacity of infancy. *Harrod v. Myers*, 21 Ark. 592; s. c., 76 Am. Dec. 409.

2. *Matherson v. Davis*, 2 Coldw. (Tenn.) 443.

A married woman may, at any time during coverture, disaffirm a deed made by her while an infant, and she is not estopped by the facts that when the deed was executed she appeared and was believed by the grantee to be an adult, that the grantee, with her knowledge, after reaching majority, improved the land, and that he had conveyed to an innocent purchaser, and that after majority she, with her husband, enjoyed and exercised dominion over the consideration received. *Buchanan v. Hubbard*, 96 Ind. 1.

In 1859 an infant married woman aged seventeen years joined her husband in the execution of a deed conveying his lands. The husband died in

1880, and nineteen months thereafter she gave notice of disaffirmance to the grantees of the husband's vendee, and four months later sued them for partition, alleging the above facts in her complaint. Answer that the conveyance was for full value, and that the defendants were purchasers for full value, without knowledge of the plaintiff's claim; that her husband, with the proceeds of his sale, bought other lands near those in controversy, and resided thereon with the plaintiff from 1859 until his death, since which she has resided thereon, and has taken a third thereof as widow; that with her knowledge defendants made valuable improvements, and for twenty-three years paid all taxes, yet she failed to disaffirm or give notice of her intention until March, 1882. *Held*, that the answer was bad on demurrer, as the acts pleaded do not constitute an estoppel. *Richardson v. Pate*, 93 Ind. 423; s. c., 47 Am. Rep. 374. But see *Ellis v. Alford*, 64 Miss. 8; *Darraugh v. Blackford*, 5 S. E. Rep. (Va.) 542; *Hartmann v. Kendall*, 4 Ind. 403; *Anderson v. Mather*, 44 N. Y. 249; *Schmidtheimer v. Eiseman*, 7 Bush (Ky.) 298.

An infant wife is not bound by her release of dower. *Watson v. Billings*, 38 Ark. 278; s. c., 42 Am. Rep. 1; *Drew v. Drew*, 40 N. J. Eq. 458. And see *Barker v. Wilson*, 4 Heisk. (Tenn.) 268.

3. A decree of a court of chancery confirming a lease of an infant's realty is so far binding on the infant that he cannot, by a bill of review, an original bill or other proceeding, impeach it to the prejudice of a *bona fide* purchaser for value, of the leasehold interest, before suit brought. *Anderson v. Ammonett*, 9 Lea (Tenn.) 1; *Talbot v. Provin*, 7 Baxt. (Tenn.) 502.

Chancery may authorize a partition sale. *Cocks v. Simmons*, 57 Miss. 183; *Scott v. Porter*, 2 Lea (Tenn.) 224.

Chancery may authorize a sale of the infant's lands and a reinvestment.

In equity, also, the proceeds of lands or personalty sold during minority retain their original character of the thing sold, and no conversion takes place until after the infant attains full age and does some act indicating an intention on his part to effect the conversion.¹

3. Acts Binding Upon Infants.—*a. Contracts for Necessaries.*—There are some contracts manifestly for the benefit of the infant where it would be detrimental to his interests not to be bound by them. Such contracts the law holds as binding as contracts between adults. These contracts have to do with the existence and proper maintenance of the infant, and he might suffer severely if he could not pledge his credit for the supply of necessities to himself. Food, lodging, clothing, medical attendance and education are the leading elements in the doctrine of necessities.²

Proctor v. Scharpff, 80 Ala. 227; *Sharp v. Findley*, 59 Ga. 722; but see *Messner v. Giddings*, 65 Tex. 301; *Pughsby v. Pughsby*, 75 Ga. 95; *Rogers v. Pace*, 75 Ga. 436; and *cf.* *Knotts v. Stearns*, 91 U. S. 638.

An infant cannot make an election, and cannot create an estoppel against himself; but a court of equity has undoubted power to elect for him, and will not allow him to receive and hold the proceeds of an unauthorized sale of his property, and at the same time repudiate the sale: equitable estoppels of this character apply to infants as well as adults. *Goodman v. Winter*, 64 Ala. 410. And where, if the infant were an adult, he would be put to an election, the court may postpone the election until he arrives at full age, or, after reference to a master to determine the advisability, may elect for him. *Brown v. Brown*, L. R., 2 Eq. 481; *Robinson v. Robinson*, 19 Beav. 494; *McQueen v. McQueen*, 2 Jones Eq. (N. Car.) 16; *Addison v. Bowie*, 2 Bland Ch. (Md.) 606. And where an infant is put to an election his personal incapacity is not sufficient to exclude the application of the rule. *In re Chesham*, 31 Ch. D. 466, 472; *Storring v. Borren*, 55 Barb. (N. Y.) 595.

In re Birchall, 16 Ch. D. 41, *JESSEL, M. R.*, says: "The court can approve a compromise on behalf of infants, but it cannot force one upon them against the opinion of their advisers." *Walsh v. Walsh*, 116 Mass. 377; and see *Forstall's Succ.*, 32 La. Ann. 97; *In re Livingstone*, 34 N. Y. 555. The infants must always be made parties to such proceedings and be served with process. *Tucker v. Bean*, 65 Me. 352; *Rowland v. Jones*, 62 Ala. 322; *Bonnell v. Holt*,

89 Ill. 71; *Carver v. Carver*, 64 Ind. 195; *Insurance Co. v. Bangs*, 103 U. S. 435; and see *Burrus v. Burrus*, 56 Miss. 92; *Cook v. Rogers*, 64 Ala. 406.

1. *Foreman v. Foreman*, 7 Barb. (N. Y.) 215; *Wells v. Seeley*, 47 Hun (N. Y.) 109. Especially when the conversion is made under order of court to pay debts, or for any other purpose, the surplus remains realty. *Snowhill v. Snowhill*, 3 N. J. Eq. 20; *Fidler v. Higgins*, 21 N. J. Eq. 138; *March v. Berrier*, 6 Ired. Eq. (N. Car.) 524; *Genet v. Talmadge*, 1 Johns. Ch. (N. Y.) 561; *Shumway v. Cooper*, 16 Barb. (N. Y.) 156; and *cf.* *Lloyd v. Hart*, 2 Pa. St. 473 (case of a lunatic). And this is so, even though the proceeds be invested in personal securities (*Sweezy v. Thayer*, 1 Duer (N. Y.) 286), and on the death of the infant the proceeds are distributed according to their original character. *Paul v. York*, 1 Tenn. Ch. 547; *Thompson v. Pettibone*, 79 Ky. 317. And the conversion is complete when the infant arrives at full age. *Forman v. Marsh*, 11 N. Y. 544. Though it seems that he may elect. *Sweezy v. Thayer*, 1 Duer (N. Y.) 286. A court of equity is slow to direct a conversion. *Ex parte Phillips*, 19 Ves. 118; *Kelland v. Fulford*, L. R., 6 Ch. D. 491. Where the infant was the owner in fee subject to a devise over if he died under twenty-one, the proceeds of timber cut on the estate were regarded as personality. *Dyer v. Dyer*, 34 Beav. 504.

2. "Necessaries, in the technical sense, means such things as are necessary to the support, use or comfort of the person of the minor, as food, raiment, lodging, medical attendance, and such personal comforts as comport with his condition and circumstances.

The term "necessaries," however, is not confined in its strict sense to such articles as are indispensably necessary to the support of life, but is extended to articles fit to maintain the particular person in the state, station and degree in life in which he is. Thus, articles that are mere conveniences or matters of taste may be considered necessaries where the usages of society render them proper for a person in the rank of life in which the infant moves;¹

in life, including a common school education." *Price v. Sanders*, 60 Ind. 310; Co. Litt. 172 a; *Reeves*, Dom. Rel. 227; Bac. Abr. Infancy (I.), 1; Com. Dig. Infant (B.), 5; *Shelton v. Pendleton*, 18 Conn. 417; *Schouler*, Dom. Rel., § 411; *Smith*, Contr. 269, says: "It is well established by the decisions that under the denomination *necessaries* fall not only the food, clothes and lodging necessary to the actual support of life, but likewise means of education suitable to the infant's degree; and all those accommodations, conveniences, and even matters of taste, which the usages of society for the time being render proper and conformable to a person in the rank in which the infant moves." It is well to bear in mind the remark of *Thomas, J.*, in *Breed v. Judd*, 1 Gray (Mass.) 458, that "It would be difficult to lay down any general rule upon this subject, and to say what would or would not be necessaries. It is a flexible and not an absolute term."

Education.—It has been ruled that an infant may be liable for schooling, and if it becomes a question of law how much schooling is necessary, then you must enquire what situation in life he is required to fill. A knowledge of the learned languages may be necessary for one, a mere knowledge of reading and writing may be sufficient for another. *Peters v. Fleming*, 6 M. & W. 42; *Manley v. Scott*, 1 Sid. 112.

A common school education is a necessary. Co. Litt. 172; *Raymond v. Loyl*, 10 Barb. (N. Y.) 489; *Price v. Sanders*, 60 Ind. 310; *Middlebury College v. Chandler*, 16 Vt. 683. In the last case the court intimated that a collegiate education is not to be ranked as a necessary. The court adds: "I would not be understood as making any allusion to professional studies, or to the education and training which is requisite to the knowledge and practice of the mechanic arts. These partake of the nature of apprenticeships, and stand on peculiar grounds of reason and policy. I speak only of the regular and full course of collegiate study." But a

medical education has been decided not to be a necessary. *Turner v. Gaither*, 83 N. Car. 357; s. c., 35 Am. Rep. 574. So religious instruction. *St. John's Parish v. Bronson*, 40 Conn. 75. In *Stanton v. Willson*, 3 Day (Conn.) 37, there was a recovery for schooling at college and also for "classic books," but the question was not specifically raised. See also *Oliver v. McDuffie*, 28 Ga. 522. But teaching an infant a trade is regarded as a necessary. *Cooper v. Simmons*, 7 H. & N. 707.

In 1871 G married a widow having a son ten years old. In 1874 the son was reasonably well educated. He died in 1878. G set up against his estate a claim of \$799.83, for his maintenance and education during years 1874 to 1878, inclusive. It was held that G's claim was not sustainable as being for necessaries. *Gayle v. Hayes*, 79 Va. 542.

Board of an infant is a necessary. *Bradley v. Pratt*, 23 Vt. 378.

1. *Peters v. Fleming*, 6 M. & W. 42. Articles of mere luxury are always excluded, though luxurious articles of utility are in some cases allowed. *Chapple v. Cooper*, 13 M. & W. 252.

The necessaries for a single infant are those which pertain to him individually; those of a married infant are such as pertain to himself and family; and those of a married infant to whom the law has entrusted his estate are such as pertain to himself, his family, and his estate. *Chapman v. Hughes*, 61 Miss. 339; *Cautine v. Phillips*, 5 Harr. (Del.) 428; *Abel v. Warren*, 4 Vt. 152; *Turner v. Trisby*, 1 Stra. 168; *Turberville v. Whitehouse*, 12 Price 692; *Beeler v. Young*, 1 Bibb (Ky.) 520.

An infant husband is liable for the debts of his wife. *Butler v. Breck*, 7 Met. (Mass.) 164; *Roach v. Quick*, 9 Wend. (N. Y.) 238; *Paris v. Stroud*, Barnes' Notes 95; certainly for necessaries furnished to her. *Gavin v. Burton*, 8 Ind. 69.

Wedding presents for the bride of the infant may be necessaries. *Genner v. Walker*, 19 L. J., N. S. 398; s. c., 3 Am.

but articles of mere ornament cannot be necessities.¹ Necessaries concern the person and not the estate, and an infant cannot

Law Rev. 590. So wedding garments in reason. *Sams v. Stockton*, 14 B. Mon. (Ky.) 232; *Jordan v. Coffield*, 70 N. Car. 110.

A solicitor's bill for drawing a marriage settlement may be a necessary. *Helps v. Clayton*, 17 C. B., N. S. 553.

The uniform for the servant of an infant officer may be a necessary, but the infant cannot be charged for cockades for the whole company. *Hands v. Slaney*, 8 T. R. 578. In *Peters v. Fleming*, 6 M. & W. 42, the jury found that fine rings and a watch and chain were necessities for an infant. It was held, on a motion for a new trial, that the watch and chain might be necessities, and therefore it was proper to submit the whole claim to the jury.

Gold filling for teeth may be a necessary. *Strong v. Foote*, 42 Conn. 203.

Their account mounts up to more than a thousand dollars, comprising charges for many articles which might be ranked with necessities when supplied in reason; but not at the rate of twelve coats, seventeen vests and twenty-three pantaloons, in the space of twenty-one months and fifteen days; to say nothing of three bowie knives, sixteen penknives, eight whips, ten whiplashes, thirty-nine handkerchiefs and five canes, with kid gloves, fur caps, chip hats, and fancy bag to match. Such a bill makes one shudder. *GIBSON, C. J.*, in *Johnson v. Lines*, 6 W. & S. (Pa.) 80; s. c., 40 Am. Dec. 542. See also *Burghart v. Angerstein*, 6 C. & P. 690.

An attorney's bill for defending an infant in bastardy process is a necessary. *Barker v. Hibbard*, 54 N. H. 539. And see *Thrall v. Wright*, 38 Vt. 494; *Epperson v. Nugent*, 57 Miss. 45.

Not Necessaries.—A pair of solitaires and a goblet for a present. *Ryder v. Wombwell*, L. R., 4 Ex. 32. Tobacco, though for an infant soldier. *Bryant v. Richardson*, L. R., 3 Ex. 93 *n.* Dinners of an undergraduate in college in his rooms. *Wharton v. Mackenzie*, 5 Q. B. 606; *Brooker v. Scott*, 11 M. & W. 67. Kid gloves, cologne, cravats and fiddle strings. *Lefils v. Sugg*, 15 Ark. 137. So saddles, bridles, liquor, pistols, whips, fiddles and strings. *Glover v. Ott*, 1 McCord (S. Car.) 572. Nor cigars and tobacco. *Bryant v. Richardson*, 12 Jur., N. S. 300. Money paid

to relieve an infant from draft for military service. *Dorrell v. Hastings*, 28 Ind. 478. A bicycle. *Pyne v. Wood*, 145 Mass. 558.

Horses, carriages and accoutrements are not ordinarily necessities, but they may be. A guardian may furnish his ward with a riding horse. *Owens v. Walker*, 2 Strobb. Eq. (S. Car.) 289. But in another case a horse and saddle were not considered necessities, although the infant was one hundred and eighty miles from home. *Beeler v. Young*, 1 Bibb (Ky.) 519; *Smithpeters v. Griffin*, 10 B. Mon. (Ky.) 259; *Rainwater v. Durham*, 2 Nott & McC. (S. Car.) 524; s. c., 10 Am. Dec. 637; *Merriam v. Cunningham*, 11 Cush. (Mass.) 40; *Wood v. Losey*, 50 Mich. 475.

And a horse is not a necessary, even to an infant farmer. *House v. Alexander*, 105 Ind. 109; s. c., 55 Am. Rep. 189; *Grace v. Hale*, 2 Humph. (Tenn.) 27. But see *Aaron v. Harley*, 6 Rich. L. (S. Car.) 26; *Harrison v. Fane*, 1 M. & G. 550. Horseback exercise, when prescribed by a physician, may be a necessary. *Hart v. Prater*, 1 Jur. 623; *Cornelia v. Ellis*, 11 Ill. 584; *Wharton v. Mackenzie*, 5 Q. B. 606.

A buggy is not a necessary for a clerk. *Howard v. Simpkins*, 70 Ga. 322; *Rice v. Boyer*, 108 Ind. 472.

Stock for a farm is not a necessary. *Decell v. Lewenthal*, 57 Miss. 331; s. c., 34 Am. Rep. 449. But see *Mohney v. Evans*, 51 Pa. St. 80.

A journey by a child without the permission of the parent is not a necessary. *McKanna v. Merry*, 61 Ill. 177.

1. *Peters v. Fleming*, 6 M. & W. 42, where *PARKE, B.*, says: "The true rule I take to be this, that all such articles as are purely ornamental are not necessities, and are to be rejected because they cannot be requisite to anyone; and for such matters, therefore, an infant cannot be made responsible. But if they are not strictly of this description, then the question arises whether they were bought for the necessary use of the party in order to support himself properly in the degree, state and station of life in which he moved; if they were, for such articles an infant may be responsible. That must be a question for the jury, and it is for them to decide whether the articles were of such description or not."

be held for repairs to his property, though they may be necessary to preserve it from serious and immediate damage.¹

As this liability of the infant is for his benefit, it cannot be pushed to his disadvantage, and the articles furnished must be actually necessary at the time; that is to say, an infant who is living with his parent or guardian whose duty it is properly to support him, or one who is already abundantly supplied with similar articles, cannot be held liable for goods furnished him that may be classed as necessities.²

In an action against the infant to recover the price of articles

1. Repairs to Real Estate.—Tupper v. Caldwell, 12 Met. (Mass.) 559; s. c., 46 Am. Dec. 707; Mathes v. Dobschuetz, 72 Ill. 438; West v. Gregg, 1 Grant (Pa.) 53; Price v. Sanders, 60 Ind. 310. Even where the contract was made by the guardian. Wallis v. Bardwell, 126 Mass. 366. So also timber furnished for a house is not a necessary, Freeman v. Bridger, 4 Jones L. (N. Car.) 1. So insurance on property. N. H. Mut. Fire Ins. Co. v. Noyes, 32 N. H. 345. Services of an attorney in a suit to protect the infant's title cannot be charged as necessities. Phelps v. Worcester, 11 N. H. 51. See *contra* Munson v. Washband, 31 Conn. 303.

An infant may be liable for rent. Lowe v. Griffith, 1 Scott 458.

2. Already Supplied.—"The rule of law is that no one may deal with a minor; the exception to it is, that a stranger may supply him with necessities proper for him in default of a supply by anyone else; but his interference with what is properly the guardian's business must rest on actual necessity of which he must judge in a manner at his peril." Johnson v. Lines, 6 W. & S. (Pa.) 80; Bainbridge v. Pickering, 2 W. Blacks. 1325; Story v. Perry, 4 C. & P. 526; Angel v. McLellan, 16 Mass. 28; Swift v. Bennett, 10 Cush. (Mass.) 436; Wailing v. Toll, 9 Johns. (N. Y.) 141; Kline v. L'Amoureux, 2 Paige (N. Y.) 419; Perrin v. Wilson, 10 Mo. 451; Freeman v. Bridger, 4 Jones L. (N. Car.) 1; Hussey v. Roundtree, Busbee L. (N. Car.) 110; Connolly v. Hull, 3 McCord (S. Car.) 6; Kraker v. Byrum, 13 Rich. (S. Car.) 163; Elrod v. Myers, 2 Head (Tenn.) 33; Reading v. Wilson, 38 N. J. Eq. 446; Nicholson v. Spencer, 11 Ga. 607. The fact that the parent is poor and unable to pay will not make the infant liable. Hoyt v. Casey, 114 Mass. 397; s. c., 19 Am. Rep. 371. But see Werner's Appeal, 91 Pa. St. 222, where two mi-

nors died intestate leaving their father as their heir at law. The latter was imbecile and possessed of no estate. A sister of the deceased nursed them through their last illness and prepared the bodies for interment. For these services she presented a claim to the administrator, who refused payment on the ground that the charges were exorbitant, and paid the balance to the father as distributee. Held, that the claim being for necessities, and the parent unable to pay it, the estate of the minors was liable.

The parent may sanction the purchase, and in such case the infant is bound. Atchison v. Bruff, 50 Barb. (N. Y.) 381; Watson v. Hensel, 7 Watts (Pa.) 344; Strong v. Foote, 42 Conn. 203. But where credit is given to the parent the infant is not liable. Sinklear v. Emert, 18 Ill. 63; Ryan v. Boltz, 41 Hun (N. Y.) 152.

In Dalton v. Gib, 5 Bing. (N. C.) 198, an infant living in a pretentious manner purchased at different times silks of a considerable value, some of which were ordered in the presence of her mother, and some were ordered sent to her hotel. It was held that the infant was liable for the price although the seller made no enquiries of the mother whether the silks were necessities or not. The court say: "The presence of the mother when the daughter purchased the articles, and her omission to reject those which were delivered at the hotel, rendered enquiry superfluous." And in Brayshaw v. Eaton, 5 Bing. (N. C.) 231, which was a suit against an infant by a tailor, it was held that an enquiry by the plaintiff as to the defendant's circumstances is not a condition precedent to recovery. TINDAL, C. J., says: "That it is prudent for a tradesman to make such enquiry is clear; but he is not bound to make it by an inflexible rule of law. The question in these cases is whether the articles furnished

furnished as necessities, there is a preliminary question for the court whether the articles can be necessities. If that is decided for the plaintiff, the jury must then decide whether under all the circumstances the articles were necessities, that is, whether they were suitable to the minor's condition and estate, and whether he

were necessary for the defendant; and that question is independent of any enquiry the plaintiff could make. After every enquiry that could be made, it might still turn out that the goods were necessary. The proposition, therefore, in the books as to the necessity of enquiry, must be understood with reference to the prudence of such a step, and as of a duty of imperfect obligation." BOSANQUET, J., adds, "It is said, indeed, in several of the cases that the plaintiff ought to make enquiries; but the consequence is not that he should be non-suited if he fails to do so, but that he trusts the defendant at his peril." And *cf.* *Eames v. Sweetser*, 101 Mass. 80.

If, therefore, the infant be supplied by his parent or any other person he cannot render himself liable for what would otherwise be necessities. *Gay v. Bal-lou*, 4 Wend. (N. Y.) 403; *Guthrie v. Murphy*, 4 Watts (Pa.) 80; *Pool v. Pratt*, 1 Chip. (Vt.) 252; *Beeler v. Young*, 1 Bibb (Ky.) 521; *Cook v. Deaton*, 3 C. & P. 114; *McKanna v. Merry*, 61 Ill. 180; *Davis v. Caldwell*, 12 Cush. 512. And see *Locke v. Smith*, 41 N. H. 346; *Foster v. Redgrave*, L. R. 4 Ex. 35 *n.*

If the minor resides with his parents there is a presumption, rebuttable by proof, that he is fully supplied with necessities. *Connolly v. Hull*, 3 McCord (S. Car.) 6; *Jones v. Colvin*, 1 McMull. (S. Cal.) 14; *Freeman v. Bridger*, 4 Jones L. (N. Car.) 1; *Perrin v. Wilson*, 10 Mo. 451.

In *Rivers v. Gregg*, 5 Rich. Eq. (S. Car.) 274, the rule is laid down that "when it is shown that an infant is supplied with necessities by his parent or guardian, or with funds amply sufficient to secure them, the presumption of law and of reason must be that he does not stand in need of credit to obtain what is necessary for him. And after this *prima facie* showing, he who alleges that notwithstanding this the infant was in a state of destitution, must take upon himself the burden of proving the allegation." And see *State v. Cook*, 12 Ired. L. (N. Car.) 67.

In *Ryder v. Wombwell*, L. R., 3 Ex.

90, it was *held* that evidence to show that an infant was already sufficiently supplied with the articles furnished was properly rejected, as it was not proposed to show that the plaintiff had knowledge of the fact; but the later case of *Barnes v. Toye*, 13 Q. B. D. 410, dissents from that rule and *holds* the jury should decide whether the goods supplied were necessities, taking into consideration not only the character of the goods, but the question whether the defendant was in possession of such a supply of goods of the same description that he was not in want of these; and this was followed in 1887, in *Johnstone v. Marks*, 19 Q. B. D. 509. In this case the plaintiff was a tailor and sued an infant for clothes supplied. The defendant proposed to prove by the evidence of his father that he was sufficiently supplied with clothes at the time of the purchase. This evidence was *held* admissible.

Where, however, the infant is absent from home or without a natural protector, he is liable for necessities furnished him. *Hunt v. Thompson*, 3 Scam. (Ill.) 179; *Smith v. Young*, 2 Dev. & Batt. (N. Car.) 26; *Hyman v. Cain*, 3 Jones L. (N. Car.) 111; *Epperson v. Nugent*, 57 Miss. 45.

A person who takes from an almshouse a minor, whose father is an inmate of a soldiers' home, and whose mother has been committed to a reformatory institution, who has a guardian, and who will inherit property upon the death of his father, may maintain an action against the minor, after his father's death, for necessities furnished to him upon the credit of his expectations of property. *Trainer v. Trumbull*, 141 Mass. 527.

When a minor is provided with necessities by a parent or guardian, neither he nor his guardian is answerable for necessities furnished by others; but if he still have the articles furnished, he will be compelled, in a court of equity, to pay for them or return them, but the bill must be properly framed to justify such decree. *Nichol v. Steger*, 6 Lea (Tenn.) 393; s. c., 2 Tenn. Ch. 328; but in general there is no remedy in

was or was not already supplied with them.¹ The burden of proof is on the plaintiff to show that the articles were necessities.² Where necessities are supplied to an infant and paid for by a third person, the infant is liable to an action by such person for the money advanced,³ and when money is loaned directly to the

equity for necessities furnished, as the remedy at law is complete. *Oliver v. McDuffie*, 28 Ga. 522.

Where necessities are furnished with things that are not necessities, there is a remedy for the former but none for the latter. *Turberville v. Whitehouse*, 12 Price 692; *Maddox v. Miller*, 1 M. & S. 738; *Bent v. Manning*, 10 Vt. 225; *Johnson v. Lines*, 6 W. & S. (Pa.) 80.

1. Question for Court.—"We think this is the true view of the law on this subject, that whether the articles sued for were necessities or not, is a question of fact to be submitted to a jury, unless in a very clear case, when a judge would be warranted in directing a jury authoritatively that some articles, as, for instance, diamonds or a race horse, cannot be necessities for any minor." *Davis v. Caldwell*, 12 Cush. (Mass.) 512; *Mohney v. Evans*, 51 Pa. St. 80. "Necessaries are a mixed question of law and fact. The court determines whether the articles furnished fall within the class of necessities suitable to anyone, infant or adult, in the defendant's situation or condition of life; and if the court decides that they do come within the class, the jury are to decide whether the particular articles furnished were actually necessary under the circumstances of the case . . . As a matter of law, the court should have decided that the tobacco and cash for cotton picking were not necessities, and so of the bagging and ties." *Decell v. Lewenthal*, 57 Miss. 331; and see *Stanton v. Willson*, 3 Day (Conn.) 37; *Peters v. Fleming*, 6 M. & W. 42; *Ryder v. Wombwell*, L. R., 4 Ex. 32; but *cf.* *Genner v. Walker*, 19 Law Times (N. S.) 398, where *COCKBURN, C. J.*, says: "I really cannot understand it [this rule], unless it means that it is to be a question of law for the judge to determine whether the articles disputed are or are not necessities. If that is to be taken to be law, of course I must act upon it; but I should certainly have preferred the law as it was previously understood to be, that it was for the jury to say what articles were reasonably necessary with reference to the position of the de-

fendant, the infant." *Phelps v. Worcester*, 11 N. H. 51; *Beeler v. Young*, 1 Bibb (Ky.) 519; *Merriam v. Cunningham*, 11 Cush. (Mass.) 40; *Bent v. Manning*, 10 Vt. 225; *Jordan v. Coffield*, 70 N. Car. 110.

"The true question is not a mere abstract one whether the articles supplied were in their nature necessities, but a practical question whether they were necessities for the defendant, that is *necessary to him*, and they could not be if he already had plenty of them." *Lindley L. J.* in *Johnstone v. Marks*, 35 W. R. 806; s. c., 19 Q. B. D. 509. So the infant may show that he was already fully supplied with similar goods, and it is immaterial whether the plaintiff knew it or not. *Barnes v. Toye*, 13 Q. B. D. 410; *Trainer v. Trumbull*, 141 Mass. 530; *Hoyt v. Casey*, 113 Mass. 397; *McKanna v. Merry*, 61 Ill. 180; *Rivers v. Gregg*, 5 Rich. Eq. (S. Car.) 274; *Mortara v. Hall*, 6 Sim. 465. See, however, *Brayshaw v. Eaton*, 7 Scott 183.

It is for the infant to show that he was so supplied. *Parsons v. Keyes*, 43 Tex. 557; *contra* *Burghart v. Hall*, 4 M. & W. 727; and see *Nicholson v. Wilborn*, 13 Ga. 467; *Thrall v. Wright*, 38 Vt. 494.

2. Burden of Proof.—*Wood v. Losey*, 50 Mich. 475; *Rundel v. Keeler*, 7 Watts (Pa.) 237; *Bent v. Manning*, 10 Vt. 225; *Merriam v. Cunningham*, 11 Cush. (Mass.) 40; *Wharton v. McKenzie*, 5 Q. B. 606; *Thrall v. Wright*, 38 Vt. 494.

Schouler, Dom. Rel., § 411, says: "The result of the cases on both sides of the Atlantic seems to be that unless the articles are, both as to quality and quantity, such as must be necessities to anyone, the burden of proof lies on the plaintiff to show such a condition of life of the defendant as might raise to the rank of necessities things which would otherwise be considered luxuries."

3. "We suppose the rule to be well settled, that an infant is liable to an action at the suit of a person advancing money to a third party to pay for necessities furnished to the infant, but that he

infant, he is liable, in equity at least, to the lender to the extent that the money is applied to the purchase of necessities.¹ Whether an infant is liable on a promissory note given in payment for necessities is not a settled question, but the tendency of the courts is to hold the infant to the extent of the value of the necessities, where that is possible.² In no case, however, is

is not liable for money supplied to him, to be by him expended, although it may actually be laid for necessities. The reason for this distinction is, that in the latter case the contract arises upon the lending, and that the law will not support contracts which are to depend for their validity on a subsequent contingency." *Swift v. Bennett*, 10 Cush. (Mass.) 436; *citing Ellis v. Ellis*, 5 Mod. 368; *Earle v. Peake*, 1 Salk. 387. "An infant is not answerable for money borrowed, though expended by him for necessities, nor for money borrowed by him to buy necessities, unless it was actually so applied. And perhaps the infant is not answerable in that case, unless the lender either lays out the money himself or sees it laid out in necessities." *Randal v. Sweet*, 1 Den. (N. Y.) 460; and see *Walker v. Simpson*, 7 W. & S. (Pa.) 83; *Bradley v. Pratt*, 23 Vt. 386; *Smith v. Oliphant*, 2 Sandf. (N. Y. Supr.) 306; *Clarke v. Leslie*, 5 Esp. 28.

But money loaned to an infant to pay off a mortgage on property inherited by him, is not regarded as a necessity. *Mahee v. Welsh*, 18 Cal. 155; and see *Bicknell v. Bicknell*, 111 Mass. 265; *West v. Gregg*, 1 Grant's Cas. (Pa.) 53.

1. *Price v. Sanders*, 60 Ind. 310; *Smith v. Oliphant*, 2 Sandf. (Sup. Ct. N. Y.) 306; *Harris v. Lee*, 1 P. Wms. 482; *Marlow v. Pittfield*, 1 P. Wms. 558. See *Watson v. Cross*, 2 Duv. (Ky.) 147; *Darby v. Boucher*, 1 Salk. 279.

Where money is loaned under authority of the court in good faith, the infant must repay. *Cane v. Cawthorn*, 32 La. Ann. 953.

2. **Note for Necessaries.**—Reeve and others state the law thus. "That an infant is not bound by an express contract for necessities to the extent of such contract, but is bound only on an implied contract to pay the amount of their value to him; that when the instrument given by him as security for payment is such that by the rules of law the consideration cannot be enquired into, it is void, and not merely

voidable; that whenever the instrument is such that the consideration may be enquired into, he is liable thereon for the true value of the articles for which it was given." *Schouler, Dom. Rel.*, § 414; *Reeve, Dom. Rel.* 229, 230; 2 *Dane Abr.* 364-5; *Met. Contr.* 75.

So a promissory note is good to the extent of the value of the necessities. *Stone v. Dennison*, 13 Pick. (Mass.) 1; *Earle v. Reed*, 10 Met. (Mass.) 387; *Morton v. Seward*, 5 Bradw. (Ill.) 533; *McMinn v. Richmond*, 6 Yerg. (Tenn.) 9; *Beeler v. Young*, 1 Bibb (Ky.) 519; *Dubose v. Wheddon*, 4 McCord (S. Car.) 221; *Haine v. Tarrant*, 2 Hill (S. Car.) 400. That the note is good in full, see *Bradley v. Pratt*, 23 Vt. 378, where an infant boarded with A for twenty weeks at a reasonable price. A, being indebted to B, drew an order on the infant, authorizing him to pay B, and the infant assented to the arrangement and later gave B his promissory note. In a suit upon this note it was held that the consideration was open to enquiry, and it being found a fair one the infant was liable for the face of the note with interest. And *cf. Ray v. Tubbs*, 50 Vt. 688.

That such note is voidable, see *Ayers v. Burns*, 87 Ind. 245; s. c., 44 Am. Rep. 759; *Buzzell v. Bennett*, 2 Cal. 101; *Dunlap v. Hales*, 2 Jones (N. Car.) 381. That it is void, see *McCrillis v. How*, 3 N. H. 348; *Fenton v. White*, 1 South (N. J.) 100; *Swasey v. Vanderheyden*, 10 Johns. (N. Y.) 33, overruled by *Goodsell v. Myers*, 3 Wend. (N. Y.) 479.

An infant's trust deed is not void, nor voidable, to the extent that it is for necessities. *Cooper v. State*, 37 Ark. 421. *Guthrie v. Morris*, 22 Ark. 411; *Trueman v. Hirst*, 1 T. R. 41. And see *Martin v. Gale*, 4 Ch. Div. 428; *Hedgley v. Holt*, 4 C. & P. 104. But see *Baylis v. Dineley*, 3 M. & S. 482. An infant's endorser or surety on such a note is sometimes given a remedy against him. *Conn v. Coburn*, 7 N. H. 368; *Ayers v. Burns*, 87 Ind. 245; s. c., 44 Am. Rep. 759. And see *Dial v. Wood*, 9 Baxt. (Tenn.) 296.

the infant held for more than the real value of the necessaries supplied.¹

b. Other Acts Binding on Infants.—An infant trustee is bound by a conveyance under the trust.² An infant is also bound by any act which the law would have compelled him to perform, such as the partition of lands,³ assignment of dower,⁴ or release of mortgaged premises on satisfaction of the debt,⁵ or support of a bastard child.⁶

He is bound by his recognizance to appear in court in a criminal case, as it is for his interest not to be confined meantime.⁷ He is bound by his enlistment in military service, although this is usually regulated by statute.⁸ An infant, on similar principles, may be bound by a contract of apprenticeship.⁹

1. *Locke v. Smith*, 41 N. H. 346; *Parsons v. Keys*, 43 Tex. 557; *Trainer v. Trumbull*, 141 Mass. 527; *Price v. Sanders*, 60 Ind. 310. Equity will set aside on the ground of fraud a note made after the maker's majority and given for extravagant supplies sold to him while an infant. *Brook v. Gally*, 2 Atk. 34.

The value is always open to examination as a question of fact. *Earle v. Reed*, 10 Met. (Mass.) 387; *Johnson v. Lines*, 6 W. & S. (Pa.) 80; *Beeler v. Young*, 1 Bibb. (Ky.) 519.

2. *Prouty v. Edgar*, 6 Iowa 353; *Starr v. Wright*, 20 Ohio St. 97; *Elliott v. Horn*, 10 Ala. 348; *Bridges v. Bidwell*, 20 Neb. 185. And see *Sheldon v. Newton*, 3 Ohio St. 494, where the infant bought for another and at once conveyed to him. And an infant trustee can be compelled to convey. *Diffin v. Simpson*, 3 Kerr. (New Br.) 194.

3. *Bavington v. Clarke*, 2 Penn. 115. But this does not apply to a voluntary distribution, as the law might have made a different one. *Kilcrease v. Shelby*, 23 Miss. 161.

4. *Jones v. Brewer*, 1 Pick. (Mass.) 314.

5. A father having a title-bond for real estate purchased by him, endorsed thereon an absolute assignment to his two sons, they at the same time becoming his sureties on a bond to S; the said real estate is subsequently sold by the father, the sons uniting in the written contract of sale to a third party, and the title-bond is then assigned by the father and sons to the purchaser, and it and the possession of the real estate are delivered to him and he paid the purchase money. During these transactions and until after said sale one of the sons was a minor.

After this minor son becomes of age he brings his suit in equity to disaffirm said sale as to one moiety of said real estate and to have the same decreed to him. The facts proved and the circumstances establish that the assignment of the title-bond was made and intended simply as an indemnity to the sons as the sureties of the father on said debt to S, and that by a provision in the contract of sale the purchaser bound himself to pay and did pay said debt, and thereby the sons were released from their liability as such sureties. *Held*, that the said assignment to the sons must be treated as a contract in the nature of an equitable mortgage, and when the said debt to S was satisfied it became inoperative and the beneficial interest in the real estate reverted in the father and passed from him by said contract of sale to the purchaser, and the son's suit was properly dismissed. *Trader v. Jarvis*, 23 W. Va. 100.

6. *People v. Moores*, 4 Den. (N. Y.) 518; s. c., 47 Am. Dec. 272; *Stowers v. Hollis*, 83 Ky. 544; *McCall v. Parker*, 13 Met. (Mass.) 372; *Bordentown v. Wallace*, 50 N. J. L. 13 (bound on his bond); *Gavin v. Burton*, 8 Ind. 69.

7. *State v. Weatherwax*, 12 Kan. 463; *Fagin v. Goggin*, 12 R. I. 398.

8. *Enlistment.*—*King v. Rotherfield Greys*, 1 B. & C. 345; *Com. v. Gamble*, 11 S. & R. (Pa.) 93; *United States v. Bainbridge*, 1 Mas. (C. C.) 71, 83; *Tarble's Case*, 13 Wall. (U. S.) 397. The statute usually provides that a contract of enlistment shall not be binding on an infant under eighteen years of age without the consent of parent or guardian. *In re Tarble*, 25 Wis. 390; *In re McDonald*, 1 Lowell (U. S.) 100; *Seavey v. Seymour*, 3 Cliff. (U. S.) 439.

9. *Apprenticeship.*—*Woodruff v. Lo-*

IV. TORTS, LIABILITY AND RIGHT OF ACTION FOR.—1. Torts Committed by Infants.—An infant is liable for all injuries to property or person wrongfully committed by him. His privilege of infancy is given to him as a shield and not as a sword, and it cannot be used for protection against the consequences of wrongful acts; for, where civil injuries are committed by force, the intent of the perpetrator is not regarded.¹ So an infant is held responsible for a tort committed at the command of his parent or guardian,² or

gan, 6 Ark. 276; *Blunt v. Melcher*, 2 Mass. 228. But the infant must execute the indenture in person, and he is not bound where it is executed by his father only. *McDowles Case*, 8 Johns. (N. Y.) 328; *Stokes v. Hatcher*, 4 N. J. L. 84. *Contra*, that such a contract is voidable, *Clark v. Goddard*, 39 Ala. 164, where the court say: "The law cannot lay down a rule for the decision of this question, for some trades or occupations might and probably would be beneficial to the infant, while others would be injurious, improper, and in some cases degrading. Trades and arts well adapted to some capacities and circumstances would be utterly inelegible under other circumstances." *Peters v. Lord*, 18 Conn. 337. And see *Nickerson v. Easton*, 12 Pick. (Mass.) 110; *Langham v. State*, 55 Ala. 114.

An infant is not estopped by a representation as to his age in a contract of apprenticeship. *Houston v. Turk*, 7 Yerg. (Tenn.) 13.

1. Injuries to Person.—*Zouch v. Parsons*, 3 Burr. 1802; *Jennings v. Rundall*, 8 T. R. 335 (where a mare was strained by accident); *Conway v. Reed*, 46 Mo. 346; s. c., 27 Am. Rep. 354; *Oliver v. McClellan*, 21 Ala. 675; *Wilbur v. Jones*, 21 New Br. 4; *Chandler v. Com.*, 4 Met. (Ky.) 68; *Barham v. Turbeville*, 1 Swan (Tenn.) 437. So where an infant shot an arrow and struck another child in the eye. *Bullock v. Babcock*, 3 Wend. (N. Y.) 391. A child of thirteen threw a piece of mortar and struck the plaintiff. *Peterson v. Haffner*, 59 Ind. 130; s. c., 26 Am. Rep. 81. An infant was held for frightening a horse with a fire cracker. *Conklin v. Thompson*, 29 Barb. (N. Y.) 218. Or at a ball game. *Neal v. Gillett*, 23 Conn. 437. An infant is liable for procuring the delivery of goods by fraud. *Matthews v. Cowan*, 59 Ill. 341. So for embezzlement. *Peigne v. Sutcliffe*, 4 McCord (S. Car.) 387; s. c., 17 Am. Dec. 756. So for stolen money, in an action of money had and received. *Bristow v.*

Eastman, 1 Esp. 172; s. c., *Peake's Case*, 223; *Shaw v. Coffin*, 58 Me. 254; s. c., 4 Am. Rep. 290; *Elwell v. Martin*, 32 Vt. 217.

Whether an infant under fourteen is liable for slander is doubtful. *Reeves*, Dom. Rel. 258. See *Defries v. Davis*, 1 Bing. (N. C.) 692.

Injuries to Property.—A child of seven held liable for damage to shrubbery and flowers. *Huchting v. Engel*, 17 Wis. 230. In trespass. *School Dist. v. Bragdon*, 23 N. H. 507. An infant occupying land is liable for a nuisance and injury to neighbors from the negligent use of his land. *McCoon v. Smith*, 3 Hill (N. Y.) 147; *Cooley on Torts*, 106. An infant is liable in ejectment, as disseisin is a tort. *Marshall v. Wing*, 50 Me. 62; *Beckley v. Newcomb*, 24 N. H. 363.

2. Tort by Command of Parent.—*Humphrey v. Douglass*, 10 Vt. 71; s. c., 33 Am. Dec. 177; *Huchting v. Engel*, 17 Wis. 230; *School Dist. v. Bragdon*, 23 N. H. 507; *Smith v. Kron*, 96 N. Car. 392 (*semble*); *Chandler v. Deaton*, 37 Tex. 406; *Cooley on Torts*, 106. In *Scott v. Watson*, 46 Me. 362, the majority of the court says: "Nor can the defendant derive any support from the scriptural injunction to children of obedience to their parents, invoked in defence. No such construction can be given to the command 'children, obey your parents in the Lord, for this is right,' as to sanction or justify the trespass of the son upon the land of another, and the asportation of his crops, even though done by the express commands of his father. The defence is as unsound in its theology as it is baseless in its law." MAY, J., dissenting: "I am not quite satisfied with either the law or the theology of the opinion in this case . . . If the doctrines of the opinion are to prevail in a case like this, then the common law is but a revival of the old doctrine that the parents, by eating sour grapes, have set the children's teeth on edge," and *cf.*

where he procures another to commit a tort,¹ but he cannot be held for torts committed under his implied authority.²

Although an infant is liable for his torts, he is not liable for the tortious consequences of his breach of contract. Whether the form of the action be contract or tort, the infant cannot be held for a mere violation of contract,³ but the contract cannot avail if the infant goes beyond the scope of it. The tort must be a distinct and substantive wrong in itself, even though it grow out of a contract, to make the infant liable. The contract must be generally put in proof to support the action, but that is because the tort, inasmuch as it is committed by departing from the terms of the contract, cannot be shown without showing the contract, and not because the contract is otherwise involved.⁴ So an infant may

Kirkpatrick v. Hall, 67 Me. 543. And see Wilson v. Garrard, 59 Ill. 51; that the parent is not liable for the torts of his child when committed without his knowledge or assent; but as to this, see Chandler v. Deaton, 37 Tex. 406; which intimates that a parent may be liable when he conceals the fact that his child committed the tort.

1. Sikes v. Thompson, 16 Mass. 389; Tift v. Tift, 4 Den. (N. Y.) 175, where a child was held in damages for setting a dog on a hog.

2. Robbins v. Mount, 4 Rob. (N. Y.) 553; s. c., 33 How. Pr. 24; and see Burnham v. Seaverns, 101 Mass. 360, where an infant was held not liable for a malicious prosecution begun by a next friend without the knowledge and consent of the infant, although he assented to the suit when he was informed of it. See *contra* Smith v. Kron, 96 N. Car. 392 (*semble*). But he cannot be held responsible for trespasses committed by his guardian. Cunningham v. I. C. Ry. Co., 77 Ill. 178.

3. Studwell v. Shafter, 54 N. Y. 249; Prescott v. Norris, 32 N. H. 101; Gilson v. Spear, 38 Vt. 311; Campbell v. Perkins, 8 N. Y. 430, 441; Nolan v. Jones, 53 Ia. 387; Jennings v. Rundall, 8 T. R. 335; Fitts v. Hall, 9 N. H. 441; Schenk v. Strong, 4 N. J. L. 87. So an infant is not liable for false representations as to the soundness of a horse. Green v. Greenbank, 2 Marsh. (Eng.) 485; Howlett v. Haswell, 4 Camp. 118; Morrill v. Aden, 19 Vt. 505; West v. Moore, 14 Vt. 447. Or as to his ownership of property sold or pledged. Doran v. Smith, 49 Vt. 353; s. c., 17 Am. Law Reg. (N. S.) 42. "Acts, however aggravated, which merely establish a breach of the contract on the part of the infant, manifestly are in-

sufficient" to render the infant liable in tort. Moore v. Eastman, 1 Hun (N. Y.) 578; Munger v. Hess, 28 Barb. (N. Y.) 75. See *contra* Ward v. Vance, 1 Nott & McC. (S. Car.) 197, and *dicta* in Norris v. Wait, 2 Rich. (S. Car.) 151, and Evans v. Terry, 1 Brev. (S. Car.) 80; where opinions are expressed that the plaintiff might maintain an action for the deceit practised on her by the defendant, a minor, in the breach of his promise of marriage.

4. **Torts Connected with Contracts.**—Freeman v. Boland, 14 R. I. 39; s. c., 51 Am. Rep. 340.

Where an infant hired a horse to go to a certain place, and went to a different place, and the horse was returned injured, he is liable in trover for conversion. Homer v. Thwing, 3 Pick. (Mass.) 492; Hall v. Corcoran, 107 Mass. 251. So where an infant hired a horse to go to a certain place and return the same day. He returned by a circuitous route by which he doubled the distance, stopped at a house on the way, left the horse all night without food or shelter, and by such over-driving and exposure caused the death of the horse. The infant was held liable for the value of the horse. Toune v. Wiley, 23 Vt. 355. The distinction seems to be that if an infant's wrongful act, though concerned with the subject matter of a contract, and such that but for the contract there would have been no opportunity of committing it, is, nevertheless, independent of the contract in the sense of not being an act of the kind contemplated by it, or being an act expressly forbidden by it, then the infant is liable. Pollock, Contracts, p. 55; Ray v. Tubbs, 50 Vt. 688; s. c., 28 Am. Rep. 519. In Burnard v. Haggis, 14 C. B. (N. S.) 45, an

be liable in trover, though his possession of the goods arises out of a previous contract.¹

a. *Fraudulent Representations as to Age*.—An infant is not

infant, a student at Cambridge, hired a horse for a ride and was distinctly told that it was not fit for jumping. He nevertheless caused the horse to jump a fence, and thereby caused its death. He was *held* liable, and the court said: "It appears to me that the act of riding the mare into the place where she received her death wound was as much a trespass, notwithstanding the hiring for another purpose, as if, without any hiring at all, the defendant had gone into the field and taken the mare out and hunted and killed her. It was a bare trespass not within the object and purpose of the hiring.

In *Walley v. Holt*, 35 L. T. (N. S.) 631, an infant hired a horse and cart to go to C and back, and with the express agreement that he should go nowhere else and carry but two persons. He drove to B, four miles beyond C, and on the return trip carried four persons. He also beat and abused the horse, which in consequence of this treatment had to be killed. The infant was *held* liable.

In *Eaton v. Hill*, 50 N. H. 235; s. c., 9 Am. Rep. 189, BELLOWS, C. J., says: "We think, then, that the doctrine is well established, that an infant bailee of a horse is liable for any positive and wilful tort done to the animal distinct from a mere breach of contract, as by driving to a place other than the one for which he is hired, refusing to return him on demand after the time has expired, wilfully beating him to death, and the like; so if he wilfully and intentionally drive him at such an immoderate speed as to seriously endanger his life, knowing that it will do so . . . In all these cases it may be urged that the law implies a promise, on the part of the bailee, to drive the horse only to the appointed place, to return him at the end of the journey, not to abuse him or drive him immoderately, and that a failure in either respect is merely a breach of contract. So it might be said that the law would raise a promise not to kill him; and yet no one would fail to see that to kill him wilfully would be a positive act of trespass, for which the infant should be liable the same as if there were no contract

When the infant stipulates for

ordinary care and skill in the use of the thing bailed, but fails from want of skill and experience, and not from any wrongful intent, it is in accordance with the policy of the law that his privilege based upon his want of capacity to make and fully understand such contracts, should shield him . . .

But when, on the other hand, the infant wholly departs from his character of bailee, and by some positive act wilfully destroys or injures the thing bailed, the act is in its nature essentially a tort, the same as if there had been no bailment, even if assumpsit might be maintained in case of an adult, on a promise to return the thing safely." *Schenk v. Strong*, 4 N. J. L. 87; *Woodman v. Hubbard*, 25 N. H. 73; *Campbell v. Stakes*, 2 Wend. (N. Y.) 137; s. c., 19 Am. Dec. 561. In *Fish v. Ferris*, 5 Duer (N. Y.) 49, the court sums up the doctrine in saying: "From the moment an infant becomes a trespasser his plea of infancy fails him." The doctrine of these cases has been strongly disapproved of in *Pennsylvania*. *Wilt v. Welsh*, 6 Watts. 9; *Penrose v. Curren*, 3 Rawle 351; s. c., 24 Am. Dec. 356, where ROGERS, J., says: "The foundation of the action is contract, and, disguise it as you may, it is an attempt to convert a suit originally in contract into a constructive tort, so as to charge the infant." And see *Livingston v. Cox*, 6 Pa. St. 360, and *cf. Root v. Stevenson*, 24 Ind. 115; 1 Am. Lead. Cas. 262-3. But the weight of authority is against this view. *Cooley on Torts* 109.

In an early case it was *held* that an infant inn-keeper was not liable in tort for the loss of his guest's goods, when he was protected by his infancy from a suit on contract for the non-delivery of the same goods. *Crosse v. Andross*, 1 Rolle Ab. 2, *Action sur Case*, D. 3. So also an infant carrier was not *held* liable in tort for non-delivery of goods entrusted to him. *Furnes v. Smith*, 1 Rolle Ab. 530.

1. *Trover*.—*Baxter v. Bush*, 29 Vt. 465; *Hiort v. London & N. W. Ry. Co.*, 4 Ex. Div. 194; *Hall v. Corcoran*, 107 Mass. 251. "Where property is bailed to a minor, and he use the property for a different purpose from that for which it was bailed, the bailment is thereby

bound by his fraudulent representations as to his age, and in an action against him, arising out of any sale or contract to which he was a party, he is not estopped to set up his infancy in defence, although he may have induced such sale or contract by fraudulently representing himself to be of age.¹ There is a tendency in

determined and the minor is liable in trover." *Green v. Sperry*, 16 Vt. 390; s. c., 42 Am. Dec. 519; *Vasse v. Smith*, 6 Cranch (U. S.) 226, where a shipowner was not allowed to recover against an infant supercargo for breach of instructions, but it was held that an action of trover lay.

Where an infant gave a promissory note in payment for a chattel obtained by fraud and pleaded infancy to a suit on the note, it was held that he might be sued in trover. *Walker v. Davis*, 1 Gray (Mass.) 506. So goods bought by an infant who refuses to pay for them may be replevied. *Badger v. Phinney*, 15 Mass. 359; s. c., Am. Dec. 105; *Nolan v. Jones*, 53 Iowa 387; *Bennett v. McLaughlin*, 13 Ill. App. 349.

An infant is responsible for obtaining goods on credit intending not to pay for them. *Wallace v. Morss*, 5 Hill (N. Y.) 391; but cf. *Campbell v. Perkins*, 8 N. Y. 430, 440, or where he makes payment by a check on a bank in which he has no funds. *Matthews v. Cowan*, 59 Ill. 341. But there is no civil responsibility for obtaining goods under false pretences, though the infant may be held criminally. *People v. Kendall*, 25 Wend. (N. Y.) 399.

Conversion, however, is always to be distinguished from the breach of a contract to sell and account for the proceeds. *Munger v. Hess*, 28 Barb. (N. Y.) 75; *Burns v. Hill*, 19 Ga. 22.

In *Lewis v. Littlefield*, 15 Me. 233, an infant in whose hands money had been put by the plaintiff to abide the result of an illegal wager, and who paid it to the winner after a notice from the plaintiff not to do so, was held liable in trover. *Green v. Sperry*, 16 Vt. 390.

So if an infant receive goods for the purpose of bestowing labor on them and subsequently refuses to return them on demand, he is liable for the conversion. *Mills v. Graham*, 4 Bos. & Pul. 140.

Parsons on Contracts, vol. 1, p. 319, says: "When the sale [to an infant] is rescinded [by the infant], the property in the goods should revert in the seller, so far, at least, that if he find them in the possession of the infant he may peaceably retake them as his own. And

if he demands them, the refusal of the infant to deliver them would seem to be a tort wholly independent of the contract, on which trover might be maintained." And see *Strain v. Wright*, 7 Ga. 568; *Jefford v. Ringgold*, 6 Ala. 544; *Carpenter v. Carpenter*, 45 Ind. 142; *Goulding v. Davidson*, 26 N. Y. 608; *Chandler v. Simmons*, 97 Mass. 514; *Kilgore v. Johnson*, 17 Tex. 341.

In *Walker v. Davis*, 1 Gray (Mass.) 506, a minor got an old man drunk and then bought his cow, giving his note in payment, this he defeated by a plea of infancy and he was then held in trover for the value of the cow, which had been sold by the infant. But see, where the infant has parted with the property. *Fitts v. Hall*, 9 N. H. 441, 445; *Whitcomb v. Joslyn*, 51 Vt. 79; *Burns v. Hill*, 19 Ga. 22.

1. **Estoppel.**—"We are not aware that any case has gone the length of holding a party estopped by anything he has said or done while he was under age; and we think it would be repugnant to the principle upon which the law protects infants from civil liabilities in general. . . . We are clear that the doctrine of estoppel is inapplicable to infants." *Brown v. McCune*, 5 Sandf. (N. Y.) 224; *Burley v. Russell*, 10 N. H. 184; s. c., 34 Am. Dec. 146; *Conroe v. Birdsall*, 1 Johns. Cas. (N. Y.) 127; *Heath v. Mahoney*, 7 Hun (N. Y.) 100; *Studwell v. Shapter*, 54 N. Y. 249; *Wieland v. Kobick*, 110 Ill. 16; s. c., 51 Am. Rep. 676; *Lackman v. Wood*, 25 Cal. 147; *Norris v. Vance*, 3 Rich. (S. Car.) 164; *Carpenter v. Carpenter*, 45 Ind. 142; *Conrad v. Lane*, 26 Minn. 389; s. c., 37 Am. Rep. 412; *Hughes v. Gallans*, 10 Phila. 618; *Merriam v. Cunningham*, 11 Cush. (Mass.) 40; *Burditt v. Williams*, 30 Fed. Rep. (Conn.) 697; *Sims v. Everhardt*, 102 U. S. 300; *Whitcomb v. Joslyn*, 51 Vt. 79; s. c., 31 Am. Rep. 678; *Brown v. Dunham*, 1 Root (Conn.) 272; *Price v. Hewitt*, 8 Ex. 146; *Bartlett v. Wells*, 1 B. & S. 836; *De Roo v. Foster*, 12 C. B., N. S., 272.

The civil law, however, declares any contract made under these circumstances valid, and this is the rule in Texas,

equity, however, to hold an infant responsible for any contract that he may have induced by his misrepresentations as to his age, especially where his appearance bears out his assertions.¹ An in-

where the civil law formerly prevailed. *Kilgore v. Jordan*, 17 Tex. 341, where the whole subject is fully and ably discussed. *Carpenter v. Pridgen*, 40 Tex. 32. In Maryland, too, it has been held that where an infant forms a partnership with an adult, he holds himself out fraudulently to the world as one capable of contracting, and is therefore bound by the firm contracts. *Kemp v. Cook*, 18 Md. 130.

Intimations are sometimes found in the reports that infants would be bound by gross frauds. *Stoolfoos v. Jenkins*, 12 S. & R. (Pa.) 399; and see *Sterling v. Adams*, 3 Day (Conn.) 411; *Henry v. Root*, 33 N. Y. 526, 544.

Where an infant who has arrived at years of discretion stands by and allows his property to be sold as the property of a third person, he is estopped to reclaim it from the purchaser. *Thompson v. Simpson*, 2 Jones & L. (Eng.) 110; *Barham v. Turbeville*, 1 Swan (Tenn.) 437; *Irwin v. Morell*, Dud. (Ga.) 72; *Whittington v. Wright*, 9 Ga. 23; *Hall v. Timmons*, 2 Rich. Eq. (S. Car.) 120; but mere knowledge on the part of the infant will not raise the estoppel. *Norris v. Wait*, 2 Rich. L. (S. Car.) 148; and retention of the purchase money will create an estoppel in equity. *Telegraph Co. v. Davenport*, 97 U. S. 369; *Merritt v. Horne*, 5 Ohio St. 307; *Com. v. Shuman*, 18 Pa. St. 343; *Goodman v. Winter*, 64 Ala. 410. But generally there must be some fraud. *Snell v. Chicago*, 38 Ill. 382. It is laid down by some courts that the doctrine of estoppel *in pais* has no application to infants. *McBeth v. Trahne*, 69 Mo. 642; *Montgomery v. Gordon*, 51 Ala. 377. And see *Bigelow on Estoppel* (4th ed.), pp. 579-586; 2 *Herman on Estoppel*, § 1116-1122.

1. Equitable Estoppel.—In *Cory v. Gertcken*, 2 Mad. 40, the VICE CHANCELLOR says: "Though in general a payment to an infant may be bad, yet if the infant practices a fraud he is liable for the consequences. At law an infant is liable in tort, and cannot plead his infancy; as where (a very strong case) an action of assumpsit was brought against an infant for money embezzled by him. *Bristow v. Eastman*, 1 Esp. 172. . . . In *Watts v. Cresswell*, 9 Vin. 415; s. c., 2 Eq. Abr. 515, a tenant for life bor-

rowed money, and his son, who was next in remainder and an infant, was witness to the mortgage deed, and the court relieved on the ground of the fraud in the infant by not giving notice to the mortgagee of his title. That, certainly, was a very strong case; for the young man did not *know*, but had only *heard*, of the settlement under which his title arose; but LORD COWPER said: 'If an infant is old and cunning enough to contrive and carry on a fraud, he ought to make satisfaction for it.' In *Becket v. Cordley*, 1 Bro. C. C. 358, LORD THURLOW says: 'If there was fraud of which the infant was consant, she would be bound as much as an adult.' In *Cicil v. Lord Salisbury*, 2 Vern. 224, an infant was *held* to be bound by an offer made by him in his answer, whereby the other side were delayed, the infant not having immediately after his coming of age applied to the court to retract his offer and amend his answer. In *Savage v. Foster*, 9 Mod. 35, the court *held* that, in the case of fraud, 'infancy or coverture shall be no excuse,' and the court not only recognized the case of *Watts v. Cresswell*, but also relied on *Clerc v. Bedford*, 13 Vin. Abr. 536-7, in which case *Clerc*, an infant and clerk to an attorney, had a mortgage on his master's estate and engrossed a subsequent mortgage of the same to another without giving notice that the estate was mortgaged to him; and for that reason, and on the ground of fraud, his mortgage was postponed. Apply these principles to the present case. Did not William *Cory*, who was nearly of age and married, conceal his infancy? It is clear he did. Did he not employ his brother, an attorney, to prevail upon the trustees to transfer the 350*l.* stock, under a representation that they ran no risk in doing so? He did. Was not that a fraud? The concealment of his infancy under such circumstances certainly was a fraud, and precludes him or his assigns, who stand precisely in his situation, from calling for a repayment."

An infant, to all appearances over twenty-one years of age, engaged in business and borrowed money, representing himself to be twenty-two years old. His estate in bankruptcy was held liable in equity to pay the debt.

fant is not liable for such representations in an action for deceit, although this rule has been denied in some jurisdictions.¹ In a

Ex parte Unity etc. Banking Assn., 3 DeG. & J. 63. And see *Inman v. Inman*, L. R., 15 Eq. 260; *Nelson v. Stocker*, 4 DeG. & J. 458; *Wright v. Snowe*, 4 DeG. & Sm. 321. In *Lempriere v. Lange*, L. R., 12 Ch. Div. 675, an infant had obtained a lease on the false representation that he was of age. It was held that the lease must be declared void and possession given up and the infant enjoined from parting with the furniture, although he could not be made liable for use and occupation.

Where an infant has, by fraudulently misrepresenting that he was of age, induced another person to enter into contract with him, under which materials were supplied and work done, such person may maintain an action against such infant to obtain a return of the materials in the possession of the infant and an account and payment of the value of so much of such materials as were no longer in his control and disposition, and where the infant has accepted a bill of exchange for the whole sum claimed to be due he will be held to pay it. *Campbell v. Ridgely*, 13 Vict. L. R. (Australia) 701.

Where an infant *cestui que trust* induces the trustee to make payment to him by misrepresenting his age, the payment is a discharge of the sum due. *Overton v. Bannister*, 3 Hare 503.

An infant ward, falsely representing himself to be of age, made a settlement with his guardian, taking for his share certain building lots at a valuation. He executed a discharge to his guardian. No advantage was taken of the infant in such settlement, and by it the guardian was induced to surrender a certain security he had taken for his own protection in managing the estate. Held, that the ward cannot now disre-gard, in a court of equity, his discharge, and call upon the estate of the deceased guardian to account. *Hayes v. Parker*, 41 N. J. Eq. 630.

In Kentucky an infant was not allowed in equity to recover land, when to induce a purchaser to take the land she had made oath before a magistrate that she was of age. *Schmitheimer v. Eiseman*, 7 Bush (Ky.) 298. And see *Ferguson v. Bobo*, 54 Miss. 121; *Davidson v. Young*, 38 Ill. 145. See also *Dibble v. Jones*, 5 Jones Eq. (N. Car.) 389,

where the purchaser of an infant's land brought a bill to compel specific performance on the ground that the infant had fraudulently represented himself to be of age, but the court refused to interfere. It appeared, however, that the purchaser had notice that there was great doubt as to the seller's age, and it also appeared that the bargain was a bad one on the part of the infant, who was under the control of his father, and that the latter assumed the whole control of the negotiation and received the benefit of the price.

There must, however, be active fraud on the part of the infant. *Baker v. Stone*, 136 Mass. 405; *Brantley v. Wolf*, 60 Miss. 420. But in *Ferguson v. Bobo*, 54 Miss. 121, a female infant of nineteen, knowing her rights, conveyed land to her father for the purpose of enabling him to borrow money by giving a mortgage thereon to one who was ignorant of her minority. The money was loaned and subsequently, the lender being still ignorant of her minority, the father conveyed the land to pay the debt. The infant, on reaching full age, brought ejectment, and it was held that a court of equity would enjoin her from asserting her legal title and thus perpetrating a fraud. The court say: "It may be stated as a general proposition, fully borne out by the authorities, that whenever an infant who has arrived at years of discretion, by direct participation or by silence when he was called upon to speak, has entrapped a party ignorant of his title or of his minority, into purchasing his property from another, he will be estopped in a court of chancery from setting up such title." But see *Geer v. Hovey*, 1 Root (Conn.) 179, that equity cannot recognize the fraud of an infant.

1. **Deceit.**—The text states the rule of the common law. *Johnson v. Pye*, 1 Sid. 258; *Price v. Hewett*, 8 Ex. 146; *Schouler, Dom. Rel.*, § 425; *Adelphi Loan Assn. v. Fairhurst*, 9 Ex. 422, 430.

"We think the fair result of the American as well as the English cases is that an infant is liable in an action *ex delicto* for an act of wilful fraud, only in cases in which the form of the action does not suppose that a contract has existed, but that where the *gravamen* of the fraud consists in a transac-

few States an infant is forbidden by statute to disaffirm a contract or conveyance procured through his own fraudulent misrepresentations.¹

2. Torts against Infants.—*a. Contributory Negligence.*—Infants have the same right as adults to sue for any injury to their person or property,² the suit being brought by guardian or next friend. The ordinary principles of law govern such actions, except in so far as they may be modified to be adapted to the immaturity of discretion or judgment of infants, and these modifications are principally met with in treating the doctrine of contributory negligence in its application to children. It is now settled law that a child is held only to such degree of discretion and care as is to be reasonably expected from children of his age, and children too young to be *sui juris* cannot be held responsible for contributory

tion which really originated in a contract, the plea of infancy is a good defence. For simple deceit on a contract of sale or exchange is an affirmation by the plaintiff of the contract of sale or exchange, and there is no cause of action unless some damage or injury results from it, and proof of damage could not be made without referring to and proving the contract." *Gilson v. Spear*, 38 Vt. 311; *Curtin v. Patton*, 11 S. & R. (Pa.) 309. See, however, *Rice v. Boyer*, 108 Ind. 472; s. c., 58 Am. Rep. 53, where the court says: "Our judgment, however, is that where the infant does fraudulently and falsely represent that he is of full age, he is liable in an action *ex delicto* for the injury resulting from his tort. The result does not involve a violation of the principle that an infant is not liable where the consequence would be an indirect enforcement of the contract, for the recovery is not upon the contract, as that is treated as of no effect, nor is he made to pay the contract price of the article purchased by him, as he is only held to answer for the loss caused by his fraud. In holding him responsible for the consequences of his wrong an equitable conclusion is reached which strictly harmonizes with the general doctrine that an infant is liable for his torts." *Fitts v. Hall*, 9 N. H. 441; *Davidson v. Young*, 38 Ill. 145; *Eckstein v. Frank*, 1 Daly (N. Y.) 334; *Schunemann v. Paradise*, 46 How. Pr. (N. Y.) 426; *Towne v. Wiley*, 23 Vt. 355, 361 (*semble*); *Manning v. Johnson*, 26 Ala. 453; *Hughes v. Gallans*, 10 Phila. (Pa.) 618.

Semble, that if the plaintiff can aver and prove that he was induced, by the positive affirmation of the defendant, to

believe that he was of age when the contract was made, and that the defendant, at the time, sought to entrap him into the contract, then secretly intending to repudiate it to his own profit and to the plaintiff's loss, he would be liable for the damage resulting from his fraud. *Yeager v. Knight*, 60 Miss. 730.

An infant may be held criminally liable for his fraud. *Neff v. Landis*, 110 Pa. St. 204.

But mere silence by the infant does not constitute fraud. *Stillman v. Dawson*, 1 De G. & Sm. 90.

1. Rev. Code of Iowa, § 2239; Comp. Laws of Kan., ch. 67, § 3. See *Prouty v. Edgar*, 6 Iowa 353; *Jaques v. Sax*, 39 Iowa 367. If, however, the other contracting party knew of the infancy the statute does not apply. *Beller v. Marchant*, 30 Iowa 350.

2. An infant of fourteen can recover against his employer, who sets him to work on a dangerous machine without instructing him as to the danger, for an injury sustained. *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; but not, however, where he has learned to use the machine, and its dangers, from some other source. *Sullivan v. India Manf. Co.* 113 Mass. 396.

Although an infant is exempt from arrest for debt, *Cassier's Case*, 139 Mass. 458, either upon execution or mesne process, he cannot maintain an action for an illegal arrest and false imprisonment against the officer or the person aiding the officer in making the arrest, if the arrest was made upon a valid writ; and the fact that the infant notified the defendant of his infancy at the time of the arrest is immaterial. *Cassier v. Fales*, 139 Mass. 461.

negligence.¹ The rule may be generally laid down that the age, the capacity and discretion of a child to observe and avoid danger are questions of fact to be determined by the jury, and his responsibility is to be measured by the degree of capacity he is found to possess;² hence, a person injuring a child may be held responsible to him under circumstances where an adult could have recovered nothing. Where the infant is a mere trespasser and is injured in consequence of his trespass he is without redress, but in such cases the courts are lenient to the infant and not only require that the injury shall occur through no fault of the adult in order to relieve him from liability, but also allow a remedy to the infant if the thing causing the injury is such as naturally attracts children and is left exposed or unguarded. This is the principle of the turn-table cases in which children have been allowed to recover for injuries caused by playing with railroad turn-tables which were left unfastened and open to public access.³

1. For a full discussion see vol. 4, p. 42, CONTRIBUTORY NEGLIGENCE, § 22. Shearman & Redfield on Negl. (4th ed.), § 73.

In *Railroad Co. v. Gladmon*, 15 Wall. (U. S.) 401, HUNT, J., said: "Of an infant of tender years less discretion is required [than of an adult] and the degree depends upon his age and knowledge. Of a child of three years of age less caution would be required than of one of seven, and of a child of seven less than one of twelve or fifteen." *Ranch v. Lloyd*, 31 Pa. St. 358; *Thurber v. Harlem etc. R. Co.*, 60 N. Y. 326. Acts that in an adult would be contributory negligence, such as would justify a non-suit, in an infant would be properly a question to be left to the jury. *Barry v. New York Cent. etc. R. Co.*, 92 N. Y. 289. And in *Haycraft v. Lake Shore R. Co.*, 64 N. Y. 636, the question whether a girl of sixteen, injured by her own carelessness, was guilty of contributory negligence was left to the jury under instructions that she was not to be held to the same degree of care as an adult. But see *Atlas Engine Works v. Randall*, 100 Ind. 293, where it is said that contributory negligence on the part of a minor, not a mere child, will be a bar to recovery.

It was held in *Fauter v. Clark*, 15 Ill. App. 470, that a boy of fourteen was exercising ordinary care in obeying the order of the feeder of a planing machine to remove a sliver caught in the machinery whereby he lost his hand, it appearing that he was ordered to do whatever the feeder directed, and that the machine could have been easily

stopped. But in *Nagle v. Alleghany Valley R. Co.*, 88 Pa. St. 35, it was held that the presumption that a boy of fourteen has capacity to avoid danger can be rebutted only by clear proof of absence of discretion, the court saying: "At what age must an infant's responsibility for negligence be presumed to commence? This question cannot be answered by referring it to a jury. That would furnish us with no rule whatever. It would give us a mere shifting standard affected by the sympathies or prejudices of the jury in each particular case. One jury would fix the period of responsibility at fourteen, another at twenty or twenty-one. This is not a question of fact for the jury, but of law for the court." And see *Dietrich v. Baltimore etc. R. Co.*, 58 Md. 347.

It has been held that a child of four is incapable of negligence. *Fink v. Missouri Furnace Co.*, 10 Mo. App. 61; *Erie etc. R. Co. v. Schuster*, 113 Pa. St. 412. So of one under six. *Bay Shore etc. R. Co. v. Harris*, 67 Ala. 6. But see *Ryder v. New York*, 50 N. Y. Sup. 220, and *cf. Johnson v. Chicago etc. R. Co.*, 56 Wis. 274.

2. *Chicago & Alton Ry. Co. v. Beeker*, 76 Ill. 25.

3. See more fully vol. 4, CONTRIBUTORY NEGLIGENCE, § 22, n 2 on p. 45 and § 26. Shearman & Redfield on Negl., § 73 (4th ed.).

The owner of a city lot is not liable for the death of a child who falls into an unfenced pond on the lot, it not being so near the street as to be dangerous to passers. *Klix v. Nieman*, 68 Wis. 271; s. c., 60 Am. Rep. 854; and

In some jurisdictions the negligence of the parents or guardians of small children which is in any way contributory to the accident is imputed to the children and prevents a recovery by them: this rule originated in New York, in the case of *Hartfield v. Roper*, and has been followed in many States,¹ but this rule is not appli-

in *Schmidt v. Kansas City Distilling Co.*, 90 Mo. 284; s. c., 59 Am. Rep. 16, it was *held* that an action for the death of a child by falling into an unfenced pool of hot water sixty feet from the highway and two hundred and twenty-five feet from any house, may not be maintained without proof that the place was attractive to children, or that to the defendant's knowledge they resorted there for amusement. *Gramlich v. Wurst*, 86 Pa. St. 74; s. c., 27 Am. Rep. 684; *Hargreaves v. Deacon*, 25 Mich. 1.

In *Galligan v. Metacomet Manf. Co.*, 143 Mass. 527, the court says: "Merely abstaining from driving the children off is not an invitation which would impose any duty or responsibility for the use of the lot." Here the plaintiff, seven years old, fell down a bank in a vacant lot in the rear of her house and separated therefrom by a fence built by the defendant's workmen. But see *Moynihan v. Whidden*, 143 Mass. 287.

In *Mangan v. Atterton*, L. R., 1 Ex. 239; s. c., 4 H. & C. 238, the defendant placed a machine on the side walk where anyone could set it in motion, and the plaintiff, four years old, put his fingers between the cogwheels while his brother of seven was turning it. It was *held* that being a trespasser he could not recover. And see *Hughes v. Macfie*, 2 H. & C. 744. But these cases have been disapproved in England. *Clark v. Chambers*, L. R., 3 Q. B. D. 327, 339. The trespass must be the substantial cause of the injury, however. *Daley v. Norwich etc. R. R. Co.*, 26 Conn. 591. As in a case where the defendant negligently hung a gate and the plaintiff, six years old, passing by, shook it and it fell upon him. The jury having found he was guilty of no negligence he was permitted to recover in spite of his trespass. *Birge v. Gardiner*, 19 Conn. 507. The distinction seems to rest on whether the defendant has reason to expect from the attractive nature of the dangerous thing that children would go to it, as for instance in the case of *Mackey v. Vicksburg*, 64 Miss. 777, a child of six sued for damage from falling into a hole excavated by

the defendant where the earth excavated had been thrown on the plaintiff's lot in such a way as to invite him to climb up and follow defendant's path to the hole. It was *held* that this latter allegation was sufficient to send the case to the jury.

It is on this principle that the long line of turntable cases rests, where children have been injured by meddling with unfastened and unguarded railway turntables. For a full list of these cases see vol. 4, p. 53, CONTRIBUTORY NEGLIGENCE, § 26; CHILDREN AS TRESPASSERS, and *Shearman & Redfield on Neg.* (4th ed.), § 73; *Beach, Contr. Neg.*, § 70. In *McAlpin v. Powell*, 70 N. Y. 126, a boy of ten years was not allowed to recover for injuries caused by a defective fire escape, and in *St. Louis etc. R. Co. v. Bell*, 81 Ill. 76, a boy of nine was not allowed to recover for an injury received when meddling with a turntable; but in both these cases there was no negligence proved against the defendant, and in the latter case the turntable was not in or near a public or frequented place. In *Keffe v. Milwaukee etc. R. R. Co.*, 21 Minn. 207, the opposite was the fact, and that was considered a material element in the decision; but in *Kolsti v. Minneapolis etc. R. Co.*, 32 Minn. 133, it was *held* where a turntable was latched but not locked, and the fastenings were those commonly in use, that the company was not required so to fasten the turntable that boys could not unfasten it and set it in motion.

1. See vol. 4, p. 87, CONTRIBUTORY NEGLIGENCE, § 38 (2), and statement of *Hartfield v. Roper*, 21 Wend. 615, on that page. The *New York* rule, as it may be called, is that where a child is so young as not to be *sui juris*, and therefore not fairly to be held responsible for the exercise of such degree of care as is required of persons of full age, fails to exercise that degree of care, the negligence of his custodians, whether parents or lawful guardians, or persons to whose care the child is entrusted by them, is to be imputed to the child, in the same manner as if they were acting under his

cable when the child has been in the exercise of the ordinary care of an adult, nor when the child is old enough to exercise reasonable care in its own behalf.¹ It is to be observed also that under this rule the negligence of the parent or guardian must occur when he is acting in that capacity, and there must be actual negligence on the part of such guardian.² This doctrine of imputable negligence seems to rest on the doctrine of the identification of parent and child, but that doctrine being a fiction the rule is denied in other jurisdictions, and the infant is not held responsible

directions, instead of his acting under theirs. *Shearman & Redfield on Negl.* (4th ed.), § 74. These learned writers deny, however, that is rule is settled law in *New York* and suggest strong reasons why the court of appeals would not consider the question as *res adjudicata* (§ 75).

A full list of cases is given in vol. 4, p. 87. The rule is probably adopted in England. *Singleton v. Eastern Co. R. Co.*, 7 C. B. (N. S.) 287, but it may be doubted since the decision of *Clark v. Chambers, L. R.*, 3 Q. B. D. 327.

1. *McGarry v. Loomis*, 63 N. Y. 104; *O'Brien v. McGlinchy*, 68 Me. 552. In *Ihl v. Forty-second St. R. Co.*, 47 N. Y. 317, a child three years old was sent by its parents across the track belonging to the defendant, attended only by a child of nine and was killed by a passing car, and in an action by the parent this was not held to be such negligence as to bar the parent's recovery. And see *Collins v. So. Boston R. Co.*, 142 Mass. 301, where the question of negligence was left to the jury in a case where a child of four was permitted to be on the street with a sister of ten. *East Saginaw R. Co. v. Bohn*, 27 Mich. 503.

2. **Actual Negligence of Parent.**—*Lannen v. Albany Gas Co.*, 46 Barb. (N. Y.) 264, s. c., on app., 44 N. Y. 459, where the judge remarks that to hold otherwise "would be 'visiting the sins of the fathers upon the children' to an extent not contemplated in the Decalogue or in the more imperfect digests of human law," and of *Holly v. Boston Gas Co.*, 8 Gray 132; *Mangan v. Brooklyn R. Co.*, 38 N. Y. 455.

But if the parent has used reasonable care, and the child escapes from the attendant and is injured, there is no negligence on the part of the parent to be imputed. Thus it is not necessarily negligence to permit a child to be alone in a room where the door is open. *Fallon v. Central Park etc. R. Co.*, 64 N. Y. 13, or to play in a retired

street. *Cosgrove v. Ogden*, 49 N. Y. 255. And see *Jeffersonville etc. R. Co. v. Bowen*, 40 Ind. 545; s. c., 49 Ind. 154; *Leslie v. Lewiston*, 62 Me. 468; *Chicago & Alton R. Co. v. Becker*, 84 Ill. 483.

Age of Child.—There is great difficulty in defining the age at which a child can be subject to this rule of imputed negligence, or the age where it is negligent to allow the child to go abroad unattended. A jury may consider it negligence to allow a child of ten to go out unattended and the court will allow the verdict to stand. *Karr v. Parks*, 40 Cal. 188; *Lovett v. Salem etc. R. Co.*, 9 Allen (Mass.) 557. But the line seems to be drawn under eleven years. *McMahon v. New York*, 33 N. Y. 642. But in the case of a child of six it is not regarded as conclusive evidence of negligence to allow him to go abroad unattended. *Oldfield v. Harlem R. Co.*, 14 N. Y. 310. So of a child of eight. *Drew v. Sixth Avenue R. Co.*, 26 N. Y. 49. Nine. *Sheridan v. Brooklyn etc. R. Co.*, 36 N. Y. 39. But it is negligence in law to allow a child of two to go unattended. *Callahan v. Bean*, 9 Allen (Mass.) 401; *Kreig v. Wells*, 1 E. D. Smith (N. Y.) 74. But see *contra* *Boland v. Missouri R. Co.*, 36 Mo. 484, and *cf.* *Gibbons v. Williams*, 135 Mass. 333 (three years); *Mangan v. Brooklyn R. Co.*, 36 Barb. (N. Y.) 230; but *cf.* *Ihl v. Forty-second St. R. Co.*, 47 N. Y. 317; *Staford v. Reubens*, 115 Ill. 196; *Robinson v. Cone*, 22 Vt. 213 (four years); *Glassey v. Hestonville etc. R. Co.*, 57 Pa. St. 172. But *cf.* *Chicago v. Major*, 18 Ill. 349 (six years), *Chicago v. Starr*, 42 Ill. 174. But *cf.* as to a child of five. *Karr v. Parks*, 40 Cal. 188.

Where, however, the act of the parent is the direct cause of the injury, his negligence is imputed to the child. *Morrison v. Erie R. Co.*, 56 N. Y. 302; and *cf.* *Walters v. Chicago etc. R. Co.*, 41 Iowa 71; *The Burgundia*, 29 Fed. Rep. (N. Y.) 464.

in any way for negligence of his parent.¹ This seems to be the true rule. In those jurisdictions, also, where the negligence of the parent may be imputed to the child, regard must be had to the circumstances of the parents or guardians, and where the parents are poor or laboring people, they will not be held to the degree of care that would be required of persons more able to guard their children.² Where the doctrine of comparative negligence is held, the New York rule of imputable negligence does no great injustice, but the rule of comparative negligence is not applicable to injuries to children too young to exercise ordinary care.³

Whoever deals with an infant must have due regard to the lack of discretion of the child, and a person selling a dangerous explosive to a child is liable for any injury to him resulting therefrom.⁴

b. Suit of Parent and Child for Injury.—In case of an injury to the infant, the parent is entitled to an action for his loss of

1. See vol. 4, p. 88, CONTRIBUTORY NEGLIGENCE, § 38, n. 1. This is called the "*Vermont rule*" by Shearman & Redfield, Negl. (4th ed.), § 78; *Robinson v. Cone*, 22 Vt. 213, was the case of a boy nearly four years old who was run over while coasting. REDFIELD, J., says: "We are satisfied that although a child or idiot or lunatic may to some extent have escaped into the highway through the fault or negligence of his keeper, and so be *improperly* there, yet if he is hurt by the negligence of the defendant, he is not precluded from his redress. If one knew that such a person is in the highway, or on a railway, he is bound to a proportionate degree of watchfulness, and what would be ordinary neglect in regard to one whom the defendant supposed a person of full age and capacity, would be gross neglect as to a child or one known to be incapable of escaping danger." *Norfolk etc. R. Co. v. Ormsby*, 27 Gratt. (Va.) 455; *Galveston etc. R. Co. v. Moore*, 59 Tex. 64; *Railroad Co. v. Herbeck*, 60 Tex. 602; *Houston etc. R. Co. v. Simpson*, 60 Tex. 103; and *Beach, Contr. Negl.*, §§ 40-43.

2. **Poverty of Parents.**—"A large majority of children living in cities depend on the daily labor of both parents for their subsistence, and these parents are unable to employ nurses who can keep a constant and vigilant eye momentarily on their children, and we cannot hold as a matter of law that every time a child of four years of age steps into the store unattended the mother is guilty of such negligence as would authorize every reckless or careless driver to run over and trample it down

with impunity." *Chicago v. Major*, 18 Ill. 349. Equally strong is the language of the court in *O'Flaherty v. Union R. R. Co.*, 45 Mo. 70: "To say that it is negligent to permit a child to go out to play unless it is accompanied by a grown attendant, would be to hold that free air and exercise should only be enjoyed by the wealthy who are able to employ such attendants, and would amount to a denial of these blessings to the poor." *Chicago v. Hesing*, 83 Ill. 204; *Kay v. Penn. R. R. Co.*, 65 Pa. St. 269; *Pittsburg etc. R. Co. v. Pearson*, 72 Pa. St. 169; *Philadelphia etc. R. Co. v. Long*, 75 Pa. St. 257; *Walters v. C. R. I. & P. R. Co.*, 41 Iowa 71; *Hoppe v. Chicago etc. R. Co.*, 61 Wis. 357; *Frick v. St. Louis etc. R. Co.*, 75 Mo. 542; *Isabel v. Hannibal etc. R. Co.*, 60 Mo. 475.

3. See vol. 3, p. 373, COMPARATIVE NEGLIGENCE, § 9, *when not applicable to children*, for a full collection of cases on this point, and *cf.* *Pittsburg etc. R. Co. v. Bumstead*, 48 Ill. 221; *Beach, Contr. Negl.*, § 41; *Kunz v. Troy*, 104 N. Y. 344.

4. The defendant sold gunpowder to an infant on his request, and the infant was injured by the explosion; "The case cannot be distinguished in principle from that of a man who delivers a cup of poison to an idiot or puts a razor into the hand of an infant in its cradle." *Carter v. Towne*, 98 Mass. 567. So one who sold toy-pistol cartridges to a young boy, knowing them to be dangerous and that the boy was unfit to be trusted with them, is liable for the consequences. *Binford v. Johnston*, 82 Ind. 426. And it is negligent to entrust a

services, and the child, for any permanent injury, the effects of which reach beyond his majority. These actions may be brought concurrently.¹ In an action by the father any contributory negligence on his part would be a defence, but such negligence is no defence in an action brought by the child.²

c. Compromises for Injuries.—Though an infant is liable for torts, he is not bound by any contract he may make in a settlement for injuries by or to him. So a note given in settlement of an injury is good only for the actual damage.³ A parent, as such, can make no settlement for an injury to his child that will bind the child.⁴

V. ACTIONS BY AND AGAINST INFANTS.—1. **Actions by Infants.**—An infant is entitled to sue on any cause of action accruing against him, but he is not considered as having sufficient discretion to conduct a suit in person,⁵ and the suit must therefore be brought

loaded gun to one incompetent to handle it. *Dixon v. Bell*, 5 Maule & Sel. 198. But in *Poland v. Earhart*, 70 Iowa 285, it was held that an allegation that the defendant sold a revolver, in violation of the statute, to the plaintiff's minor son, fifteen years old, with which he afterwards injured himself, does not show a cause of action in the plaintiff to recover for loss of service and expense of caring for him. It should also show that the accident ought to have been anticipated by the defendant as the probable result of the sale. And see 2 *Shearman & Redfield on Negl.* (4th ed.), § 686.

1. *Central R. R. v. Brinson*, 64 Ga. 475; *Houston etc. R. Co. v. Miller*, 51 Tex. 271; *Pratt Coal and Iron Co. v. Brawley*, 83 Ala. 371; *Sibley v. Ratliffe*, 8 S. W. Rep. (Ark.) 686. See also *Propst v. Ga. Pac. Ry. Co.*, 83 Ala. 518.

2. This distinction is clearly brought out in *Bellefontaine etc. R. Co. v. Snyder, jr.*, 18 Ohio St. 399 (suit by infant), and *Bellefontaine etc. R. Co. v. Snyder, sr.*, 24 Ohio St. 670 (suit by parent). See *Louisville etc. Canal Co. v. Murphy*, 9 Bush (Ky.) 552; *Gleassy v. Hesstonville etc. R. R. Co.*, 57 Pa. St. 172.

3. *Ray v. Tubbs*, 50 Vt. 688; *Hanks v. Deal*, 3 McCord (S. Car.) 257; *Ware v. Cartledge*, 24 Ala. 622; *Pitcher v. Turin Plank Road Co.*, 10 Barb. (N. Y.) 436.

Where an infant compromises for an injury done to himself, he may recover enough more than he has received to make full compensation. If full satisfaction has been already made he is entitled to nominal damages. *Baker v. Lovett*, 6 Mass. 78.

4. *Loomis v. Cline*, 4 Barb. (N. Y.) 453. *Contra*, *Merritt v. Williams*, Harp. (S. Car.) 306. See also *Passenger R. R. Co. v. Stutler*, 54 Pa. St. 375.

5. **Appearance by Attorney.**—It is well settled that an infant cannot sue in person or by attorney. *Jeffrie v. Robideaux*, 3 Mo. 33; *Miles v. Boyden*, 3 Pick. (Mass.) 213; *Clark v. Turner*, 1 Root (Conn.) 200; *Mockey v. Grey*, 2 Johns. (N. Y.) 192; *Nicholson v. Wilborn*, 13 Ga. 467; *Wright v. McNatt*, 49 Tex. 425; *McGiffen v. Stout*, Cox (N. J.) 92.

An infant brought a suit by her *prochein ami*, in a court of law. Afterwards she employed an attorney and requested him to dismiss the suit, which was accordingly done. A motion was subsequently made in the name of the infant by her *prochein ami*, asking the court to strike out the entry of "off," which had been made in the case, and reinstate it on the docket for trial. *Held*:

1st. That the infant, until she reached the age of twenty-one years, was incompetent to appoint an attorney, or to take any step in the suit which could bind her rights.

2nd. That the appointment of an attorney by her being nugatory, his dismissal of the suit was simply void. *Wainwright v. Wilkinson*, 62 Md. 146. But see *Stumps v. Kelley*, 22 Ill. 140, where it is held that it is not necessary to sue out process by a next friend.

Where, however, an infant is co-plaintiff with an adult, his appearance by the attorney of the adult is valid; and in such case an appeal to the supreme court will not be dismissed because the infant does not appear by

in his name by his guardian or by a third person who is styled the next friend or *prochein ami*.¹ In some jurisdictions the suit may be instituted either by the general guardian or by a next friend,² but elsewhere the general guardian conducts the suit, although a next friend may be appointed if the guardian do not dissent, or

guardian or guardian *ad litem*. *Chandler v. Chandler*, 78 Ind. 417. And the father cannot sue on a contract made by his minor son. *Osburn v. Farr*, 42 Mich. 134.

Employment of Attorney.—This rule, however, does not prevent a next friend from employing an attorney to conduct the case, and in fact that is considered one of his duties, "as he is not supposed to be a person learned in the law, and his intervention is by no means designed to dispense with the services of an attorney to carry on the proceedings and to try the cause, if necessary." *Baltimore etc. Ry. Co. v. Fitzpatrick*, 36 Md. 619; *Carter v. Montgomery*, 2 Tenn. Ch. 455; *People v. New York*, 11 Wend. (N. Y.) 164. It would seem to follow that the infant would be bound to pay the attorney for his services, but one case intimates that the next friend cannot bind the infant for attorney's fees. *Houck v. Bridwell*, 28 Mo. App. 644.

Where the next friend dies pending the suit, the infant's attorney should at once move for the appointment of a new one. *Bracey v. Sandiford*, 3 Madd. 468; and where the party named as next friend is dead at the institution of the suit, the infant may amend and substitute a new name. *Bond v. Dillard*, 50 Tex. 302.

1. *Hooks v. Smith*, 18 Ala. 338; *Strode v. Clark*, 12 Ala. 621; *Jennings v. Collins*, 99 Mass. 29; *Raymond v. Sawyer*, 37 Me. 406; *Price v. Phoenix Mut. Ins. Co.*, 17 Minn. 497; *Jack v. Davis*, 29 Ga. 219; *Fox v. Minor*, 32 Cal. 111. So where a promise is made "to the guardian of the minor children of A. B.," it was held that the action must be brought in the name of the children. *Carkskadden v. McGhee*, 7 W. & S. (Pa.) 141; *Wilson v. Unsell*, 12 Bush. (Ky.) 215. And where suit was brought in the name of the guardian the judgment was reversed. *Longstreet v. Tilton*, *Coxe* (N. J.) 38; *Bradley v. Amidon*, 10 Paige (N. Y.) 235. But by statute in Nevada the guardian sues in his own name. *Ricord v. Central Pacific Ry. Co.*, 15 Nev. 167; and in New York the guardian was allowed to sue

a pension agent employed by him to collect pension money collected by him. *Thomas v. Bennett*, 56 Barb. (N. Y.) 197. And in all notices and rules in a case the next friend uses his own name. *People v. New York*, 11 Wend. (N. Y.) 164.

A suit in equity for a legacy should be brought in the name of the infant and not that of the guardian, though payment can only be legally made to the latter. *Simpson v. King*, 1 Ired. Eq. (N. Car.) 11. And see *Hoyt v. Hilton*, 2 Edw. Ch. (N. Y.) 202; *Lemon v. Hausbarger*, 6 Gratt. (Va.) 301.

Where the suit is in the name of the next friend for the benefit of the infant, there is no cause of error. It is enough if it appears that the action is for the benefit of the infant. *Gulf Cal. etc. Ry. Co. v. Styron*, 66 Tex. 421. And see *Elrod v. Lancaster*, 2 Head (Tenn.) 571.

2. *Barwick v. Rackley*, 45 Ala. 215; *Cook v. Adams*, 27 Ala. 294; *Sutton v. Nichols*, 20 Kan. 43; *Kleffel v. Bullock*, 8 Neb. 336; *Hurt v. Southern Ry. Co.*, 40 Miss. 374 (and is not bound to show he has no guardian); *Brown v. Hull*, 16 Vt. 673; *Judson v. Blanchard*, 3 Conn. 579; *Perkins v. Wright*, 37 Ind. 27; *Evans v. Mason*, 1 Lea (Tenn.) 26; *Fox v. Minor*, 32 Cal. 111. In *Deford v. Keyser*, 30 Md. 179, the court decides that infants were properly represented by next friend, although they had a guardian appointed by the orphans court, and says: "By the common law infants could sue or defend only by guardian. It was by the statute of Westminster 1, ch. 48, that they were authorized to sue by *prochein ami* in an assize; and by the statute of Westminster 2, ch. 15, that they were authorized so to sue in all other actions. And according to LORD COKE, since these statutes an infant shall sue by *prochein ami* and defend by guardian." 2 Just. 261, 390; Co. Litt. 135 b., and FITZHERBERT, in the N. B. (27) H., lays it down that "an infant shall sue by *prochein ami*, but if the infant be defendant in any action he shall make his defence by guardian and not by *prochein ami*." MR. HARGRAVE thinks it prob-

if his interests are in any way adverse to those of his wards.¹ It is not necessary that the suit should be instituted with the knowledge and consent of the infant,² but the next friend or guardian while conducting the suit is regarded, as an officer of the court, appointed to look out for the interests of the infant in this par-

able, however, that neither FITZHERBERT nor LORD COKE designed to be understood as excluding the election to sue either by *prochein ami* or by guardian, and in accordance with this suggestion have been the decisions and the established practice. 2 Wms. Saunders, 5th ed., 117 f. 1."

See also *Roberts v. Maddox*, 5 Ark. 51; *Bradley v. Amidon*, 10 Paige (N. Y.) 235.

The court will not permit anyone to act as next friend who has any adverse interest to the infant. *Walker v. Crowder*, 2 Ired. Ch. (N. Car.) 478.

1. This whole matter of the practice in suits by and against infants is often regulated by statute, and the statutes of each State should be carefully looked at for the details.

In *Simpson v. Alexander*, 6 Coldw. (Tenn.) 619, the court says: "And although the practice of allowing an infant to sue by his guardian, describing him as such, has prevailed in this State, still he is in all respects the *next friend* of the infant. He is charged with all the duties and liabilities, subject to the same restraints, and bears the same relation to the infant and the suit as though he had been described as the *next friend* of the infant. . . . He is, in the conduct of the suit, subject to the control of the court; and if he fail to do his duty, or if any other sufficient ground be brought to the knowledge of the court, as if he have an interest in the subject matter of the litigation antagonistic to the interests of the infant, the court not only has the power, but it is its duty to remove him and appoint another, who may be more faithful or not subject to a similar temptation." See *Daniels' Ch. Pr.* *68.

Thomas v. Dike, 11 Vt. 273; *Robson v. Osborn*, 13 Tex. 298. In *Texas*, by statute, a special guardian must always be appointed. *Bond v. Dillard*, 50 Tex. 302. And in *Alabama* the infant may sue by next friend, whether he have a general guardian or not. *Hooks v. Smith*, 18 Ala. 338; *Hunt v. Southern Ry. Co.*, 40 Miss. 374.

In *Indiana* an infant can prosecute an action, even a cross action, only by

next friend. *Spencer v. Robbins*, 106 Ind. 580. And *cf. Wettig v. Langdon*, 11 Vict. L. R. (Australia) 530; *Wolford v. Oakley*, 43 How. Pr. (N. Y.) 118.

An infant married woman in *Indiana* can have no guardian, and therefore she sues in reference to her separate property by a next friend. *Ex parte Post*, 47 Ind. 142. And *cf. Dugas v. Gilbeau*, 15 La. Ann. 581.

It seems to be a practice in suits by an infant wife that the husband should be allowed to join as a co-plaintiff and then the suit proceed under the direction of the next friend of the wife. *Hopkins v. Vergin*, 11 Bush. (Ky.) 677; *Adams v. Hannon*, 3 Mo. 222. And the wishes of the husband should be consulted. *Anderson v. Anderson*, 11 Bush. (Ky.) 327.

2. **Consent of Infant.**—*Barwick v. Rackley*, 45 Ala. 215, where it is said, "a motion to dismiss was made founded on a petition of the infant, on the ground that the next friend was a mere volunteer and filed the said petition without the knowledge or consent of the infant; that said next friend was believed to be irresponsible; that said infant was sixteen years of age and had a guardian able and willing to represent him . . . and that the interference of the said Rackley in the affairs of said infant was wholly unauthorized by him." The court overruled the motion, holding "the true doctrine on this subject to be, that it is not necessary to obtain either the consent of the infant or the leave of the court in such cases before the commencement of a suit." And see *Morgan v. Thorne*, 9 Dowl. Pr. 228; s. c., 7 M. & W. 400; *Pyne v. Wood*, 145 Mass. 558; *Fulton v. Rosevelt*, 1 Paige (N. Y.) 178. But where two suits are instituted in behalf of the infant at the same time, the court will institute an inquiry which is most for the advantage of the infant. *Dormer v. Fortescue*, 3 Atk. 130.

The court will direct an inquiry if the suit brought is for the benefit of the infant, and if it is not, proceedings will be stayed. *Richardson v. Miller*, 1 Sim. 133; *Fulton v. Rosevelt*, 1 Paige (N.

ticular suit, and to whom is entrusted its management and control.¹ No relationship between the infant and the next friend is necessary,² although the father's natural right to appear as next friend is to be respected,³ but apart from that any person may act as next friend without regard to his means or standing who can give security for the costs.⁴ The infant cannot be held respon-

Y.) 178; *Garr v. Drake*, 2 Johns. Ch. (N. Y.) 542. But the enquiry will not be made on the instigation of the next friend himself. 1 Dan. Ch. Pr. *73.

1. **Officer of Court.**—That the next friend is regarded as an officer of the court, see *Baltimore etc. Ry. Co. v. Fitzpatrick*, 36 Md. 619; *Klaus v. State*, 54 Miss. 644; *Bartlett v. Batts*, 14 Ga. 539; *Isaacs v. Boyd*, 5 Port. (Ala.) 388. Who manages the suit. *Sutton v. Nichols*, 20 Kan. 43.

The court has authority to remove the next friend at any stage of the case and appoint another where it is for the infant's benefit. *Barwick v. Rackley*, 45 Ala. 215; *Klaus v. State*, 54 Miss. 644; *Deford v. Keyser*, 30 Md. 179, and so in *Mills v. Humes*, 22 Md. 346, where the next friend was a material witness for the plaintiff and disqualified by his position from testifying. *Davies v. Lockett*, 4 Taunt. 765; *Martin v. Weyman*, 26 Tex. 460; *Tate v. Mott*, 96 N. Car. 19; *Guild v. Cranston*, 8 Cush. (Mass.) 506; *Bank of U. S. v. Ritchie*, 8 Pet. (U. S.) 128; *Simpson v. Alexander*, 6 Coldw. (Tenn.) 619; *Brown v. Hull*, 16 Vt. 673; *Hood v. Pearson*, 67 Ind. 368. So also where the next friend refused to appeal. *DuPuy v. Welsford*, 28 W. R. 762; *Ward v. Ward*, 3 Mer. 706; *Russell v. Sharpe*, 1 Jac. & W. 482.

The next friend cannot withdraw from the case without the permission of court. *Melling v. Melling*, 4 Madd. 261.

Where the next friend is in any way connected with the defendant he should be removed. *Burgess v. Bottomley*, 25 Ch. Div. 243; *Gee v. Gee*, 12 W. R. 187. And see *Ball v. Miller*, 59 Iowa, 634. So if he shows an unwillingness to prosecute the action. *Hardy v. Scanlin*, 1 Miles (Pa.) 87; *Ward v. Ward*, 3 Mer. 706.

2. *Burns v. Wilson*, 1 Mo. App. 179; *Guild v. Cranston*, 8 Cush. (Mass.) 506; *Bartlett v. Batts*, 14 Ga. 539. In *Evans v. Mason*, 1 Lea (Tenn.) 26, A slandered B's daughter by charging her with criminal intercourse with C. C thereupon authorized B to sue A,

agreeing to pay the costs of suit. It was held that as C was next friend in all but name, he was liable on his agreement.

3. *Rue v. Meirs*, 43 N. J. Eq. 377; *Woolf v. Pemberton*, 6 Ch. Div. 19, where a suit had been instituted in behalf of infants by a next friend without the knowledge of their father, and it was held that the father had a right to be substituted as next friend even after a decree had been rendered. But where the father sued as next friend without leave of court and it appeared that the father had an interest in the suit adverse to that of the infant, the court dismissed the suit. *Patterson v. Pullman*, 104 Ill. 80.

4. "In England a *prochein ami* is appointed by the court, and he must be a man of character and substance; but here any person who chooses can act as such, no matter what his means and standing may be, provided he can give security for costs. We do not mean to say that this has been settled by judicial determination, but by a practice so long pursued and acquiesced in as to render it impossible to alter it but by legislative enactment." *Miles v. Kaigler*, 10 Yerg. (Tenn.)

"It has been before stated that any person who may be willing to undertake the office may be the next friend of an infant. . . . Though it has been doubted, it is now clear that a next friend of an infant need not be a person of substance." *Daniels, Ch. Pr. *74*; *Green v. Harrison*, 3 Sneed (Tenn.) 131; *Robson v. Osborn*, 13 Tex. 298; *Cook v. Rawdon*, 6 How. Pr. 233.

Where the next friend is irresponsible or insolvent he may be removed. *Smith v. Anderson*, 1 Bail. (S. Car.) 123. Or required to give security for costs. *Fulton v. Rosevelt*, 1 Paige (N. Y.) 178. Giving security for costs will not obviate the necessity of suing by next friend. *Sutton v. Nichols*, 20 Kan. 43.

The defendant cannot be appointed as next friend. *Payne v. Little*, 13 Beav. 114. But where the next friend is a defendant in right of his wife his

sible for costs,¹ which must be borne by the next friend in the event of the suit going against the plaintiff,² but it seems that the next friend will be allowed to reimburse himself from the estate of the infant if it appears that he has conducted the suit carefully and in good faith.³ In practice the next friend is rarely appointed by the court by special order, the recital in the writ being considered sufficient evidence of appointment, unless objection is made by the defendant, in which case the proper order may be supplied;⁴ in fact, the next friend is hardly considered to be a

name will be stricken out as defendant. *Lewis v. Nobbs*, 8 Ch. Div. 591.

A next friend or guardian appointed out of the jurisdiction must have special authority to sue. *Williams v. Storrs*, 6 Johns. Ch. (N. Y.) 373; *Verrier v. Verrier*, 7 Phila. (Pa.) 618.

1. **Costs.**—"No execution issues against the infant for the cost; for it is said costs came in lieu of the common law amercement of the plaintiff *pro falso clamore*, and the plaintiff could not be subject to amercement, and of course could not be liable to its substitute." *Cook v. Adams*, 27 Ala. 294; *Heft v. McGill*, 3 Pa. St. 256; *Sproule v. Botts*, 5 J. J. Marsh. (Ky.) 162; *Bouche v. Ryan*, 3 Blackf. (Ind.) 472. See *contra* *Howett v. Alexander*, 1 Dev. (N. Car.) 431, where execution for costs issued against an infant plaintiff on the ground that no one would undertake the office of next friend if made liable for costs.

Execution for costs issues against the estate of the guardian. *Schoen v. Schlessinger*, 57 How. Pr. (N. Y.) 490.

2. *Newton v. L. B. etc. R. R. Co.*, 7 Dow & L. 328; *Beames v. Farley*, 5 C. B. 178; *Swain v. Follows*, 18 Q. B. D. 585; *Klaus v. State*, 54 Miss. 644; *Albee v. Winterink*, 55 Iowa 184. And *cf.* *Vance v. Fall*, 48 Iowa 364; *Holmes v. Robinson*, 2 Ind. 398; *Evans v. Mason*, 1 Lea (Tenn.) 26; *Baltimore etc. Ry. Co. v. Fitzpatrick*, 36 Md. 619; *Sproule v. Botts*, 5 J. J. Marsh. (Ky.) 162; *Perryman v. Burgster*, 6 Port (Ala.) 99; *Mill v. Mill*, 8 Ont. R. 370. But see *Proudfoot v. Poile*, 3 Dowl. & L. 524, where an infant was ordered to pay costs.

In some jurisdictions the liability of the next friend to pay costs is statutory. *Kleffel v. Bullock*, 8 Neb. 336; *Linner v. Crouse*, 61 Barb. (N. Y.) 289.

Unless there is such an admission of the next friend as makes him liable for costs the defendant need not plead, but

may move to dismiss. *Keeran v. Clowser*, 5 Blackf. (Ind.) 604.

In *Massachusetts* the next friend is not liable. *Crandall v. Slaid*, 11 Met. 288; overruling *Blood v. Harrington*, 8 Pick. 552. And *WILDE, J.*, says the defendant can call on the infant to furnish an endorser for costs or become nonsuit, and the liability thus falls on the infant. *Smith v. Floyd*, 1 Pick. 275. And see *Howett v. Alexander*, 1 Dev. (N. Car.) 431.

3. *Cook v. Adams*, 27 Ala. 294. *Tyler, Infancy and Cov.*, § 142, says: "The rule laid down by Lord Thurlow in this regard is, that no degree of mistake or misapprehension will be sufficient to charge the *prochein ami* with costs; and that anyone who will stand forward in that character on the behalf of infants is to be encouraged to every possible extent to which he can be supposed to intend the infant's benefit. *Whittaker v. Marlar*, 1 Cox Cas. 285. *LORD HARDWICKE* held that if it appear that the next friend was sufficiently warranted in bringing suit, and that it was brought on and continued in a reasonable manner, and without laches, then the infant ought to reimburse him. *Taner v. Ivie*, 2 Ves. Sr. 466. But the costs will not be charged on the infant's estate, unless the court is satisfied the suit was brought in good faith and with the *bona fide* intent to benefit the witness. *Pearce v. Pearce*, 9 Ves. 548." And where there is a fund belonging to the infant in the control of the court the costs may be charged against it. *Waring v. Crane*, 2 Paige (N. Y.) 79.

4. **Evidence of Appointment.**—"The probability is, that, like many other such requisites, the practice of obtaining such previous order, from inconvenience, fell into disuse; probably in the confidence that the authority would not be called in question, or, if called in question, could be supplied when all was right and well intended, by an or-

party by some courts,¹ while by others his interest in the suit is considered sufficient to disqualify him as a witness.² Where the infant sues alone, the defendant must make due objection by a plea in abatement or a motion to dismiss,³ and the defect can be remedied by amendment and is deemed to be cured after verdict,⁴

der nunc pro tunc; and if the defendant appeared and pleaded it would be too late then to question the authority of the *prochein ami*. It was put on the footing, in this respect, of a power of attorney, which is always presumed to exist, and which cannot be questioned unless seasonably challenged, and may then be supplied." *Guild v. Cranston*, 8 Cush. (Mass.) 506; *Barwick v. Rackley*, 45 Ala. 215; *Bethea v. McCall*, 3 Ala. 449; *Trask v. Stone*, 7 Mass. 241; *Boynton v. Clay*, 58 Me. 236; *Deford v. Keyser*, 30 Md. 179; *Klaus v. State*, 54 Miss. 644; *Resor v. Resor*, 9 Ind. 347; *Judson v. Blanchard*, 3 Conn. 579; *Burwell v. Corbin*, 1 Rand. (Va.) 131; and see *Stumps v. Kelley*, 22 Ill. 140.

Where an infant sues by next friend, it is not necessary to aver in the complaint that the plaintiff is an infant, or that the written consent of the next friend had been filed. *Dodd v. Moore*, 91 Ind. 522; s. c., 92 Ind. 397; and see *Funk v. Davis*, 103 Ind. 281.

But the next friend is regarded as having no authority before appointment, and hence cannot sue for any cause of action that requires a special demand before suit. *Miles v. Boyden*, 3 Pick. (Mass.) 213.

1. Not a Party.—"The guardian or next friend is not in any sense a legal party to the action, although his name appears upon the record." *Tate v. Mott*, 96 N. Car. 19; *Brown v. Hull*, 16 Vt. 673; *Anon.* 2 Hill (N. Y.) 417; *Bartlett v. Batts*, 14 Ga. 539; *Baltimore etc. Ry. Co. v. Fitzpatrick*, 36 Md. 619. "It appears to me that the view taken by this court in *Morgan v. Thorne*, 7 M. & W. 400, is perfectly correct; that he is not a party, but is merely to be considered as an officer of the court, especially appointed by them to look after the interests of the infant." *Pollock, C. B.*, in *Sinclair v. Sinclair*, 13 M. & W. 640; but he is a party within the meaning of a statute requiring writs to be endorsed by the party, his agent or attorney. *Crossen v. Dryer*, 17 Mass. 222.

2. Disqualifying Interest.—*Head v. Head*, 3 Atk. 511; *Sproule v. Botts*, 5

J. J. Marsh (Ky.) 162; but the court will protect the infant's rights, and if the next friend is needed as a witness, the court will remove him and appoint someone else. *Bartlett v. Batts*, 14 Ga. 539; the substitute giving security for the costs already incurred. *Colden v. Haskins*, 2 Edw. Ch. (N. Y.) 311; *Helms v. Franciscus*, 2 Bland (Md.) 544. And where a person has been appointed next friend without his knowledge or consent, he is not disqualified as a witness. *Burwell v. Corbin*, 1 Rand. (Va.) 131; and see *Lupton v. Lupton*, 2 Johns. Ch. (N. Y.) 614; *Sinclair v. Sinclair*, 13 M. & W. 640; holding that there is no disqualification in any case. This disqualification, which is that of interest in the suit, is based on the responsibility of the next friend for costs, but such disqualification has been abolished by statute in many jurisdictions.

3. Plea in Abatement.—*Bird v. Pegg*, 5 B. & Ald. 418; *Finley v. Jowle*, 13 East 6; *Apthorp v. Backus*, Kirby (Conn.) 407; *Jones v. Steele*, 36 Mo. 324; *Holton v. Townner*, 81 Mo. 360; *Albert v. State*, 66 Md. 325; *Tate v. Mott*, 96 N. C. 19; *Blood v. Harrington*, 8 Pick. (Mass.) 552; *Smith v. Van Houton*, 9 N. J. L. 381; *Heft v. McGill*, 3 Pa. St. 256; *Greenman v. Cohee*, 61 Ind. 201; *Jack v. Davis*, 29 Ga. 219; *Schemerhorn v. Jenkins*, 7 Johns. (N. Y.) 373; and the failure to sue by next friend is no ground for a non-suit. *Treadwell v. Bruder*, 3 E. D. Smith (N. Y.) 596; *Drago v. Mosco*, 1 Speer L. (S. Car.) 212. *Overruling McDaniel v. Nicholson*, 2 Mill Const. (S. Car.) 344.

The allegation of appointment is not traversable, but the objection should be made by preliminary motion. *Schuck v. Hagar*, 24 Minn. 239.

4. Amendment of Writ.—The infant is allowed to amend his writ by inserting the name of a next friend. *Blood v. Harrington*, 8 Pick. (Mass.) 552; *Young v. Young*, 3 N. H. 345; or he may be appointed on motion and the cause will go on. *Rima v. Rossie Iron Works*, 47 Hun (N. Y.) 153; *Neal v. Spooner*, 20 Fla. 38; *Webster v. Page*, 54 Iowa 461.

and in some States an infant is allowed to sue *in forma pauperis*.¹

In other jurisdictions, however, the next friend must be specially appointed by the court before process is sued out, and due appointment as well as the infancy of the plaintiff must be alleged and proved.²

The authority of the next friend ends on judgment, which he has no authority to collect,³ and if the infant becomes of age

And the irregularity is cured after verdict. *Smith v. Carney*, 127 Mass. 179; *Bartlett v. Batts*, 14 Ga. 539; *Jones v. Steele*, 30 Mo. 324; *Kid v. Mitchell*, 1 Nott & McCord (S. Car.) 334.

Under the *New York* practice, it was held too late to raise the objection after the answer had been served. *Parks v. Parks*, 19 Abb. Pr. (N. Y.) 161. But delay in making the objection may be excusable. *Ex parte Scott*, 1 Cow. (N. Y.) 33. And if the suit is begun without a next friend the proceedings will not be set aside if the appointment is made previous to the motion to set aside, and the costs of this motion are paid. *Fitch v. Fitch*, 18 Wend. (N. Y.) 513. And see *Rutter v. Puckhofer*, 9 Bosw. (N. Y.) 638; *Wolford v. Oakley*, 43 How. Pr. (N. Y.) 118.

1. Suit in Forma Pauperis.—The right to commence suit without security for costs, conferred by the act of 1821, is a right personal to the plaintiff. The guardian or next friend of an infant plaintiff cannot avail himself of it. And the fact that the person who assumes to act as next friend is unable to give security for the prosecution of the suit is a very sufficient reason why he should neither seek, nor be permitted, to place himself in that attitude. *Green v. Harrison*, 3 Sneed (Tenn.) 131; and as the infant must sue by next friend he cannot therefore have the benefit of the statute. *Roy v. L. N. O. & T. Ry. Co.*, 34 Fed. Rep. (Tenn.) 276. The rule in *Indiana* is, however, different, and where the statute allows a suit *in forma pauperis* there is no liability for costs on the infant or next friend. *Britton v. State*, 115 Ind. 55.

The requirement of the statute, *R. S. 1881*, § 260, that the court shall assign a poor person an attorney, is substantially complied with by appointing the attorney of such an infant as next friend without liability for costs.

When an infant plaintiff cannot procure any person to act as next friend, and it is shown that he has but little means, it is not error to allow him to prosecute as a poor person; and when

such order is obtained he is authorized to prosecute without a next friend. *Wright v. McLarinan*, 92 Ind. 103; *Hood v. Pearson*, 67 Ind. 368.

2. *Bond v. Dillard*, 50 Tex. 302; *Shirley v. Hagar*, 3 Blackf. (Ind.) 225; *Stanley v. Chappell*, 8 Cow. (N. Y.) 235; *Wilder v. Ember*, 12 Wend. (N. Y.) 191; *Grantman v. Thrall*, 44 Barb. (N. Y.) 173; *Boyd v. Boyd*, 6 Gill & J. (Md.) 25. The next friend verifies the complaint as a party and not as agent. *Clay v. Baker*, 41 Hun (N. Y.) 58. See *Sinclair v. Sinclair*, 13 M. & W. 646.

Where an infant sues by a guardian *ad litem* (as provided in section 372 Code Civ. Proc.), the complaint must allege the due appointment of the guardian, for the appointment of such guardian is a traversable fact, and must be stated in order that it may be traversed. *Held*, accordingly, that a *special demurrer* to a complaint, on this ground, was rightly sustained. *Crawford v. Neal*, 56 Cal. 321; *Porter v. Hannibal & St. Jo. R. Co.*, 60 Mo. 160; *Byers v. Des Moines etc. R. Co.*, 21 Iowa 54; *Fitzgerald v. Villiers*, 3 Mod. 236; *contra*, *Meyenberg v. Eldred*, 35 N. W. Rep. (Minn.) 371.

Minority is a fact to be litigated on the pleadings. *Hanly v. Levin*, 5 Ohio 227; *McGillicuddy v. Forsyth*, 5 Blackf. (Ind.) 435; but see *contra* *Schuek v. Hagar*, 24 Minn. 339.

3. It must be paid to the general guardian or the clerk of the court. *Smith v. Redus*, 9 Ala. 99; *Miles v. Kaigler*, 10 Yerg. (Tenn.) 10; *Klaus v. State*, 54 Miss. 644; but see *Baltimore etc. Ry. Co. v. Fitzpatrick*, 36 Md. 619; that "in the absence of a regularly constituted guardian for the infant, he [next friend's attorney of record] may receive the money recovered of the defendant, give a sufficient acquittance therefor, and enter satisfaction on the roll." *Morgan v. Thorne*, 7 M. & W. 400. Where the attorney employed by the next friend has collected the judgment, he is responsible to the infant directly for the sum. *Collins v. Brook*, 4 H. & N. 270.

pending the suit, he may be admitted to prosecute in his own name.¹

2. Actions Against Infants.—When a cause of action exists against an infant, the suit must be brought against him in his proper person,² but for his own protection the law does not allow him to appear in person or by attorney,³ but protects his rights by appointing a guardian *ad litem* to conduct the case. Such person is either the general guardian of the infant or a third person specially appointed by the court in case there is no general guardian,⁴ or his interests are adverse to those of the infant's, or for other rea-

1. *Patton v. Furthmier*, 16 Kan. 29. When the infant arrives at majority during the pendency of the suit, he may enter that fact upon the record and thenceforward conduct the suit alone. *Holmes v. Robinson*, 2 Ind. 398; *Shuttlesworth v. Hughey*, 6 Rich. (S. Car.) 329; *Ricord v. C. P. Ry. Co.*, 15 Nev. 167; or at most on amendment by striking out the name of the next friend. *Lassiter v. Simpson*, 3 S. E. Rep. (Ga.) 243; or where the infant has sued in his own name without objection he may proceed without amendment. *Woodman v. Rowe*, 59 N. H. 453.

Where a husband sues as next friend of his minor wife, and pending suit she becomes of age, the declaration can be amended so as to strike out the representative character of the husband, and leave the suit to proceed in the names of the husband and wife. *Bryant v. Helton*, 66 Ga. 477.

The court makes an order relieving the next friend from future costs. *Wainwright v. Wilkinson*, 62 Md. 146. But he must give security for past costs. *Davenport v. Davenport*, 1 Sim. & St. 101.

In Louisiana a minor may sue in his own name when he has been emancipated. *Beauchamp v. Whittington*, 10 La. Ann. 646.

If the suit has been improperly begun, the infant may abandon it on attaining his majority, and leave the next friend to pay the costs. *Waring v. Crane*, 2 Paige (N. Y.) 79.

2. *Oliver v. McDuffie*, 28 Ga. 522; *Jack v. Davis*, 29 Ga. 219. In *Wakefield v. Marr*, 65 Me. 341, a bill in equity was brought against a guardian to procure the conveyance of land held by the infant ward as trustee. The court dismissed the bill, holding that the minor should be a party to the bill; and see *Tucker v. Bean*, 65 Me. 352. So the judgment must run against the

minor, and not the guardian. *Tucker v. McClure*, 17 Iowa 583.

3. **Defence by Attorney.**—An infant cannot defend by attorney or in person. *Alderman v. Tirrell*, 8 Johns. (N. Y.) 418; *Bullard v. Spoor*, 2 Cow. (N. Y.) 430; *Knapp v. Crosby*, 1 Mass. 479; *Miles v. Boyden*, 3 Pick. (Mass.) 213; *Fetrow v. Wiseman*, 40 Ind. 148; *Kessler v. Penninger*, 59 Ill. 134; *Bedall v. Lewis*, 4 J. J. Marsh. (Ky.) 562; *Starbird v. Moore*, 21 Vt. 529; *Fuller v. Smith*, 49 Vt. 253; *Thornton v. Thornton*, 27 Mo. 302; *De La Hunt v. Holderbaugh*, 58 Ind. 285; *Cavender v. Smith*, 5 Iowa 157; *Marshall v. Wing*, 50 Me. 62; *Gamache v. Prevost*, 71 Mo. 84; *Bustard v. Gates*, 4 Dana (Ky.) 429; *Winston v. McLendon*, 43 Miss. 254; *Wright v. McNatt*, 49 Tex. 425.

An infant cannot appear in person or by attorney, even to set aside proceedings, where there was no guardian. *Shepherd v. Hibbard*, 19 Wend. (N. Y.) 96.

A judgment does not bind an infant appearing by attorney. *Goodridge v. Ross*, 6 Met. (Mass.) 487; *Bailey v. McGinniss*, 57 Mo. 362; *Townsend v. Cox*, 45 Mo. 401. The judgment is voidable only, and good until set aside by the infant. *Taylor v. Rowland*, 26 Tex. 293; *Marshall v. Fisher*, 1 Jones L. (N. Car.) 111.

4. **Guardian ad Litem.**—The appointment is for the particular case. *Larkin v. Mann*, 2 Paige (N. Y.) 27; *Roberts v. Stanton*, 2 Munf. (Va.) 129.

Where the general guardian appears and defends, a special appointment is not necessary. *Hughes v. Seller*, 34 Ind. 337; *Smith v. McDonald*, 42 Cal. 484; *Colt v. Colt*, 19 Blatchf. (C. C.) 402; *Mansur v. Pratt*, 101 Mass. 60; *Cowan v. Anderson*, 7 Coldw. (Tenn.) 284, 291.

"All motions for a *guardian ad litem* shall be made in writing, and the court shall appoint such guardian only after

sons.¹ It is usual to appoint the nearest relative of the infant,² but as in the case of the next friend, the guardian *ad litem* is regarded as an officer of the court, and not a party in any technical

due enquiry as to the fitness of the person to be appointed, and such guardian must file an answer in every case." *Young v. Young*, 91 N. Car. 359; *Bond v. Dillard*, 50 Tex. 302.

The statute may prescribe that the infant shall appear by general guardian, if he has one, as in Kentucky. *McMakin v. Stratton*, 82 Ky. 226. And this seems the general rule. *Oliver v. McDuffie*, 28 Ga. 528; *Winston v. McLendon*, 43 Miss. 254; *Foulkes v. Young*, 21 N. J. L. 438; *Pucket v. Johnson*, 45 Tex. 550; *Lloyd v. Malone*, 23 Ill. 43; *Tucker v. Bean*, 65 Me. 352; *Roach v. Hix*, 57 Ala. 576; *Brown v. Severson*, 12 Heisk. (Tenn.) 381; *Swan v. Horton*, 14 Gray (Mass.) 179; *Robinson v. Swift*, 3 Vt. 283; *Gronfier v. Puymirol*, 19 Cal. 629; *Buddecke v. Buddecke*, 31 La. Ann. 572.

The fact of infancy must be sworn to before a guardian *ad litem* will be appointed. *Rhett v. Martin*, 43 Ala. 86. See *contra* *Martia v. Porter*, 4 Heisk. (Tenn.) 407.

An appearance for a minor defendant by guardian *ad litem*, without the authority of an order of the court, is an irregularity, which may be objected to by a motion to strike out the answer. But where minor defendants have been served with summons and have answered by their general guardian or guardian *ad litem*, the court will assume, when the record is silent, that the appointment of the guardian was regularly made. *Emeric v. Alvarado*, 64 Cal. 529. See *Ivey v. McKinnon*, 84 N. Car. 651.

Where a guardian *ad litem* is appointed, his appointment should appear of record. *Fuller v. Smith*, 49 Vt. 253; *Abdil v. Abdil*, 26 Ind. 289; *Stinson v. Pickering*, 70 Me. 273; *Myers v. Myers*, 6 W. Va. 369; *Rhett v. Martin*, 43 Ala. 86; *Treiber v. Shaefer*, 18 Iowa 29. And when the record shows the appointment of a guardian *ad litem*, but no motion therefor or prayer in the bill, such appointment will be considered the act of the court on its own motion, which it might make *sua sponte*. *Rhoads v. Rhoads*, 43 Ill. 239. The appearance and defence of the general or natural guardian may be shown by parol. *Fuller v. Smith*, 49 Vt. 253; *Brown v. Severson*, 12 Heisk. (Tenn.)

381. Where the mother, who was appointed guardian by the will of the father, appeared and defended. And see in a like case, *Treiber v. Shaefer*, 18 Iowa 29; *Swain v. Fidelity Ins. Co.*, 54 Pa. St. 455; *Clark v. Platt*, 30 Conn. 282. Such appearance is deemed equivalent to the appointment of a guardian *ad litem*. *Price v. Winter*, 15 Fla. 66.

The guardian *ad litem* should be a real and not a nominal person, and the appointment of "John Doe" as guardian is error. *Bullard v. Spoor*, 2 Cow. (N. Y.) 430; *Young v. Whittaker*, 1 A. K. Marsh. (Ky.) 398, though it seems the old practice sanctioned such appointments. *Mercer v. Watson*, 1 Watts (Pa.) 330; *Fearing v. Clawson*, 1 Hall (N. Y.) 55; *Van Deusen v. Brower*, 6 Cow. (N. Y.) 50.

Where the record fails to show that part of the defendants are minors, an order appointing a guardian *ad litem* for the minor defendants without naming is void. *Sullivan v. Sullivan*, 42 Ill. 318; *Rucker v. Moore*, 1 Heisk. (Tenn.) 726.

The acceptance of the guardianship by the person appointed should appear of record. *Daniel v. Hanagan*, 5 J. J. Marsh. (Ky.) 48; *Schaefer v. Gates*, 2 B. Mon. (Ky.) 453; *Fox v. Cosby*, 2 Call (Va.) 1; *St. Clair v. Smith*, 3 Ohio 355. The record should show the fact of the appointment or the decree will be erroneous and may be reversed. *Myers v. Myers*, 6 W. Va. 369; *McDonald v. McDonald*, 3 W. Va. 676.

1. A guardian *ad litem* is appointed if the interests of the general guardian are adverse or he fails to appear. *Stinson v. Pickering*, 70 Me. 273; *Mansur v. Pratt*, 101 Mass. 60; *Cowan v. Anderson*, 7 Coldw. (Tenn.) 284; *Wells v. Smith*, 44 Miss. 296; *cf.* *Freedman v. Thompson*, 41 Miss. 49; *Grant v. Van Schoonhoven*, 9 Paige (N. Y.) 255; *Gronfier v. Puymirol*, 19 Cal. 629. The plaintiff or a person out of the jurisdiction cannot be appointed guardian *ad litem*. *Anon.* 18 Jur. 770. But a codefendant may be. *Bonfield v. Grant*, 11 W. R. 275 (*semble*); 1 *Daniell's Ch. Pr.* *160.

2. They (infants) defend by guardian to be appointed by the court, who is usually the nearest relation not concerned, in point of interest, in the

sense,¹ and the same rules apply to both. No attorney or party in the suit should be appointed, and the defence of the guardian must be not merely formal, but real and earnest; he should put in issue and require proof of every material allegation to the infant's prejudice, whether it be true or not, and make no concessions on his own knowledge, and in every case the cause must be heard and no judgment entered except on proof.²

Suit is begun against an infant by service on him, and neither

matter in question. It is not error, but it is calculated to awaken attention that in this case, though the infants, as the record shows, had parents living, a person not appearing from his name, or shown on the record to be connected with them, was appointed guardian *ad litem*. Bank of U. S. v. Ritchie, 8 Pet. (U. S.) 128; Grant v. Van Schoonhoven, 9 Paige (N. Y.) 255; Rhoads v. Rhoads, 43 Ill. 239.

1. Officer of Court.—The plaintiff objected to the relationship of the judge to the guardian *ad litem* as disqualifying the judge from sitting in the case, but as the statute refers to relationship to "a party," the objection was not sustained, the guardian *ad litem* not being a party to the action. Bryant v. Livermore, 20 Minn. 313; McDonald v. McDonald, 24 Ind. 68. And there he is competent to testify.

The court may remove the guardian and appoint a substitute if at any time the interests of the infant demand it. Walker v. Hull, 35 Mich. 488; Henly v. Gore, 4 Dana (Ky.) 133; Damouth v. Klock, 29 Mich. 289.

The power of the court to appoint a guardian *ad litem* for parties to a suit who are minors, and who are unrepresented, is unquestioned. This is a discretionary power vested in the courts from the necessity of the case, and that discretion must rest in the sound judgment of the court; and, under ordinary circumstances, the exercise of that discretion is not subject to revision. Smith v. Taylor, 34 Tex. 589; and *cf.* Gronfier v. Puymiro, 19 Cal. 629; Cowan v. Anderson, 7 Coldw. (Tenn.) 284; Rhoads v. Rhoads, 43 Ill. 239; Burrus v. Burrus, 56 Miss. 92.

The court, in its discretion, will consult the wishes of an infant defendant over fourteen years of age. Walker v. Hallett, 1 Ala. 379, and the court has authority to appoint a guardian *ad litem* for non-resident infants. Walker v. Hallett, 1 Ala. 379; Graham v. Sublett, 6 J. J. Marsh. (Ky.)

44. And can allow him a reasonable compensation. Walker v. Hallett, 1 Ala. 379.

2. Duties of Guardian ad Litem.—Pinchback v. Graves, 42 Ark. 222; Chalfant v. Monroe, 3 Dana (Ky.) 35; Randall v. Wilson, 24 Mo. 76; Revelly v. Skinner, 33 Mo. 98; Soper v. Fry, 37 Mich. 236; Price v. Crone, 44 Miss. 571; Long v. Mulford, 17 Ohio St. 484; Fischer v. Fischer, 54 Ill. 231; Tucker v. Bean, 65 Me. 352; Covington etc. Ry. Co. v. Bowler, 9 Bush (Ky.) 468; Berrett v. Oliver, 7 Gill & J. (Md.) 191; Eaton v. Tillinghast, 4 R. I. 276; Howell v. Mills, 53 N. Y. 322.

The rights of the infant are under the special protection of the court, which is bound to notice them whether they are specially pointed out by the guardian *ad litem* or not. Thus where incompetent evidence is offered against the infant the court cannot admit it, even though the guardian does not object. Cartwright v. Wise, 14 Ill. 417. The general rule is clearly laid down in Rhoads v. Rhoads, 43 Ill. 239: "The rule is inflexible in this State that the guardian *ad litem* shall make a defence of the interests of the infant as vigorous as the nature of the case will admit. It is understood to be the special duty of such guardian to submit to the court, for its consideration and decision, every question involving the rights of the infant affected by the suit. . . . A bill cannot be taken as confessed against infants under any circumstances, nor their interests decreed away without an answer by the guardian *ad litem*, or on full proof. Nor can a default be entered against them; and it is further held that nothing can be admitted, but everything must be proved, against an infant; and strict proof is required, and the record must furnish proof to sustain a decree against them, whether the guardian *ad litem* answers or not." A judgment by default is erroneous. Peak v. Pricer, 21 Ill. 164; Chalfant v.

he nor his guardian can accept or waive due service;¹ the requirements of the statute in respect to service must be strictly com-

Monroe, 3 Dana (Ky.) 35; Massie v. Donaldson, 8 Ohio 377; Metcalfe v. Alter, 31 La. Ann. 389.

A counter claim to the suit of an infant prosecuted by next friend cannot be taken as confessed for want of a reply. A guardian *ad litem* must be appointed for him and a reply filed, denying every material allegation in the counter-claim; and the circuit court should see that this is done. *Morris v. Edmonds*, 43 Ark. 427.

The plaintiff is not exonerated by the admissions in the answer from proving his whole case. *Holden v. Hearn*, 1 Beav. 445; *Mills v. Dennis*, 3 Johns. Ch. (N. Y.) 367; *Crain v. Parker*, 1 Cart. (Ind.) 374; *Smith v. Smith*, 13 Mich. 288; *Chaffin v. Kimball*, 23 Ill. 36; *Lenox v. Notrebe*, 1 Hemp. (U. S.) 251. And *cf.* *English v. Savage*, 5 Oreg. 518. The answer of the infant, even though sworn to by his guardian, cannot be used as evidence. *Bulkley v. VanWyck*, 5 Paige (N. Y.) 563; *Stephenson v. Stephenson*, 6 Paige (N. Y.) 353; *Benson v. Wright*, 4 Md. Ch. 278; *Bank v. Alexandria v. Patton*, 1 Rob. (Va.) 499; *Stewart v. Duvall*, 7 Gill & J. (Md.) 179; *Coffin v. Heath*, 6 Met. (Mass.) 76.

But it seems that admissions by the infant may be received against him. *Haile v. Lillie*, 3 Hill (N. Y.) 149; *O'Neill v. Read*, 7 Ir. L. R. 434. But see *Claxton v. Claxton*, 56 Mich. 567; *Lunday v. Thomas*, 26 Ga. 537.

The usual answer by the guardian is to the effect "that the infant knows nothing of the matter, and, therefore, neither admits nor denies the charges, but leaves the plaintiff to prove them as he shall be advised, and throws himself upon the protection of the court." *Dow v. Jewell*, 21 N. H. 470.

The guardian can, however, waive further service on himself, and consent to an immediate hearing of the case. *Pollock v. Buie*, 43 Miss. 140. And can execute a discharge to remove the incompetency from interest of a witness. *Walker v. Ferrin*, 4 Vt. 523. And generally may consent to any matter relating to the conduct of the case, as, for example, to the taking of evidence by deposition. *Knatchbull v. Fowle*, 1 Ch. Div. 604.

The infant nor the guardian *ad litem* can make no binding submission

to arbitration of the case. *Jones v. Payne*, 41 Ga. 23; *Fort v. Battle*, 13 Sm. & M. (Miss.) 133; but see *Hannum v. Wallace*, 9 Humph. (Tenn.) 129. Nor can the guardian *ad litem* make a binding agreement that the decision in one case shall determine that in another, although the cases involve precisely the same facts, and the same parties, and substantially the same points of controversy. *McClure v. Farthing*, 51 Mo. 109.

The court may confirm a compromise which will not be set aside except for fraud or collusion. *Walsh v. Walsh*, 116 Mass. 377.

The time for filing dilatory pleas dates from the appointment of the guardian *ad litem*. *Fall River Foundry Co. v. Doty*, 42 Vt. 412. But it is not necessary to serve a copy of the bill on the guardian after he is appointed. *Jones v. Drake*, 2 Hay. (N. Car.) 237.

The guardian *ad litem* is responsible for the character of the defence, and is liable to the infant in damages if he neglects his duty. *Knickerbocker v. De Freest*, 2 Paige (N. Y.) 304. And he must always put in a defence, and cannot omit it because he does not think the infants are proper parties to the suit. *Farmers' Loan and Trust Co. v. Reed*, 3 Edw. Ch. (N. Y.) 414. If the guardian fails to answer, the court should compel him or remove him and appoint a substitute. *Henly v. Gore*, 4 Dana (Ky.) 133.

1. Service of Process.—*Genobles v. West*, 23 S. Car. 154; *Young v. Young*, 91 N. Car. 359; *Winston v. McLendon*, 43 Miss. 254; *Good v. Norley*, 28 Iowa 188; *Abdil v. Abdil*, 26 Ind. 287; *Robins v. Robins*, 2 Carter (Ind.) 74; *Clark v. Thompson*, 47 Ill. 25; *Kansas City etc. Ry. Co. v. Campbell*, 62 Mo. 585; *Lenox v. Notrebe*, 1 Hemp. (U. S.) 251; *Armstrong v. Wyandotte Bridge Co.*, 1 McCahon (Kan.) 166; *Taylor v. Walker*, 1 Heisk. (Tenn.) 734. But see *Masson v. Swan*, 6 Heisk. (Tenn.) 450; *Cowan v. Anderson*, 7 Coldw. (Tenn.) 284, *contra*.

The acceptance of service by a minor defendant is not equivalent to the personal service required by the statute to be made by the officer, and a judgment against the minor will be reversed on appeal or error, when this personal ser-

plied with,¹ and no guardian *ad litem* can be appointed until the infant has been properly served.² In case of a default by the infant, then it is incumbent on the plaintiff to move for the ap-

vice has not been obtained. *Wheeler v. Ahrenbeak*, 54 Tex. 535; *Finley v. Robertson*, 17 S. Car. 435; *Whitesides v. Barker*, 24 S. Car. 373; *White v. Albertson*, 3 Dev. (N. Car.) 241.

1. *Ingersoll v. Mangam*, 84 N. Y. 622; *Price v. Winter*, 15 Fla. 66; *Brown v. Severson*, 12 Heisk. (Tenn.) 381; *Clark v. Thompson*, 47 Ill. 25; *Coster v. Bank of Georgia*, 24 Ala. 37; *Price v. Crone*, 44 Miss. 571. And a return by the sheriff that the process was "executed in full" is insufficient. *Carter v. Ingraham*, 43 Ala. 78.

It must appear affirmatively that the infant was duly served with process. *Abdil v. Abdil*, 26 Ind. 287; *Winston v. McLendon*, 43 Miss. 254. And in some States process must also be served on parent or guardian. *Ingersoll v. Ingersoll*, 42 Miss. 155; *Bellamy v. Guhl*, 62 How. Pr. (N. Y.) 460; *Cox v. Story*, 80 Ky. 64; *Helms v. Chadbourne*, 45 Wis. 60. And a return showing personal service on the infant, but none on his father, is insufficient. *Mullins v. Sparks*, 43 Miss. 129. And see *Irwin v. Irwin*, 57 Ala. 614.

Under the code, the service of summons upon an infant over the age of fourteen years, but not upon the guardian, no guardian *ad litem* being appointed, but the record reciting that the infant defendant appeared by his next friend as well as by attorney, held sufficient service, and the appearance authorized. *Filmore v. Russell*, 6 Colo. 171.

2. The guardian *ad litem* can only be regularly appointed after service on the infant. *Ingersoll v. Mangam*, 84 N. Y. 622; *Davis v. Crandall*, 10 N. Y. 311; *Crocker v. Smith*, 10 Ill. App. 376; *Pinchback v. Graves*, 42 Ark. 222; *Insurance Co. v. Bangs*, 103 U. S. 435; *Carrington v. Brents*, 1 McLean (U. S.) 16; *Harvey v. Cubbege*, 75 Ga. 792; *Montgomery v. Carlton*, 56 Tex. 361; *Hendricks v. McLean*, 18 Mo. 32; *Price v. Crone*, 44 Miss. 571; *Good v. Norley*, 28 Iowa 188; *Graham v. Sublett*, 6 J. J. Marsh. (Ky.) 44; *Taylor v. Walker*, 1 Heisk. (Tenn.) 734.

Infants cannot be brought into court on stipulations of attorneys. *McDermaid v. Russell*, 4 Ill. 489.

Where infants are made parties defendant, they must be served with

the summons. Until this is done the court has no jurisdiction of them, and the appointment of a guardian *ad litem* is void. *Johnston v. S. F. Sav. Union*, 63 Cal. 554; *McCloskey v. Sweeney*, 66 Cal. 53; *Sprague v. Haines*, 68 Tex. 215; *Galpin v. Page*, 18 Wall. (U.S.) 350.

In a suit for partition, under the statute, process should be served upon a minor defendant before a guardian *ad litem* is appointed. *Brock v. Doyle*, 18 Fla. 172.

When it is necessary to appoint a guardian *ad litem* for a minor over fourteen years of age, the minor, or someone in his behalf, must apply for the appointment within ten days after service. It would seem that the court is authorized to appoint on application only when the minor is fourteen years of age. *Filmore v. Russell*, 6 Colo. 171.

An infant above fourteen should be consulted. *Walker v. Hallett*, 1 Ala. 379.

A guardian *ad litem* will always be appointed upon petition of the infant in his own name. *Bush v. Linthicum*, 59 Md. 344.

Personal service of little children with an application for leave to sell trust property of which they are beneficiaries, though required by the act of 1876, is a formality. *Boardman v. Taylor*, 66 Ga. 638.

Judgment Voidable.—If there has been no personal service on the infant, any judgment rendered against him in the suit is voidable at his election, even though a guardian *ad litem* may have been appointed and an answer filed and defence set up. *Robb v. Irwin*, 15 Ohio 689; *Preston v. Dunn*, 25 Ala. 507; *Nelson v. Moon*, 3 McLean (U. S.) 319; *Larkins v. Bullard*, 88 N. Car. 35; *Gronfier v. Puymirol*, 19 Cal. 629; *Cox v. Story*, 80 Ky. 64; *Gibson v. Chouteau*, 39 Mo. 536.

Where a suit is brought, not to enforce a claim or lien upon property, but to cancel a purely personal contract, the circuit court cannot acquire jurisdiction of the defendant unless he appear or there be personal service of process upon him within the district. If he is an infant, the decree against him is void on its face, the record showing affirmatively the non-service of process, although a guardian *ad litem*

pointment of a guardian to conduct the defence.¹ Where the infant comes of age pending the suit he is entitled from that time

was appointed for him in his absence. *Insurance Co. v. Bangs*, 103 U. S. 435; *Whitney v. Porter*, 23 Ill. 445.

The judgment of a court of general jurisdiction recited an appearance by minor defendants, an adjudication that they were minors, the appointment of a guardian *ad litem*, and his appearance and defence for them. *Held*, the fact that the minors were not really cited personally, even if sufficient to cause a reversal of the judgment on direct proceedings, furnished no ground for attacking the judgment in a collateral proceeding. *McAnear v. Epperson*, 54 Tex. 220; s. c., 38 Am. Rep. 625; *Wheeler v. Ahrenbeak*, 54 Tex. 535; *Kremer v. Haynie*, 67 Tex. 450.

So also where no guardian *ad litem* has been appointed, the judgment is voidable. *O'Hara v. MacConnell*, 93 U. S. 150; *Walkenhorst v. Lewis*, 24 Kan. 420; *Allison v. Taylor*, 6 Dana (Ky.) 87; *Roberts v. Stanton*, 2 Munf. (Va.) 129; *Austin v. Charleston Fem. Sem.*, 8 Met. (Mass.) 196; *Bailey v. McGinniss*, 57 Mo. 362; *Blake v. Douglas*, 27 Ind. 416; *Barber v. Graves*, 18 Vt. 292; *St. Clair v. Smith*, 3 Ohio 363; *Peak v. Shasted*, 21 Ill. 137; s. c., 74 Am. Dec. 83; *Moore v. McEwen*, 5 S. & R. (Pa.) 373; *Webster v. Page*, 54 Iowa 461; *Larkins v. Bullard*, 98 N. Car. 35; *Finley v. Robertson*, 17 S. Car. 435; *Taylor v. Rowland*, 26 Tex. 293; *Quigley v. Roberts*, 44 Ill. 503; *Bonnell v. Holt*, 89 Ill. 71; *Montgomery v. Carlton*, 56 Tex. 361; *Boyd v. Roane*, 49 Ark. 397; *Parker v. Starr*, 21 Neb. 680; *Milard v. Marmon*, 116 Ill. 649; *Drake v. Henshaw*, 47 Iowa 291; *Tucker v. Bean*, 65 Me. 352; *Cook v. Rogers*, 64 Ala. 406; *Carver v. Carver*, 64 Ind. 195.

The judgment is valid until set aside. *Bernecker v. Miller*, 44 Mo. 102; *England v. Garner*, 90 N. Car. 197; *Simmons v. McKay*, 5 Bush (Ky.) 25; *Frierson v. Travis*, 39 Ala. 150. That it is absolutely void see *Whitney v. Porter*, 23 Ill. 445; *McDaniel v. Carrell*, 19 Ill. 226; s. c., 68 Am. Dec. 587; *Linnville v. Darby*, 1 Baxt. (Tenn.) 306; *Allsmiller v. Trentchenicht*, 5 S.W. Rep. (Ky.) 746; *Piercy v. Piercy*, 5 W. Va. 199.

Where there was an actual appearance by guardian the decree is valid, though there is no record of the fact.

Hopper v. Taylor, 2 Head (Tenn.) 253. And where one decree has been set aside because there was no guardian *ad litem*, a subsequent decree in the same cause will not be set aside for the same reason, the record showing no appointment. *Tuttle v. Garrett*, 74 Ill. 444.

The omission to appoint a guardian does not affect the jurisdiction of the court. *Sims v. N. Y. Dentistry Coll.*, 35 Hun (N. Y.) 344.

The case is not at issue until a guardian *ad litem* has been appointed and filed an answer. *Daily v. Reid*, 74 Ala. 415; *Ewing v. Ferguson*, 33 Gratt. (Va.) 548.

The Code, section 387, making valid judgments against infants and certain other persons, in cases where, being parties defendant, they are not personally served, does not apply to cases where there has never been any service upon the infant, nor upon any person representing him. *Stancill v. Gay*, 92 N. Car. 462; *Perry v. Adams*, 98 N. Car. 167.

Where the statute provides for service on non-resident defendants by publication, service may be made upon non-resident infants in that manner. *Bryan v. Kennett*, 113 U. S. 179; *Walkenhorst v. Lewis*, 24 Kan. 420.

1. Appointment by Plaintiff.—*Judson v. Storer*, 5 N. J. L. 544; *Fearing v. Clawson*, 1 Hall (N. Y.) 55; *Knickerbocker v. De Freest*, 2 Paige (N. Y.) 304; *Mockey v. Grey*, 2 Johns. (N. Y.) 192; *Clark v. Gilmanton*, 12 N. H. 515; *Kesler v. Pennington*, 59 Ill. 134. The appointment must be made before the court can pass on the case. *Roach v. Hix*, 57 Ala. 576. So where infants are non-residents who have been served by publication. *McDermaid v. Russell*, 41 Ill. 489; *Mace v. Scott*, 17 Abb. N. C. (N. Y.) 100; *Walker v. Hallett*, 1 Ala. 379; *Graham v. Sublett*, 6 J. J. Marsh. (Ky.) 44; *Shropshire v. Reno*, 5 Dana (Ky.) 583; *Swan v. Horton*, 14 Gray (Mass.) 179; *Stinson v. Pickering*, 70 Me. 273. And it is the duty of the court to see that a guardian is appointed whether the plaintiff moves or not. *Cov. & Lex. Ry. Co.*, 9 Bush (Ky.) 468; *Concklin v. Hall*, 2 Barb. Ch. (N. Y.) 136. The court will appoint the clerk of the court or an attorney. *Carter v. Montgomery*, 2 Tenn. Ch. 455; *Cook v. Rawdon*, 6 How. Pr. (N. Y.) 233.

on to conduct the suit in person.¹ The guardian *ad litem* can employ an attorney to conduct the suit,² but the infant defendant is personally liable for the costs in the event the suit goes against him.³

Infancy is an affirmative defence and must be specially set up⁴ in the answer, but the burden of proof is on the infant to make out the defence.⁵

3. Suits in Equity.—Chancery regards the infant as a privileged person, and while, in general, the rules regulating suits at law are applicable to suits in equity, chancery is able to exercise a larger discretion and can adopt such means as are necessary fully to

1. *Mitchell v. Berry*, 1 Met. (Ky.) 602; *Marshall v. Wing*, 50 Me. 62; *Stupp v. Holmes*, 48 Mo. 89; *Bursen v. Goodspeed*, 60 Ill. 277; *Patton v. Furthmeyer*, 16 Kan. 29. See *Sims v. N. Y. Dentistry Coll.*, 35 Hun (N. Y.) 344.

An infant was, by his general guardian, made a party defendant to an action of ejectment, upon the verdict in which the lower court rendered judgment in his favor, and this court against him *after he came of age*, but without any entry showing appearance by him as an adult, and he filed a bill for the recovery of the land within three years after he came of age. *Held*, that the judgment in ejectment was no bar to the new suit. *Boro v. Harris*, 13 Lea (Tenn.) 36.

On coming of age he is allowed to plead or demur anew if it is necessary to protect his rights. *Stephenson v. Stephenson*, 6 Paige (N. Y.) 353. Or amend his answer. *Winston v. Campbell*, 4 Hen. & M. (Va.) 477. And see *Bulkley v. Van Wyck*, 5 Paige (N. Y.) 536; *Coffin v. Heath*, 6 Met. (Mass.) 76. The plaintiff can then amend his bill and waive an answer under oath. *Stephenson v. Stephenson*, 6 Paige (N. Y.) 353.

2. *Gott v. Cook*, 7 Paige (N. Y.) 521; *Doe v. Brown*, 8 Blackf. (Ind.) 444; *Colgate v. Colgate*, 23 N. J. Eq. 372; *Carter v. Montgomery*, 2 Tenn. Ch. 455.

3. **Costs.**—*Perryman v. Burgster*, 6 Port. (Ala.) 99; *Gardiner v. Holt*, *Strange* 1217; *Bryant v. Livermore*, 20 Minn. 313; and see *Smith v. Smith*, 69 Ill. 308; but see *Morgan v. Morgan*, 11 Jur. N. S. 223, for costs on misconduct of guardian.

Under the Probate act of 20th March, 1848, the share of each distributee, in the partition of an estate, was liable for costs in proportion to the share he received, and the payment of which

might be enforced by execution. By the act concerning guardians and wards provision is made for the raising of means to pay debts against the minor's estate by a sale of his property under the direction of the probate court. *Held*, that a sheriff's sale, and deed executed in pursuance thereof, under a judgment in partition awarding execution for costs against a minor distributee, vested title in the purchaser of the minor's interest. *Laughter v. Seela*, 59 Tex. 177.

A fund in chancery should not be given up without securing the guardian's costs. *Sheahan v. Circuit Judge*, 42 Mich. 69. An infant is not liable for costs on a bill for the recovery of land descended to them. *Tuttle v. Garrett*, 74 Ill. 444.

4. *Roe v. Angevine*, 7 Hun (N. Y.) 679. See *Bryant v. Pattinger*, 6 Bush (Ky.) 473; *Clemson v. Bush*, 3 Binn. (Pa.) 413; *Campbell v. Wilson*, 23 Tex. 252; *Shiver v. Shelback*, 1 Dall. (U. S.) 165.

In some States evidence of infancy may be given under the general issue. *Wailing v. Toll*, 9 Johns. (N. Y.) 141; *Thrall v. Wright*, 38 Vt. 494; *Cutts v. Gordon*, 13 Me. 474; *Da Costa v. Davis*, 4 Zab. (N. J.) 319.

Where there are several issues and the plea of infancy is proved, the case ends at once. *Rohrer v. Morningstar*, 18 Ohio 579.

On a suit on a judgment, infancy cannot be pleaded. *Ludwicke v. Fair*, 7 Ired. L. (N. Car.) 422.

5. *Roberts v. Bethell*, 12 C. B., N. S. 778; *State v. Arnold*, 13 Ired. L. (N. Car.) 184.

Where the plaintiff replies a ratification, the infant has the burden to show that the ratification was also made during infancy. *Bay v. Gunn*, 1 Den. (N. Y.) 108.

protect the interests of the infant.¹ So equity will not hold an infant to strict rules of pleading, but will allow him to take advantage of any defence whether pleaded or not.² The court will see that proper service has been made on the infant,³ and will require an enquiry into the merits of every case before a decree is

1. *Pace v. Pace*, 19 Fla. 438.

An infant suitor or defendant, when brought into court, becomes the ward of the court, whose duty it is to see that his rights in the subject matter of the litigation are properly presented and protected. If the general guardian fails to appear, the court should appoint a guardian *ad litem* to look after the infant's rights. If the guardian who undertakes this trust, whether he be the general guardian or guardian *ad litem*, fails to properly protect the interests of the ward, it is the duty of the court, *sua sponte*, to compel him to do so whenever that fact comes to the knowledge of the court. The court should see that the proper pleadings are made to present any defence the infant may have. *Lloyd v. Kirkwood*, 112 Ill. 329. Equity will not suffer the interests of an infant to be prejudiced by admissions or laches. *Long v. Mulford*, 17 Ohio St. 484; *Milly v. Harrison*, 7 Coldw. (Tenn.) 191.

"Numerous instances are to be found where the court has interfered and instituted an inquiry, by a reference, in order to ascertain whether the suit is for the benefit of an infant; and, as occasion required, the court has changed a guardian and the position of the infant in order to have its rights better protected." *Bowen v. Idley*, 1 Edw. Ch. (N. Y.) 148. And the court can order the infant to be placed on the other side of the case, if it is shown that he is on the wrong side. *Le Fort v. Delafield*, 3 Edw. Ch. (N. Y.) 32.

2. *Westbrook v. Munger*, 64 Miss. 575; *Price v. Crone*, 44 Miss. 571; *Turner v. Short*, 4 S.W. Rep. (Ky.) 347; So, the court protects the rights of an infant without the necessity of his filing a cross bill. *Gilmore v. Gilmore*, 109 Ill. 277.

Where a bill to establish and enforce a resulting trust as against an infant heir showed upon its face that the alleged trust arose twenty-five years before suit, and the court rendering a decree therein against the infant failed to require the guardian *ad litem* to set up the laches in defence, it was held that the proceedings and decree against the

infant showed error on their face sufficient to justify the court in setting the decree aside on bill filed by the infant. *Lloyd v. Kirkwood*, 112 Ill. 329.

The infant can object to the jurisdiction on the ground that the remedy is at law and not in equity, although the guardian has not raised the objection in his answer. *Bowers v. Smith*, 10 Paige (N. Y.) 193.

3. In a suit in equity against infants, process should be served upon them and a guardian *ad litem* appointed by the court to defend them, notwithstanding their legal guardian is also a party; but where a general guardian appears and makes the defence required by law and is heard by the court as the representative of the infant, such action is equivalent to his appointment as guardian *ad litem*; but the cause should not be heard without answer in behalf of infant defendants. *Thompson v. McDermott*, 19 Fla. 852; *Walker v. Hull*, 35 Mich. 488.

The mode for the service of summons to answer bills in equity issuing against infants, prescribed by the 23rd rule of Chancery Practice, is *exclusive* of all other modes; and hence service on infant defendants personally, whose parents are living and not interested adversely to them, whether they are of tender years or have nearly attained their majority, is irregular; and the appointment of a guardian *ad litem* on such service is premature and erroneous. *Hibbler v. Sprowl*, 71 Ala. 50.

Where the formalities are not all complied with the decree may be set aside. *Ivey v. Ingram*, 4 Coldw. (Tenn.) 129; *Swain v. Fidelity Ins. Co.*, 54 Pa. St. 455; *Girty v. Logan*, 6 Bush (Ky.) 8; *O'Hara v. McConnell*, 93 U. S. 150; *Stimson v. Pickering*, 70 Me. 273; *Roberts v. Stanton*, 2 Munf. (Va.) 129; *Crockett v. Drew*, 5 Gray (Mass.) 399.

If a decree be entered by the court, ordering a sale of the lands of infants, before a guardian *ad litem* is appointed for them, and before he files an answer for them, and under such decree the lands of infants be sold, and the sale be confirmed by the court, any one of these infants may within six months

entered.¹ An infant cannot be made a party to a bill for discovery, as he does not answer under oath.²

4. Validity of Judgments and Decrees.—When a decree in equity has been rendered against an infant, after a full hearing, where a guardian *ad litem* has appeared and answered and process has been duly served, it will not be reversed except for fraud, collusion, or some material error;³ but where there has been a defect

after he attains the age of twenty-one, appear in the suit, whether it be ended or not, and have these decrees reviewed and reversed, and on such a reversal of such decrees for this error the title of the purchaser of the land falls, and the parties must by proper proceedings by the court be put *in statu quo*. Hull v. Hull, 26 W. Va. 1. See also Ewing v. Ferguson, 33 Gratt. (Va.) 548.

In *Tennessee* a guardian may waive service on the infant. Scott v. Porter, 2 Lea (Tenn.) 224.

1. Decree Pro Confesso.—A guardian *ad litem* cannot admit away the rights of the infant; nor will a bill be taken *pro confesso* against the infant. Mills v. Dennis, 3 Johns. Ch. (N. Y.) 367; Enos v. Capps, 12 Ill. 255; Hamilton v. Gilman, 12 Ill. 260; Wells v. Smith, 44 Miss. 296; McIlvoy v. Alsop, 45 Miss. 365; Johnson v. McCabe, 42 Miss. 255; Walton v. Coulson, 1 McLean (U. S.) 120; Daily v. Reid, 74 Ala. 415; Jones v. Jones, 56 Ala. 612; Hooper v. Hardie, 80 Ala. 114; English v. Savage, 5 Oreg. 518; Tucker v. Bean, 65 Me. 352; Turner v. Jenkins, 79 Ill. 228; Burt v. McBain, 29 Mich. 260; Lane v. Hardwicke, 9 Beav. 148; Barker v. Hamilton, 3 Colo. 291; Thompson v. McDermott, 19 Fla. 852; Quigley v. Roberts, 44 Ill. 503; Rhoads v. Rhoads, 43 Ill. 239; Bank of U. S. v. Ritchie, 8 Pet. (U. S.) 128; Wright v. Miller, 8 N. Y. 9; Dow v. Jewell, 21 N. H. 470, 486; Greenwood v. New Orleans etc., 12 La. Ann. 426; Hanna v. Spotts, 5 B. Mon. (Ky.) 362; Cowan v. Anderson, 7 Coldw. (Tenn.) 191; Heath v. Ashley, 15 Mo. 393.

An infant cannot be compelled in equity to testify in a case in which he is a party, and the court may suppress his deposition freely given if it is unfavorable to his cause. Moore v. Moore, 4 Sandf. Ch. (N. Y.) 37; Serle v. St. Eloy, 2 P. Wms. 386. But see Bennett v. Welch, 15 Ind. 332.

An infant may at any time impeach a decree in favor of his guardian and prejudicial to him. Sledge v. Boone, 57 Miss. 222.

In foreclosure suits against an infant a guardian *ad litem* is always necessary. Stinson v. Pickering, 70 Me. 273.

An infant residing with its mother, who is a widow and a resident of another State, will not be presumed to have a guardian residing in this State, and in a suit against such infant for the purpose of foreclosing a mortgage on real estate situated in this State, it will be sufficient to state in the affidavit for service of notice by publication: "That said . . . are non-residents of the State of Nebraska, and that service of a summons cannot be made upon them in this State." Davis v. Huston, 15 Neb. 28.

When the defendants to a bill for foreclosure are some of them infants, it is irregular and erroneous to render a decree of sale without a prior reference to the register to ascertain and report whether the premises are susceptible of division, whether a sale of part only would not be sufficient, whether the interest of the infants requires a sale in parcels, and what parcel should be first sold. Boyle v. Williams, 72 Ala. 351.

2. Leggett v. Sellon, 3 Paige (N. Y.) 84.

3. Decrees Binding.—"An infant defendant is as much bound by a decree in equity against her as a person of full age; therefore, if there be an absolute decree against a defendant who is under age, she will not be permitted to dispute it, unless upon such grounds as an adult might have disputed it, as fraud, collusion or error. . . . She may either impeach the decree on the ground of fraud or collusion between the plaintiff and her guardian, or she may show error in the decree. She may also show she had grounds of defence which were not before the court or were not insisted on at the hearing; or that new matter has subsequently arisen upon which the decree may be shown wrong." Ralston v. Lahee, 8 Iowa 17; s. c., 74 Am. Dec. 291. Or that the merits of the case were not understood by the guardian *ad litem*. Curtis v. Ballagh, 4 Edw. Ch. (N. Y.) 635.

in the proceedings the infant may lose his rights by laches.¹ This rule is subject to the exception that in many jurisdictions an infant is allowed his day in court after he arrives at his majority to come in and show cause why the decree should not be made absolute. If he does not come in he is bound by the decree.²

In the case of a decree of foreclosure of a mortgage on property

And see further *Gregory v. Molesworth*, 3 Atk. 626; *Richmond v. T aylleur*, 1 P. Wms. 734; 1 Dan. Ch. Pr. *164.

Re Hogton, L. R., 18 Eq. 573; *Rivers v. Durr*, 46 Ala. 418; *In re Livingston*, 34 N. Y. 555; *English v. Savage*, 5 Oreg. 518; *McLemore v. Chicago etc. R. Co.*, 58 Miss. 514; *Waring v. Reynolds*, 3 B. Mon. (Ky.) 59; *Marshall v. Fisher*, 1 Jones (N. Car.) L. 111; *Smith v. McDonald*, 42 Cal. 484; *Wills v. Spraggin*, 3 Gratt. (Va.) 567; *Martin v. Weyman*, 26 Tex. 460; *Allman v. Taylor*, 101 Ill. 185; *Lloyd v. Kirkwood*, 112 Ill. 329; *Mutual Life Ins. Co. v. Schwamer*, 36 Hun (N. Y.) 373; *Simmons v. Goodell*, 63 N. H. 458; *Ashton v. Ashton*, 35 Md. 496. So a decree in favor of an infant plaintiff cannot be reopened by him except for fraud. *Johns v. Harper*, 61 Miss. 142; *Becton v. Becton*, 3 Jones Eq. (N. Car.) 419; *Zirkle v. McCue*, 26 Gratt. (Va.) 517; *Williamson v. Gordon*, 19 Ves. 114; *cf. Clark v. Platt*, 30 Conn. 382.

There is no appeal from a refusal to open a judgment. *Phillips v. Alleghany Co. R. Co. (Pa.)*, 3 Atl. Rep. 438.

1. *Walker v. Mulvean*, 76 Ill. 18; *Corwin v. Shoup*, 76 Ill. 246; *McMurray v. McMurray*, 60 Barb. (N. Y.) 117; *Wickersham v. Timmons*, 49 Iowa 267; *Waples v. Waples*, 3 Houst. (Del.) 458; *Mason v. Debow*, 1 Hay. (N. Car.) 178; *Townsend v. Cox*, 45 Mo. 401; *Lloyd v. Kirkwood*, 112 Ill. 329.

Where the record showed that a guardian *ad litem* was appointed in 1866, but no answer was filed for the infants and no effort made to assert their rights, but the infants delayed action until the youngest of them was twenty-four years old. It was held that the cause would not be opened to allow them to assert their rights, when it had proceeded to an end; and all that was necessary was a final decree.

Where the plaintiff was in possession and a suit for partition was progressing, and the infants, for a number of years after reaching majority, raised no

objection to the possession and made no defence to the proceeding. *Williams v. Williams*, 94 N. Car. 732. And see *Williamson v. Hartman*, 92 N. Car. 236.

Where judgment was confessed by the attorney, and it was allowed to stand for six years after the infant became of age, it was held that he had lost his right to set it aside. *Kemp v. Cook*, 18 Md. 130; s. c., 79 Am. Dec. 681. See, however, *Tiernan v. Hammond*, 41 Md. 548.

2. *Infant's Day in Court.*—*Kuchenbeiser v. Beckert*, 41 Ill. 172; *Seward v. Clark*, 67 Ind. 289; *Simpson v. Alexander*, 6 Coldw. (Tenn.) 619; *Wright v. Miller*, 1 Sandf. Ch. (N. Y.) 103; s. c., 59 Am. Dec. 447; *Waring v. Reynolds*, 3 B. Mon. (Ky.) 59; *Harris v. Youman*, Hoff. Ch. (N. Y.) 178; *Ralston v. Lahe*, 8 Iowa 17; s. c., 74 Am. Dec. 291; *Wilkinson v. Oliver*, 4 Hen. & Mun. (Va.) 450; *Coffin v. Heath*, 6 Met. (Mass.) 76; *Scottish Manitoba Investment etc. Co. v. Blanchard*, 2 Manitoba Rep. 154; *Dow v. Jewell*, 21 N. H. 470; *Mair v. Kerr*, 2 Grant (Up. Can.) 223; *Long v. Mulford*, 17 Ohio St. 484; *Moss v. Hall*, 79 Ky. 40; *Cox v. Story*, 80 Ky. 64.

The decree should contain a clause providing for the day in court in the following words: "And this decree is to be binding on the defendants, unless, on being served with subpoena, they shall, within six months after they shall attain the age of twenty-one, show unto this court good cause to the contrary." By the practice established under this rule, if the infant defendant is dissatisfied with the defence which has been made for him and wishes to make a new defence, he must, in general, wait until he has attained the age of twenty-one years, but, upon special circumstances shown, he may obtain leave to make a new defence during his infancy, and in such case, in order to bind him by the decree to be made, he will be treated as a complainant and be bound accordingly, with no right to show cause against the second

of an infant, the infant is allowed his day to show cause, but only for error in the decree, and he will not be then permitted to go into the accounts, or to redeem the mortgage by paying what is due.¹ The more usual practice, however, is not to foreclose but to sell the property, and in that case the sale is absolute without any day to show cause.²

There is a growing tendency to put judgments at law on the

decree. But, if such infant defendant wishes to impeach the decree on the ground of fraud, collusion or error, he may proceed by original bill without waiting to attain his majority. *McLe-more v. Chicago etc. R. Co.*, 58 Miss. 514.

But the court retains control over the method of attacking the decree. *Field v. Williamson*, 4 Sandf. Ch. (N. Y.) 613, where the VICE CHANCELLOR says: "I think the counsel err in the effect which they give to this provision of the decree. It does not permit him to assail the decree in any mode that he pleases, without regard to the course of practice pursued by the adult defendant. He cannot show cause except in some regular proceeding adapted to the nature of the case; and in order to institute such, he must first obtain the leave and direction of the court. Not that the court, in a case of any doubt, would refuse leave, but that there is a sound judgment and discretion to be exercised in each instance, both as to the probable cause for granting leave and the most expedient mode of effecting the object." The infant, however, need not wait until he is of age, but may apply for redress against the decree as soon as he sees fit. *Newland v. Gentry*, 18 B. Mon. (Ky.) 666; *Richmond v. Tayleur*, 1 P. Wms. 736.

If this clause is omitted, the decree may be set aside. *Beeler v. Bullitt*, 4 Bibb (Ky.) 11; *Wright v. Miller*, 4 Barb. (N. Y.) 600; *Townsend v. Cox*, 45 Mo. 401; *Coffin v. Heath*, 6 Met. (Mass.) 76.

The rule allowing an infant his day has been abrogated in some jurisdictions. *Phillips v. Dusenberry*, 8 Hun (N. Y.) 348; and it never applied to an infant trustee. *Walsh v. Walsh*, 116 Mass. 377.

Purchaser for Value.—A decree against an infant will not be set aside to affect the rights of a purchaser for value without notice who has acquired rights under it. *Bennett v. Hammill*, 2 Sch. & Lef. (Irish Ch.) 556; *Gronfier v. Puymirol*, 19 Cal. 629; *Joyce v. McAvoy*,

31 Cal. 273; *Sheldon v. Newton*, 3 Ohio St. 494; *Hare v. Holloman*, 94 N. Car. 14; *Lloyd v. Kirkwood*, 112 Ill. 329; and that is true, even though the decree itself may be reversed for error. *England v. Garner*, 90 N. Car. 107; *Allman v. Taylor*, 101 Ill. 185; *Wright v. Miller*, 1 Sandf. Ch. (N. Y.) 103; *Gwinn v. Williams*, 30 Ind. 374 (where the judgment was obtained by the guardian to defraud the infant).

So an infant is concluded by a decree enforcing a vendor's lien, though he had a title that his guardian failed to assert. *Cocks v. Simmons*, 57 Miss. 183.

Infant Plaintiff.—A decree need not give a day to infant complainants. *Jameson v. Moseley*, 4 Mon. (Ky.) 416; *McClay v. Norris*, 4 Gilm. (Ill.) 370, 383; *Brown v. Armistead*, 6 Rand. (Va.) 594; *Williamson v. Johnston*, 4 Mon. (Ky.) 255; *Becton v. Becton*, 3 Jones Eq. (N. Car.) 422; *Simpson v. Alexander*, 6 Coldw. (Tenn.) 619, 621; *Cannon v. Hemphill*, 7 Tex. 184, 201.

1. Foreclosure.—"In decrees of foreclosure against an infant there is, according to the old and settled rule of practice in chancery, a day given when he comes of age, usually six months, to show cause against the decree and make a better defence, and he is entitled to be called in for that purpose by process of subpoena." 1 Dan. Ch. Pr. *167 n; *Jackson v. Turner*, 5 Leigh (Va.) 119; *Mills v. Dennis*, 3 Johns. Ch. (N. Y.) 367; *Dow v. Jewell*, 21 N. H. 470, 491; *Coffin v. Heath*, 6 Met. (Mass.) 76.

The infant cannot redeem his property when it has once been foreclosed. *Mallack v. Galton*, 3 P. Wms. 352; *Williamson v. Gordon*, 19 Ves. 114; *Mills v. Dennis*, 3 Johns. Ch. (N. Y.) 367; *McClay v. Norris*, 4 Gilm. (Ill.) 370.

This rule, however, does not apply to cases where there has been fraud or collusion in obtaining the decree. 1 Dan. Ch. Pr. *172; *Loyd v. Mansell*, 2 P. Wms. 73.

2. Booth v. Rich, 1 Vern. 295; *Cooke*

same footing as decrees in equity, and to hold them binding where the infant has had full opportunity to make his defence, and infancy is regarded as a personal defence that may be waived, and whether the plea is set up or not, the judgment against an infant properly before the court is as obligatory on him as if he were of full age;¹ but in any event the judgment or decree cannot be set aside except by some direct judicial proceeding instituted for that purpose.²

VI. RESPONSIBILITY FOR CRIME.—An infant's responsibility for crime rests on his capacity to entertain a criminal intent. The law

v. Parsons, 2 Vern. 429; *Mills v. Dennis*, 3 Johns. Ch. (N. Y.) 367; *Smith v. Bradley*, 6 Sm. & M. (Miss.) 485; *Brown v. Armistead*, 6 Rand. (Va.) 594; *Creath v. Smith*, 20 Mo. 113; *Wilkinson v. Oliver*, 4 Hen. & Mun. (Va.) 450. And see *Hendricks v. McLean*, 18 Mo. 32, 45, where the court lays down the general rule: "That no day is given where the decree directs the sale of land to be made for the payment of debts, and the conveyance is not to be made by the infant. Where he is required to unite in the conveyance, or to make the conveyance, time is given him to show cause against the decree after his maturity." *Winston v. Campbell*, 4 Hen. & M. (Va.) 477; *Rogers v. Clark*, 4 Sneed (Tenn.) 468.

The court, however, has authority to set aside the sale and order a new one, where it is for the interest of the infant, and may do this on its own motion. *Lefevre v. Laraway*, 22 Barb. (N. Y.) 167; *Duncan v. Dodd*, 2 Paige (N. Y.) 99. And still more, where there is any fraud in the transaction the court will interfere. *Howell v. Mills*, 53 N. Y. 322.

1. "While the court will always be careful of the rights of infants, it will not, in all cases, set aside irregular judgments against them, as of course; it will not do so where it appears from the record, or otherwise, that the infant suffered no substantial injustice." *Syme v. Trice*, 96 N. Car. 243; *McCrosky v. Parks*, 13 S. Car. 90; *Phillips v. Dusenberry*, 8 Hun (N. Y.) 348; *Bickel v. Erskine*, 43 Iowa 213; *Morgan v. Thorne*, 7 M. & W. 400; *Fuller v. Smith*, 49 Vt. 253; *Rankin v. Kemp*, 21 Ohio St. 651; *Gottendorf v. Goldschmidt*, 83 N. Y. 110; *Richards v. Richards*, 10 Bush (Ky.) 617; *Pond v. Doneghuy*, 18 B. Mon. (Ky.) 558; *Marshall v. Fisher*, 1 Jones L. (N. Car.) 111; *Ludwick v. Fair*, 7 Ired. (N. Car.) 422; *Kemp v. Cook*, 18 Md. 130; and *cf.*

Cochran v. Violet, 37 La. Ann. 227. Equity may, however, interfere to set aside a judgment against an infant where the plaintiff has no equitable claim. *L'Amoureux v. Crosby*, 2 Paige (N. Y.) 422; s. c., 22 Am. Dec. 655.

"In the case of *Rawles v. State*, 56 Ind. 433, it was decided that the fact that a guardian *ad litem* had not been appointed for an infant defendant in a bastardy suit, was not sufficient ground for arresting the judgment therein." *De Priest v. State rel. Harris*, 68 Ind. 569.

It is to be noted, however, that a judgment will not be set aside if the infant has become of age before the judgment is entered, and therefore an affidavit that the defendant was an infant at the time of the filing of the answer was held insufficient. *Stupp v. Holmes*, 48 Mo. 89.

2. *Livingston v. Noe*, 1 Lea (Tenn.) 55; *Allman v. Taylor*, 101 Ill. 185; *Trapnall v. State Bank*, 18 Ark. 53; *Day v. Kerr*, 7 Mo. 426; *Lloyd v. Malone*, 23 Ill. 43; *Tucker v. Moreland*, 10 Pet. (U. S.) 59; *Martin v. Weyman*, 26 Tex. 460. But the infant can proceed for any matter not presented at the hearing. *Vaughan v. Hudson*, 59 Miss. 421.

So an infant cannot defend a suit on a judgment on the ground that the judgment was obtained against him while an infant. *Ludwick v. Fair*, 7 Ired. (N. Car.) 422; *Townsend v. Cox*, 45 Mo. 401. But see *Etter v. Curtis*, 7 W. & S. (Pa.) 170.

"To impeach a decree on the ground of fraud or collusion, the infant may proceed either by a bill of review or supplemental bill in the nature of a bill of review, or he may so proceed by original bill. He may also impeach a decree on the ground of error by original bill, and he is not obliged, for that purpose, to wait till he has attained twenty-one." *Dan. Ch. Pr.* *164.

regards children under seven years of age as conclusively incapable of committing crime.¹ Children above that age may be convicted for committing crime, but the law protects children between the ages of seven and fourteen who are accused of crime by requiring the prosecution to establish the capacity of the child to entertain a criminal intent by clear and strong proof.² As it is commonly put, there is a presumption that a child between the ages of seven and fourteen is *prima facie* incapable of committing crime, but this presumption may be rebutted.³ A person over fourteen is *prima facie* responsible for crime. It is commonly stated as an exception to the above rule, that a male infant under the age of fourteen is conclusively presumed incapable of committing rape, but it may be doubted whether this rule is law in America.⁴

1. 1 Hale, P. C. 27; 1 Hawk., P. C. 2; 1 Russell, Crimes 1; 1 Bishop, Cr. L., § 368; People v. Townsend, 3 Hill (N. Y.) 479; State v. Guild, 10 N. J. L. 163; Com. v. Mead, 10 Allen (Mass.) 398; State v. Goin, 9 Humph. (Tenn.) 175; Marsh v. Loader, 14 C. B., N. S. 535. This fixing of ages is wholly arbitrary, and perhaps the only real value of it is in ascertaining where the burden of proof lies. State v. Aaron, 4 N. J. L. 231; s. c., 7 Am. Dec. 592. These ages are changed by statute in some States, e. g.: "No person shall in any case be convicted of any offence committed before he was of the age of nine years, nor of any offence committed between the years of nine and thirteen, unless it shall appear by proof that he had discretion sufficient to understand the nature and illegality of the act constituting the offence." Paschal's Tex. Dig., art. 1638. See Wusnig v. State, 33 Tex. 651; State v. Barton, 17 Mo. 288; Angelo v. People, 96 Ill. 209; s. c., 36 Am. Rep. 132 (irresponsible up to ten years). In New York the age of responsibility is fixed at twelve. Penal Code, § 19. In California at fourteen, Penal Code, § 26.

2. State v. Learnard, 41 Vt. 585; Com. v. Mead, 10 Allen (Mass.) 398; Stephenson v. State, 28 Ind. 272; State v. Adams, 76 Mo. 355; State v. Tice, 90 Mo. 112; State v. Fowler, 52 Ia. 103; Carr v. State, 7 S. W. Rep. (Tex.) 328; Angelo v. People, 96 Ill. 209; s. c., 36 Am. Rep. 132; State v. Pugh, 7 Jones (N. Car.) 61. But see State v. Arnold, 13 Ired. L. (N. Car.) 184; Law v. Com., 75 Va. 885; s. c., 40 Am. Rep. 750. "When the prosecution satisfies the jury that the infant, at the time he committed the offence, knew it was wrong, and was aware of his legal re-

sponsibility for the commission of the crime, the legal presumption of his innocence on account of his tender years no longer exists; but in absence of such proof the legal presumption must produce an acquittal." Willet v. Com., 13 Bush (Ky.) 230 (perjury); Parker v. State, 20 Tex. App. 451; Reg. v. Adams, 1 New Zeal. L. R. (Ct. App.) 311. And see State v. Toney, 15 S. Car. 409; which holds that independent evidence of capacity is not essential.

3. Godfrey v. State, 31 Ala. 323; State v. Bostick, 4 Harr. (Del.) 563; Irby v. State, 32 Ga. 496; Hill v. State, 63 Ga. 578; s. c., 36 Am. Rep. 120; State v. Goin, 9 Humph. (Tenn.) 175; Stage's Case, 5 City H. Rec. 177.

4. The rule of the English law is based on the assumption that a boy under fourteen is physically undeveloped, and therefore incapable of committing rape. The rule as first adopted in Ohio is, that whether a boy is physically capable of committing rape is a question of fact depending on climate, and in countries where boys develop early, a boy under fourteen may be entirely capable of committing rape. The fact of puberty may be shown and the presumption rebutted. Williams v. State, 14 Ohio 222; s. c., 45 Am. Dec. 536. The burden is on the State to prove capacity for the crime. Hiltabiddle v. State, 35 Ohio St. 55; s. c., 35 Am. Rep. 592; Wagoner v. State, 5 Lea (Tenn.) 352; s. c., 40 Am. Rep. 36; State v. Jones, 3 S. Rep. (La.) 57. But see *contra* that the presumption is conclusive. Reg. v. Phillips, 8 Car. & P. 736; State v. Handy, 4 Harring. (Del.) 566; Williams v. State, 20 Fla. 777; Stephen v. State, 11 Ga. 225. It has been held that a boy under fourteen

An infant accused of crime does not defend by guardian, as in civil process.¹ His confessions may be used against him,² but his minority must be clearly made out.³ He cannot plead that the crime was committed at the command of his parent or guardian;⁴ when illegally imprisoned his remedy is *habeas corpus*.⁵

An infant is liable to bastardy process.⁶ He is bound by his recognizance to appear.⁷

See also vol. 1, p. 327, AGE, IN CRIMINAL LAW, and vol. 4, p. 683, CRIMINAL LAW, V. Capacity to commit crime—(2). Infancy.

INFANTICIDE.—See HOMICIDE.

INFECTIOUS ANIMALS.—See ANIMALS; HEALTH; QUARANTINE.

INFER.—See note 8.

may be convicted of an attempt to commit rape. *Com. v. Green*, 2 Pick. (Mass.) 380; *People v. Randolph*, 2 Parker Cr. (N. Y.) 174. See *contra* *State v. Sam.*, 1 Winst. (N. Car.) 300.

1. *Word v. Com.*, 3 Leigh (Va.) 473.

2. *Carr v. State*, 7 S. W. Rep. (Tex.) 328. In *State v. Guild*, 10 N. J. L. 163; s. c., 18 Am. Dec. 404, a boy of twelve years of age was convicted of murder on his own confession, with imperfect corroboration by circumstantial evidence. See *State v. Bostick*, 4 Harr. (Del.) 563; *State v. Aaron*, 4 N. J. L. 231; s. c., 7 Am. Dec. 592.

3. The infant may testify to his own age. *Cheever v. Congdon*, 34 Mich. 206; *State v. Cain*, 9 W. Va. 559; *Watson v. Brewster*, 1 Pa. St. 381 (*semble*); *Hill v. Eldridge*, 126 Mass. 234. The opinion of medical experts is admissible. *State v. Smith*, Phill. L. (N. Car.) 302; but the age must be made out by sworn testimony, and the jury cannot judge on inspection. *Stephenson v. State*, 28 Ind. 272; *Morse v. State*, 6 Conn. 9. See *contra* that the jury may judge on inspection. *State v. Arnold*, 13 Ired. (N. Car.) 184; *People v. Townsend*, 3 Hill (N. Y.) 479.

4. *People v. Richmond*, 29 Cal. 414. But see *Com. v. Mead*, 10 Allen (Mass.) 398; *Humphrey v. Douglass*, 10 Vt. 71; *State v. Learnard*, 41 Vt. 585.

5. *Cathing v. State*, 62 Ga. 243.

6. *Chandler v. Com.* 4 Met. (Ky.) 66.

7. *State v. Weatherwax*, 12 Kan. 463; *Fagin v. Goggin*, 12 R. I. 398.

Books Consulted in the Preparation of This Article.—Schouler, *Domestic Relations* (3rd ed.) 1882; Field, *Law of Infants* (1st ed.) 1888; Tyler, *Infancy*

and *Coverture* (2nd ed.) 1882; Ewell's *Leading Cases on Infancy* (1st ed.) 1876; Eversley, *Domestic Relations* (1st ed.) 1885; Reeves, *Domestic Relations* (2nd ed.) 1888; Bishop, *Marriage and Divorce* (6th ed.) 1881; Perry on *Trusts* (3rd ed.) 1882; Lewin on *Trusts* (8th ed.) 1885; Schouler, *Executors and Administrators* (2nd ed.) 1889; Williams on *Executors* (6th Am. ed.) 1877; Daniells, *Chancery Practice* (5th Am. ed.) 1879; Jones on *Mortgages* (4th ed.) 1889; Thomas on *Mortgages* (2nd ed.) 1887; Parsons on *Contracts* (7th ed.) 1883; Wharton on *Contracts* 1882; Benjamin on *Sales* (5th Am. ed.) 1888; Pollock on *Contracts* (Wald's ed.) 1885; Randolph on *Commercial Paper* 1886; Lindley on *Partnership* (2nd Am. ed.) 1888; *Same* Rapalje's ed. 1888; *Same* Wentworth's Notes 1888; Story on *Agency* (7th ed.) 1882; Morawetz on *Corporations* (2nd ed.) 1886; Waterman on *Corporations* 1888; Taylor, *Private Corporations* (2nd ed.) 1888; Cook, *Stock and Stockholders* 1887; Hawes, *Parties to Actions* 1884; Barbour on *Parties* (2nd ed.) 1884; Freeman on *Judgments* 1881; Bishop, *Criminal Law* (7th ed.) 1882; Cooley on *Torts* (2nd ed.) 1888; Shearman and Redfield on *Negligence* (4th ed.) 1888; Bigelow on *Estoppel* (4th ed.) 1886; Herman on *Estoppel and Res Adjudicata* 1886; Greenleaf on *Ev.* (14th ed.) 1883.

8. "We think the judge made the maxim [the law never presumes fraud] more misleading by substituting the word 'inferred' for 'presumed.' The former is a stronger word than the latter (in connection with the words 'cannot') for the purpose of excluding indirect evidence. To infer is derived from the Latin *inferre*, compounded of 'in,'

INFERENCE.—A deduction or conclusion from facts or propositions known to be true.¹

INFERIOR COURTS.—(See COURTS, vol. 4 p. 453).—The technical meaning of this term is courts of special and limited jurisdiction, which are erected on such principles that their judgments taken alone are entirely disregarded, and whose proceedings must show their jurisdiction. The expression is also used as synonymous with courts not of record. In American constitutional law the term also applies to courts from which an appeal or writ of error lies to a higher court.²

from, and '*ferre*,' to carry or bring, and its strict meaning is to bring a result or conclusion from something back of it, that is, from some evidence or data from which it may be logically deduced. But to presume is from the Latin *præsumere*, consisting of '*præ*,' before, and '*sumere*,' to take, and signifies to take or assume a matter beforehand, without proof—to take for granted.

"We do not suppose jurors would weigh these words in the light of such a verbal criticism, but we know of no better way to illustrate the substantial difference in the impression which these two words are calculated to make on the common mind." *Morford v. Peck*, 46 Conn. 385.

1. *Gates v. Hughes*, 44 Wis. 336. An inference is something inferred from precedent matter, separated from which it is a mere absurdity in language. There may be precedent matter and no inference, but there can be no inference without precedent matter; they must stand together, and cannot be separated. *Chambers v. Hunt*, 3 Harr. (N. J.) 354.

When the facts themselves are directly attested, the jury may *deduce*, or *infer*, or *presume* from them the truth or falsity of the main proposition; and the principal question may be thereby determined in the affirmative or in the negative, as the conclusion may necessarily follow the attested premises. *Gates v. Hughes*, 44 Wis. 336.

2. The rule for jurisdiction is that nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged. *Peacock v. Bell*, 1 Saund. 73 & ns.; *Yates v. Lansing*, 7 Johns. (N. Y.) 407; *Chemung Canal*

Bank v. Judson, 8 N. Y. 259. And see the distinction recognized in 1 Bl. Com. 207; 3 Bl. Com. 23.

All courts from which an appeal lies are inferior courts, in relation to the appellate court, before which their judgment may be carried; but they are not therefore inferior courts in the technical sense of those words. They apply to courts of special and limited jurisdiction, which are erected on such principles that their judgments taken alone, are entirely disregarded, and the proceedings must show their jurisdiction. *MARSHALL, C. J.*, in *Kempe's Lessee v. Kennedy*, 5 Cranch (U. S.) 185. The inferior courts of the United States are all of limited jurisdiction, but they are not therefore inferior courts in the technical sense of those words, whose judgments, taken alone, are to be disregarded. *McCormick v. Sullivan*, 10 Wheat. (U. S.) 199; *Ex parte Watkins*, 3 Pet. (U. S.) 103; *Kennedy v. Ga. St. Bank*, 8 How. (U. S.) 611; *Ruckman v. Cowell*, 1 N. Y. 507. Circuit courts are not inferior courts in the technical sense of the books, but they are so in some respects. They are subordinate to the supreme court, and their jurisdiction is special and limited both in regard to the nature of the cases on which they can decide and the nature of the parties who may come into them. *Livingston v. Van Ingen*, 1 Paine (U. S.) 48.

"A preliminary question is: What is meant in this constitution by the term 'inferior courts'? The relator's argument is largely based upon what counsel suppose to be the common law definition of an inferior court, which always means a court which is not one of the four great courts of the realm; that is, the court of chancery and the three great common law courts sitting at Westminster. *Tomlyn, Law Dict.*

"Another less accurate distinction is found in the distinction between courts

INFIDEL—INFIRMARY—INFIRMITY—INFLICT.

INFIDEL—(See WITNESS).—One who does not believe the Christian religion.¹

INFIRMARY.—See note 2.

INFIRMITY.—A disease; a malady; feebleness.³

INFLICT.—See note 4.

of record, whose records establish themselves and are valid judgments in themselves, and courts not of record, proceeding under special conditions whose jurisdiction is not presumed. . . .

"An American constitutional use of the word refers to relative rank and authority, and not to intrinsic quality." *Swift v. Judges of Wayne Circ. Ct. (Mich.)*, 7 West Rep. 800. And see *Davey v. B. C. R. & M. R. R. Co.*, 10 Wis. 553.

"What tests are to be applied in determining the question of inferiority? It may be solved by showing that the court is either placed under the supervisory or appellate control of those named, or that the jurisdiction conferred upon it is limited and confined. Conceding that the act in question does not place the court which creates it under the supervisory control of the circuit court, and only allows appeals and writs of error to be prosecuted directly to the supreme court, yet it will still be an inferior tribunal if its jurisdiction is limited and inferior. General jurisdiction is that which extends to a great variety of matters. Limited jurisdiction, also called specific and inferior, is that which extends only to certain specified causes." *State v. Daniels*, 66 Mo. 200.

"All courts from which an appeal or writ of error lies are inferior courts in relation to the court before which their judgments may be carried and by which they may be reviewed, annulled or affirmed. It is in this latter sense that the framers of our constitution used the words inferior courts. They meant thereby courts whose judgments could be reviewed and their errors corrected by another and a higher tribunal." *Nugent v. State*, 18 Ala. 524; *Ex parte Roundtree*, 51 Ala. 42; *Saunders v. State*, 35 Ala. 42.

"A tribunal which is not a common law court, which does not proceed according to the course of the common law, a newly created, limited and special jurisdiction from which no appeal is allowed by statute, nor writ of error by the common law, yet determining in a summary way the most important

rights and franchises, both as respects the people and private persons, is and cannot be otherwise than an inferior tribunal in the strictest sense of the word." A board of supervisors of elections is such within the meaning of an act giving circuit courts supervision and control of proceedings before inferior tribunals. *Cunningham v. Squires*, 2 W. Va. 422; s. c., 98 Am. Dec. 770.

1. *Omichund v. Barker*, Willes 541. And see *Hale v. Everett*, 53 N. H. 57. "The 'infidel' is one who does not recognize the inspiration or obligation of the Holy Scriptures, or the generally recognized features of the Christian religion. The 'atheist' is one who does not believe in the existence of a God." In an action upon an insurance policy it is not competent to show that the deceased was an infidel in order to draw the inference of suicide. *Gibson v. American Mut. Life Ins. Co.*, 37 N. Y. 580.

2. In a contract by physicians to prescribe for and attend the inmates of the county infirmary, the infirmary may consist of several buildings. *Johnson v. Santa Clara Co.*, 28 Cal. 545.

3. Webster quoted in *Collins v. State*, 24 Tex. App. 149; s. c., 5 S. W. Rep. 850. In this case it was held that a statute providing that the written testimony of a witness, taken at the examining trial of the accused, can be read in evidence when he by reason of bodily infirmity cannot attend, does not require a permanent infirmity. A witness who had been left a chronic invalid by an attack of measles, was held to be suffering from an infirmity within the meaning of the act.

4. 'InFLICT' does not necessarily imply direct violence. There is no more appropriate use of the word 'inFLICT' than in connection with punishment, and to 'inFLICT punishment' clearly includes imprisonment and involuntary restraint, as well as hanging, beheading and whipping. We can have no doubt that any bodily harm which is caused to be suffered by the act of the accused is an 'injury inFLICTed' within the meaning of the statute. *Com. v. Macloon*, 101 Mass. 23.

INFORMATION (Criminal).—See CRIMINAL LAW; CRIMINAL PROCEDURE; QUO WARRANTO.

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| <p>I. Definition. Criminal Information, 702.</p> <p>II. Source, 702.</p> <p>III. When Information Lies, 702.</p> <p>1. <i>Right to File Information</i>, 703.</p> <p>2. <i>Constitutional and Statutory Prohibitions Against Informations</i>, 703.</p> | <p>IV. Forms of Information, 706.</p> <p>1. <i>Signature and Verification</i>, 707.</p> <p>2. <i>Conclusion</i>, 707.</p> <p>3. <i>Sufficiency</i>, 708.</p> <p>4. <i>Amendment</i>, 709.</p> <p>V. Information in nature of Quo Warranto, 709.</p> |
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I. Definition—Criminal Information.—An information is an accusation or complaint exhibited against a person for some criminal offence. It differs from an indictment principally in that in an indictment the facts constituting the offence are presented to the court upon the oath of a grand jury, whereas in informations the facts are presented by way of suggestion or information upon the oath of some authorized public officer.¹

Information is also a proper remedy in certain civil and *quasi* civil proceedings as well as in those which are strictly criminal.²

II. Source.—Prosecution by information is founded on the common law.³

III. When Information Lies.—All public misdemeanors which may be prosecuted by indictment may be prosecuted by information in behalf of the commonwealth, unless the prosecution be

1. Bacon's Abridg., Information; Cole on Informations 1; 2 Hawk. P. C., ch. 26; 1 Chit. Crim. Law 841; Archbold's C. P. 66; BURNS, Justice, tit. Information.

An information resembles not only an indictment in the correct and technical description of the offence, but also in actions *qui tam*, in which the informer must show the forfeiture and its appropriation, or at least the proportion given him by statute. Com. v. Messenger, 4 Mass. 465.

A justice of the peace cannot hold one to bail for an offence which may by law be prosecuted by information *qui tam*, as well as indictment. Com. v. Cheyney, 6 Mass. 347.

An information may be had against a justice of the peace for taking a recognizance with insufficient sureties. *Respublica v. Burns*, 1 Yeates (Pa.) 370.

A felony cannot be prosecuted by information. Com. v. Barrett, 9 Leigh (Va.) 665.

The affidavit of a private individual is not an information and will not therefore support a prosecution for crime. *State v. Kelm*, 79 Mo. 515.

But where an indictment has been quashed because of insufficient aver-

ments, the district attorney may proceed by information against the same person for the same offence. *United States v. Nagle*, 17 Blackf. (U. S. C. C.) 258.

2. Bish. Crim. Proc., § 141.

Information is a proper remedy for unauthorized possession of lands of the State. *Queen v. Hughes*, L. R., 1 P. C. App. 81; Com. v. Heite, 6 Leigh (Va.) 588; *Queen v. Blagden*, 10 Mod. 296. And against an importer for the duties on smuggled goods. *United States v. Lyman*, 1 Mason (U. S.) 482. And where a statute imposes certain fines, one-half to be paid to the informer. *State of Texas v. Gargia*, 38 Tex. 543. See *Ward v. Tyler*, 1 Nott & McC. (S. Car.) 22.

3. "There can be no doubt that this mode of prosecution by information (or suggestion) filed on record by the king's attorney general, or by his coroner or master of the crown office in the court of king's bench, is as ancient as the common law itself." 4 Black. Com. *309.

As to origin and history of informations see *Pryme's Case*, 5 Mod. 459; *Rex v. Berchet*, 1 Show. 106; Bacon's Abridg., Information; Cole on Information *2 *et seq.*; 4 Black. Com. *310.

restrained by the statute to indictment.¹ But it may not be exhibited for treasons, felonies, or misprision of treason.²

1. *Right to File Information.*—In England informations may be filed by the attorney general, *ex officio*, upon his own discretion, without any leave of the court. During a vacancy in that office they may be filed by the solicitor general.³ In the United States the district attorneys have a right to prosecute by information as a right inherent in their office without leave of court.⁴

2. *Constitutional and Statutory Prohibitions Against Proceedings by Information.*—The provision in the constitution of the United

As to the powers and practice of the attorney general and other officers in filing informations see *Rex v. Wilkes*, 4 Burr. 2527; *Wilkes v. Rex*, 4 Bro. P. C. 360; *Rex v. Phillips*, 3 Burr. 1564; *Rex v. Plymouth*, 4 Burr. 2089; *Rex v. Robinson*, 1 W. Bl. 541; *Rex v. Joleffes*, 2 T. R. 190.

The statute 4 and 5 W. & M. 18, enacted that the clerk of the crown shall not file any information without express direction from the court of king's bench. 4 Black. Com. *311; *Rex v. Brooke*, 2 T. R. 190. This statute is said to have been in force in *Maryland*. *Killy Rep. Stat.* 180. But not in *Alabama*. *State v. Moore*, 19 Ala. 520. It is doubtful if the statute is common law in the United States. *Bish. Crim. Proc.*, § 143. See *Com. v. Varner*, 2 Va. Cas. 62; *Com. v. Ayres*, 6 Gratt. (Va.) 668.

1. *Com. v. Waterborough*, 5 Mass. 259; *Troy's Case*, 1 Mod. 5.

"I think it cannot be doubted that a criminal information is a criminal cause or matter; it only differs in mere form from an indictment." Per *COLERIDGE*, C. J., *Queen v. Steel*, L. R. 2, Q. B. D. 40.

It lies at common law to prevent the usurpation for private franchise. *Com. v. Arreson*, 15 St. R. (Pa.) 130; *Chambers v. Baptist Educational Society*, 1 B. Mon. (Ky.) 215; *Com. v. Lex*, 6 B. Mon. (Ky.) 397; *Com. v. City of Frankfort*, 13 Bush (Ky.) 185.

2. *Cole on Information* *9; 2 Hawk., ch. 26, § 3; *Cush. Pl. & Ev.*, C. C. 69; *Bacon's Abridg.*, Information; *Com. v. Barrett*, 9 Leigh (Va.) 665.

"In *England*, when the application is by a private person the court will not always grant it, though an indictment would lie. *Ex parte Cransby*, 8 Cas. C. C. 356; *Rex v. Peach*, 1 Burr. 548; *Reg. v. Marshall*, 4 Ellis & B. 475; *Rex v. Smithson*, 4 B. & Atl. 861; 1 Nev. & M. 775; *Anonymous*, Lofft

155; *Rex v. Morgan*, 1 Doug. 314. But this sort of information is not known—or not generally—in the American practice.

Our prosecuting officers will grant informations more freely than the English attorney generals, and more freely in some States than in others. . . . yet their discretion will present more or less practical obstacles." 1 *Bish. Crim. Proc.*, § 141, n. 7. See *Atty. Gen. v. Ewart Brewing Co.*, 34 Mich. 462; *Bish. Crim. Law*, §§ 246, 266, 258, 688; *Reed v. C. O. Canal*, 65 Me. 132. See *Quo Warranto*.

3. *Cole on Information*; *Rex v. Phillips*, 3 Burr. 1654; *Rex v. Mayor of Plymouth*, 4 Burr. 2089; *Wilkes v. King*, 4 Bro. P. C. 360; 4 Burr. 2553. They may also be filed by the queen's coroner and attorney (commonly called the master of the crown office); but not without previous leave of the court of queen's bench, given in open court, and a recognizance being entered into by the prosecutor, pursuant to statute. *Cole on Inform.* 2. But in practice the attorney general seldom exhibits an information unless so directed by one of the house of parliament, the lords of the treasury, or the commissioners of some public department. *Cole on Inform.* 9.

4. 1 *Bish. Crim. Proc.*, § 144; *Respublica*, *Griffith*, 2 Dall. (Pa.) 112; *State v. Dover*, 9 N. H. 468.

By Whom Made.—An information is the official act of the state's attorney, and not the act of the person upon whose affidavit it is made: and it must clearly appear on the face of the information that the charge against the accused is preferred by the attorney. *Prophit v. State*, 12 Tex. App. 233; *Thompson v. State*, 15 Tex. App. 39; *Johnson v. State*, 17 Tex. App. 230.

A justice of the peace cannot hold one to bail for an offence which may by law be prosecuted by information *qui*

States, that "no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury,"¹ except in certain cases, applies only to prosecutions

tam as well as indictment. *Com. v. Cheney*, 6 Mass. 347.

As to informations *qui tam*, see *Ketland v. Cassius*, 2 Dall. (U. S.) 365; *Merriam v. Langdon*, 10 Conn. 461; *State v. Garcia*, 38 Tex. 543.

1. Const. U. S., amend. article 5. In *United States courts*. An offence against the laws of the United States, which is of a character not capital or infamous, may be prosecuted in the courts of the United States by an information according to the course of the common law. *United States v. Sheppard*, 1 Abb. U. S. Rep. 431; *U. S. v. Maxwell*, 3 Dill. (U. S.) 275; 21 Int. Rev. Rec. 148; *U. S. v. Waller*, 1 Sawy. (U. S.) 701; *Stockwell v. U. S.* 13 Wall. (U. S.) 531; *United States v. Isham*, 17 Wall. (U. S.) 496; *United States v. Mann*, 1 Gall. (U. S.) 3; *United States v. Block*, 4 Sawy. (U. S.) 211; *United States v. Miller*, 3 Hughes (U. S.) 553; *United States v. Gates*, 6 Fed. Rep. 861; *Re Wilson*, 18 Fed. Rep. 33.

"I have no doubt that an information, although in the remote past it was used as an instrument of oppression, would, if authorized by congress, be a constitutional and lawful proceeding for the prosecution of offences of the grade of misdemeanor and not infamous; and the practice and precedents in the federal courts seem to me to favor such a proceeding as legal, without express enactment authorizing it, in cases directly affecting the public service, and such an information corresponds, in my judgment, to that class of informations which the attorney general in England would file *sua sponte*, and would be filed in this country by the district attorney." Per Cox, J., *U. S. v. Brady*, 3 Crim. Law Mag. (Sup. Ct. Dist. of Col.) 73.

Offences Not Infamous.—Offences arising under the revenue laws being misdemeanors merely, and not "infamous," may be prosecuted by information filed by the district attorney. *U. S. v. Ebert*, 1 Cent. Law Jour. 205; *U. S. v. Buzzo*, 18 Wall. (U. S.) 125.

A bankrupt who makes a wilful and fraudulent omission from his inventory of some of his assets, contrary to the bankruptcy statute, may be prosecuted by information. *U. S. v. Block*, 4

Sawy. (U. S.) 211; 15 Nat. Bank Reg. 325.

The violation of the statute of the United States prohibiting any person who has been removed from the Indian country from returning thereto may be punished by information. *U. S. v. Howard*, 17 Fed. Rep. 638.

Where congress has reduced a crime from the grade of infamous to that of a misdemeanor the offender may be prosecuted by information. *U. S. v. Cross*, 1 McArth. (D. C.) 149. And all crimes and offences committed against the election franchise which are not infamous may be prosecuted either by indictment or information filed by a district attorney. *U. S. Rev. Stat.*, § 1022.

The following offences against the United States have been held not to be infamous and may be prosecuted by information: Stealing from the mail. *U. S. v. Wynn*, 3 McCrary (U. S.) 266. A conspiracy to make counterfeit coin. *U. S. v. Burgess*, 3 McCrary (U. S.) 278. Embezzlement. *U. S. v. Reilley*, 20 Fed. Rep. (C. C. Nev.) 46. Passing counterfeit money. *U. S. v. Field*, 21 Blatchf. (C. C.) 330. Embezzling a letter in postal custody which has a valuable thing enclosed. *U. S. v. Baugh*, 4 Hughes (U. S.) 501.

Infamous Crimes.—Conspiracy has been held to be infamous and cannot be prosecuted by information. *United States v. Butler*, 4 Hughes (U. S.) 512. See *United States v. Blackburn*, 1 N. Y. Weekly Dig. 276.

In *United States v. Waddell*, 112 U. S. 76, it was said to be a very serious question whether the crime (sec. 5508, Rev. Stat.) of conspiracy "to injure or oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the United States, or because of his having so exercised the same," etc., etc., is not an infamous one by the language of the statute, and cannot, therefore, be prosecuted on information.

A crime punishable by imprisonment in a state prison or penitentiary, with or without hard labor, is an infamous crime, within the provision of

by the United States.¹ In some of the States there are constitutional prohibitions against proceeding by information in any case where an indictment lies;² in others the restriction is limited to cases of infamous crimes.³

the fifth amendment of the constitution that "No person shall be made to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury," and, therefore, cannot be prosecuted by information in any court of the United States. *Mackin v. United States*, 117 U. S. 350; *Ex parte Wilson*, 114 U. S. 417; *United States v. Tod*, 25 Fed. Rep. 815.

In prosecuting an information to enforce a seizure, under the act of August 6, 1861, declaring private property used in promoting insurrection to be "lawful subject of prize and capture," issues of fact should be submitted for a trial by jury according to the course of the common law. *United States v. Athens Armory*, 2 Abb. U. S. Rep. 129.

It is not necessary that a criminal information should show either that the defendant has been held to answer the charge on complaint before a commissioner, or that the charge had been found true by a grand jury. *U. S. v. Moller*, 16 Blatchf. (U. S.) 65. See *U. S. v. Renzone*, 14 Blatchf. (U. S.) 69.

Under Revenue Laws.—See *U. S. v. Twenty-eight Packages*, Gilp. (U. S. D. Ct.) 306; *U. S. v. A Package of Wool*, Gilp. (U. S. D. Ct.) 349.

Admiralty—Seizure Essential to Jurisdiction.—In cases of information an actual seizure of the *res* prior to the filing of the libel is essential to the jurisdiction of the court. *The Tug May*, 6 Biss. (U. S.) 243. And such precedent seizure must be averred in the libel. *The Lewellen*, 4 Biss. (U. S.) 156.

In revenue or instance causes the circuit court may, upon appeal, allow the introduction of a new allegation into the information by way of amendment. *The Edward*, 1 Wheat. (U. S.) 261.

See generally *Schooner Bolivia and Cargo*, 1 Gall. (U. S.) 75; *Schooner Harmony*, 1 Gall. (U. S.) 125; *The Sarquel*, 1 Wheat. (U. S.) 9; *The Emily*, 9 Wheat. (U. S.) 381; *The Merino*, 9 Wheat. (U. S.) 391; *The Palmyra*, 12 Wheat. (U. S.) 13; *Schooner Hopeful v. United States*, 7 Cr. (U. S.) 389; *Brig Caroline v. United States*, 9 Cr. (U. S.) 497.

1. In State Courts.—"The provisions in the constitution, as first reported, and

the amendments, all have reference solely to trials in the courts of the United States." Per REDFIELD, J., *State v. Keyes*, 8 Vt. 63. They do not restrict the States in the prosecution of capital or infamous crimes, to the common law indictments. *Noles v. State*, 24 Ala. 672; *State v. Jackson et al.*, 21 La. Ann. 574; *State v. Anderson*, 30 La. Ann. 557; *State v. Shumbert*, 1 Richards (S. Car.), N. S., 85; *State v. Cowan*, 29 Mo. 339.

2. No person shall for any indictable offence be proceeded against criminally by information except in cases arising in the land or naval forces or in the militia when in actual service in time of war or actual danger. Const. of Ky., art. 13, § 13; Const. of Del., art. 1, § 8; Const. of Ala., art. 1, § 9; Const. of Pa., art. 1, § 10; Const. of Miss., art. 1, § 31. Or (in *Pennsylvania, Kentucky, Alabama and Mississippi*) by leave of the court for misdemeanor or oppression in office. In *Alabama and Mississippi* the legislature may dispense with a grand jury in certain cases of petit crimes. Const. of Ala., art. 1, § 9; Const. of Miss., art. 1, § 3. Proceeding by way of information is said to be abolished by the constitution of *South Carolina*. *State v. Mitchell*, 1 Bay. (S. Car.) 267. See *Cleary v. Delieesseline*, 1 McCord (S. Car.) 35.

3. In *New York* the restriction applies only to a capital or other infamous crime. Const. of U. S. (1889) art. 1, § 6. In *Vermont* state's attorney may prosecute by information all crimes except those punishable by death or imprisonment more than seven years. Rev. Stat. Vt., ch. 86, § 1618. In *New Hampshire* any offence, the punishment for which may be death or imprisonment for more than one year, is triable only by indictment. Gen. Laws N. H., ch. 260, § 1.

In what cases information may be the basis of criminal prosecution:

Indiana.—See *Hennly v. State*, 74 Ind. 99; *Lindsey v. State*, 72 Ind. 40; *Davis v. State*, 69 Ind. 130. In *Georgia*, *Groves v. State*, 73 Ga. 205. In *California* there is no restriction on proceedings by information. *People v. Carlton*, 57 Cal. 551.

IV. Forms of Information.—Except the formal beginning and close, the structure of an information is the same as that of an indictment, and the substantial parts should be drawn as exactly and nicely as the corresponding parts of an indictment for the same offence. The same rules applicable to indictments apply to informations in determining their sufficiency.¹

In *Connecticut* the statute requires an indictment by a grand jury only in cases where the crime is punishable with death or imprisonment for life; the practice is to summon a grand jury in such cases only, and in all other cases to proceed to trial on the complaint of a single grand juror, or the information of an attorney for the state. 2 Swift's Dig., Laws of Conn. 370. The same practice prevails in *Michigan*. 1 Bish. Crim. Proc., § 144; Campbell, Political Hist. of Mich. 162, 163.

In *Massachusetts* criminal prosecution may be by information when expressly authorized by statute; in cases before police justices and in courts martial. Rev. Stat. of Mass., § 1022.

In *Louisiana* the prosecution of all except capital offences may be by information. State v. Hoods, 31 La. An. 267; State v. Anderson, 30 La. An. 557; State v. Newton, 30 La. An. 1253; and the State has the right to prosecute by indictment or information, but cannot prosecute by both at the same time. State v. Ross, 14 La. An. 364.

In *New Hampshire* informations may be filed at any regular term of the court by the attorney general or the solicitor in his absence, at their discretion, in all cases of offences and misdemeanors, excepting in capital cases or other infamous crimes. State v. Dover, 9 N. H. 468; State v. Ingalls, 59 N. H. 88.

In *Arkansas* under the provisions of the constitution of the State there can be no criminal prosecution in the circuit court by information, except for the removal of county officers from office. Texas & St. Louis R. R. v. State, 41 Ark. 488.

See generally People v. Whipple, 9 Conn. (U. S.) 707; Com. v. Shave, 3 W. & S. (Pa.) 338; Reddish v. State, 4 Tex. App. 32; Rex v. Hickman, 1 Wood C. C. 34.

The Fourteenth Amendment.—The fourteenth amendment to the constitution of the United States, which declares that no State shall "deprive any

person of life, liberty or property *without due process of law*," was not designed and does not have the effect to prevent the States from punishing felonies by criminal informations without presentment or indictment by a grand jury; but as respects the punishment of crimes, the amendment merely requires that this shall be effected through courts of justice by regular judicial proceedings therein previously prescribed by law. Rowan v. State, 30 Wis. 131.

But in *Maine*, it was held that a commitment to a workhouse by the *ex parte* determination of two overseers of the poor was not due process of law, and was in violation of the 14th amendment. City of Portland v. City of Bangor, 65 Me. 120. See also as to due process of law, Sears v. Cottrell, 5 Mich. 251; Brown v. Commissioners, 50 Miss. 468. And where by the general laws of the State persons charged with certain offences of the grade of misdemeanor must be proceeded against criminally by indictment, it was held that the legislature may grant to municipal corporations the power to ordain that persons charged with such offences may be proceeded against criminally by information. State v. Cowan, 29 Mo. 330.

1. See INDICTMENT. State v. Elliott, 41 Tex. 224; Cooley, Black Com. 310; Whart. Crim. Plead. & Prac., § 87; Bishop, Crim. Proc., § 147; Enders v. People, 20 Mich. 233; People v. Olmstead, 39 Mich. 357; Vogel v. State, 31 Ind. 64; Gallagher v. People, 120 Ill. 179; Dyer v. State, 85 Ind. 525; Autle v. State, 6 Tex. App. 202; Leatherwood v. State, Tex. App. 244; McJunkins v. State, 20 Ind. 140; Watson v. State, 38 Tex. 548.

An information takes the place of an indictment, and, like it, should show that the act was unlawful, and should state specifically the manner and character of the act. Avery v. People, 11 Ill. App. 332; Thomas v. State, 58 Ala. 365.

An information under a statute must contain all the substantial requisites of

1. *Signature and Verification*.—A criminal information must be signed by the informing officer.¹

2. *Conclusion*.—If any information conclude *contra formam statuti*, and the offence charged is not within any statute, these words may be rejected as surplusage.²

an indictment at common law. *State v. Miles*, 4 Ind. 577.

A proper venue must be laid in the information. *People v. Higgins*, 15 Ill. 110. See *Evarts v. State*, 48 Ind. 422.

The words "Knox county and circuit" on the margin of an information, though they be not expressly referred to, may imperfectly serve for a venue through the whole case. *State Bank v. State*, 1 Blackf. (Ind.) 267.

But it is not necessary in an information to show why the prosecution was not commenced by indictment. *State v. Frain*, 82 Ind. 532; *Hodge v. State*, 85 Ind. 561.

Affidavit and Information.—In charging offences the same certainty is required in the affidavit and information that is necessary in an indictment, and the information must be quashed if the affidavit upon which it is based is insufficient. *State v. Beebe*, 83 Ind. 171.

Language Used in Information.—Where an information contains common law phrases and references, it may be assumed that a description contained in it is meant to have its common law interpretation. *Chapman v. The People*, 39 Mich. 357.

Texas Practice.—In *Texas* a transcript to the court of appeals in a case prosecuted on an information should bring up the affidavit on which the information is based, as well as the information itself. *Lackey v. State*, 14 Tex. App. 164.

Though the material allegations of an information must conform to those of its supporting affidavit, yet the information must be self-sufficient, irrespective of the affidavit on which it is based. If necessary allegations be wanting in the information they cannot be supplied by the affidavit; for the accused must plead to and be tried upon the charge in the information, and not on the allegations of the affidavit. *Pittman v. State*, 14 Tex. App. 576.

1. *Bishop, Crim. Proc.*, § 713.

In *Canada*, by the master of the crown office. *Regina v. Crooks*, 5 U. C. (O. S.) 733.

In *Texas* it seems it need not be signed by the county attorney if it pur-

ports to be made by him. *Raspberry v. State*, 1 Tex. App. 664.

In most States by statute it must be supported by the oath of the prosecuting officer. *Baramon v. State*, 4 Ind. 524; *Dist. of Columbia v. Herlily*, 1 McArth. (D. C.) 466.

It was held in *Vermont* that the oath was unnecessary. *State v. Sickie, Brayt.* (Vt.) 132.

The *English* practice did not require a verification, except when applied for by private persons. *Cole, Crim. Inf.* 50, *et seq.*; *Rex v. Fielding*, 2 Burr. 654; *Rex v. Gardiner*, 2 Burr. 1117; *Rex v. Willitt*, — T. R. 294; *Rex v. Jones*, 1 Strain 704; *Rex v. Haswell*, 1 Doug. 387; *Rex v. Miles*, 1 Doug. 284.

The verification of the prosecuting officer upon information and belief is sufficient. *State v. Nulf*, 15 Kan. 404.

If the affidavit is bad the information, though otherwise sufficient, will be quashed. *State v. Gartrell*, 14 Ind. 280.

See generally *Brooster v. State*, 15 Ind. 190; *State v. Clevinger*, 14 Ind. 366; *State v. Ellison*, 14 Ind. 380; *Levy v. State*, 6 Ind. 281; *Malone v. State*, 14 Ind. 220; *Washburn v. People*, 10 Mich. 372; *People v. Smith*, 25 Mich. 497; *State v. Montgomery*, 8 Kan. 351; *Bishop, Crim. Proc.* 713 *a*.

In *Indiana* an information must be based upon an affidavit first filed. It is not sufficient that the information itself is verified. *Carpenter v. State*, 14 Ind. 109.

The verification of a criminal information by the prosecuting attorney that "he knows the contents of the foregoing information and that he has good reason to believe and does believe the same to be true as therein set forth" is sufficient. *Washburn v. People*, 10 Mich. 372.

2. *Southworth v. State*, 5 Conn. 326; *Knowles v. State*, 3 Day (Conn.) 103. But in *Texas* the constitution of the State requires that indictments or informations shall conclude "against the peace and dignity of the State," and the omission of the word "the" before the word "State" is fatal to an information. *Thompson v. State*, 15 Tex. App. 168. So if the information commence "by and

3. *Sufficiency*.—The crime charged in an information must be expressed with reasonable precision, directness and fullness.¹

with the authority of the State" and omit "of Texas." *Saine v. State*, 14 Tex. App. 144.

Where there is no jurat to the affidavit on which the information is based, there is no legal information. *Scott v. State*, 9 Tex. App. 434.

Where an offence unknown to the common law has been created by statute, whether the proceeding be by bill, information or the common law declaration, the same certainty is required in the specification of facts constituting the offence as in a bill of indictment. *State v. Williams*, 8 Tex. 256.

See also *Turner v. People*, 33 Mich. 363; *McNamee v. People*, 31 Mich. 473.

For *English* form of information see *Bish. Crim. Proc.*, § 146.

An information in the county court, like an indictment, should be carried on "in the name and by the authority of the People of the State of Illinois," and conclude, "against the peace and dignity of the same." *Parris v. People*, 76 Ill. 275.

1. *Com. v. Phillips*, 16 Pick. (Mass.) 213; *Vogel v. State*, 31 Ind. 64.

An information on oath "that the complainant has probable cause to suspect" that the accused has committed the offence charged, is not a complaint made with such reasonable and sufficient certainty as to be the ground of a conviction and sentence. *Com. v. Phillips*, 16 Pick. (Mass.) 211.

Nor an information in which the district attorney charges the offence "as he verily believes." *Vannatta v. State*, 31 Ind. 210.

Where an offence created by statute is described in an information in the words of the statute, and the averments are sufficient for an intelligible verdict and judgment, the prisoner must show that other omitted averments are necessary to insure a fair trial or reasonable protection against further prosecution. *State v. Lockbaum*, 38 Conn. 400.

What Must be Recited in an Information for Additional Punishment.—An information for additional punishment need not set forth the previous convictions and sentences *in extenso*, but is sufficient if it set forth the convictions with such particularity as to identify them and indicate the character of the

offence charged, and if it also set forth the sentences with such exactness as to show that they bring the convict within the law for additional punishment. An information for additional punishment for a third offence of a convict who has been before sentenced to additional punishment for a second offence is irregular, if not fatally defective, if it merely recite the first information in which the two former convictions were averred instead of directly averring them. *Hilde v. Com.*, 2 Metc. (Mass.) 408; *Evans v. Com.*, 3 Metc. (Mass.) 453.

It is not necessary that an information should show on its face that a preliminary examination has been had, or been waived, in cases where the defendant is not a fugitive from justice. *Washburn v. People*, 10 Mich. 372.

An information does not put the accused on trial for a different offence from that covered by the preliminary examination. *Brown v. People*, 39 Mich. 37.

For sufficiency of and practice in cases of information, see *United States v. Funkhauser*, 4 Biss. (U. S.) 176; *United States v. 78 Cases of Books*, 2 Bond (U. S.) 271; *Sawyer v. Steele*, 3 Wash. (U. S.) 464; *Kallock v. Superior Court*, 56 Cal. 229; *People v. Quive*, 56 Cal. 396; *People v. Lewis*, 61 Cal. 366; *People v. Flores*, 64 Cal. 426; *People v. Vierra*, 67 Cal. 231; *Kilbourn v. State*, 9 Conn. 560; *State v. Lochbaum*, 38 Conn. 400; *State v. Jackson*, 39 Conn. 229; *State v. Ransell*, 41 Conn. 433; *Avery v. People*, 11 Ill. App. 332; *Eldora v. Burlingame*, 62 Ill. 32; *Vogel v. State*, 31 Ind. 64; *Vanatta v. State*, 31 Ind. 210; *Evarts v. State*, 48 Ind. 422; *State v. Zimmerman*, 53 Ind. 360; *Shinn v. State*, 68 Ind. 423; *Davis v. State*, 69 Ind. 130; *Heanly v. State*, 74 Ind. 99; *Iter v. State*, 74 Ind. 188; *Sturm v. State*, 74 Ind. 278; *State v. Bunnell*, 81 Ind. 315; *State v. Frain*, 82 Ind. 502; *Smith v. State*, 85 Ind. 553; *Hodge v. State*, 85 Ind. 561; *Miller v. State*, 107 Ind. 152; *State v. Harp*, 31 Kan. 496; *State v. Stearns*, 28 Kan. 154; *State v. Goodwin*, 33 Kan. 538; *State v. McGaffin*, 36 Kan. 315; *State v. Collins*, 33 La. An. 152; *State v. De Serrant*, 33 La. An. 979; *State v. Malloy*, 30 La. An., part 1, 61; *People v. Calder*, 30 Mich. 85; *McNamee v.*

4. *Amendment*.—An amendment unlike an indictment, is amendable by the district attorney, with leave of court.¹

V. Information in Nature of Quo Warranto.—An information in the nature of a quo warranto is an information criminal in form, presented to a court of competent jurisdiction by the public prosecutor, for the purpose of correcting the mis-user, non-user, or

People, 31 Mich. 473; *People v. Parke-*
low, 37 Mich. 455; *People v. Stuart*, 42
Mich. 255; *People v. Hall*, 48 Mich.
482; *People v. Haley*, 48 Mich. 495;
People v. Murray, 57 Mich. 396; *State*
v. Bach, 25 Mo. App. 554; *State v.*
Shaw, 26 Mo. App. 383; *State v. Gal-*
limon, 2 Ired. (N. Car.) 377; *Hutchinson*
v. Com., 91 Pa. St. 390; *Hutchinson*
v. Com., 96 Pa. St. 503; *Lasindo v.*
State, 2 Tex. App. 59; *Blake v. State*, 3
Tex. App. 149; *Stinson v. State*, 5 Tex.
App. 31; *Brewer v. State*, 5 Tex. App.
248; *Leatherwood v. State*, 6 Tex. App.
244; *Tucker v. State*, 6 Tex. App. 251;
Harrison v. State, 6 Tex. App. 256;
Strickland v. State, 7 Tex. App. 34;
Hunt v. State, 9 Tex. App. 404; *Smith*
v. State, 9 Tex. App. 475; *Rivers v.*
State, 10 Tex. App. 177; *Thomas v.*
State, 12 Tex. App. 227; *Allen v.*
State, 13 Tex. App. 28; *Wadgyman v.*
State, 21 Tex. App. 409; *Clements*
v. State, 21 Tex. App. 258; *Holtzgraft*, 23
Tex. App. 404; *State v. Johnson*, 1 D.
Chip. (Vt.) 129; *State v. Pratt*, 54 Vt.
484; *State v. Clancey*, 56 Vt. 698; *State*
v. Brainerd, 57 Vt. 369; *Winn v.*
Peckham, 42 Wis. 493; *Chase v. State*,
50 Wis. 510.

1. *State v. Merchant* 38 Iowa 375;
King v. Gosse, 1 Lev. 189; *Anonymous*,
Comb. 45; *State v. Wear*, 38 N. H.
314; *Rex v. Harris*, 1 Salk. 47; *Rex v.*
Wilkes, 4 Burr. 2568. In *England*,
the attorney general is entitled to have
the amendment without a rule to show
cause. *Atty. Gen. v. Ray*, 11 M. &
W. 464.

An information may be amended in
a point to which the defendant has ex-
cepted by plea in abatement. *Rex v.*
Leaward, 2 Stra. 739; *King v. Sea-*
wood, 2 Ld. Raym. 1472; *Regina v.*
Stedman, 2 Ld. Raym. 1307; as by sub-
stitution or addition of real name. *State*
v. Washington, 15 Rich. (S. Car.) 39.
Or to cure a variance. *State v. Steb-*
bins, 29 Conn. 464. A criminal infor-
mation, filed by a public prosecutor, is
not amendable by adding a new count
for the offence already charged after
the statute of limitations has run upon
such offence. *State v. Rowley*, 12 Conn.

106. In this case the court say (page
106): "That the public prosecutor may
amend an information at any time be-
fore trial, is too well settled to admit
of dispute; and even during trial it has
often been done. And that he may
amend by adding a new count is
equally indisputable. But whether he
may add such a count for the offence
already charged, after that offence is
barred by the statute of limitations,
presents a question upon which there
has not been an entire uniformity of
decision. In many instances amend-
ments of informations, whether pre-
sented by public officers or *qui tam*,
have been permitted in *England* after
the statute of limitations has run
against the offence. In others, and es-
pecially where there appeared to have
been an unreasonable delay, they have
been refused." See *Merriam v. Lang-*
don, 10 Conn. 462. Nor can it be
amended by adding new charges. *Com.*
v. Rodes, 1 Dana (Ky.) 595. Nor in
Virginia, after demurrer, when the of-
fence charged in the presentment upon
which the information is based does
not amount to a misdemeanor. *Com.*
v. Williamson, 4 Gratt. (Va.) 554.
See as to allowance of amendments,
Com. v. Smith, 1 Cranch (U. S.) 22;
U. S. v. Evans, 1 Cranch (U. S.) 55;
U. S. v. Schack, 1 Cranch (U. S.) 56;
Brig Caroline v. U. S., 7 Cranch (U.
S.) 496; *Winn v. Peckham*, 42 Wis.
493; *State v. Frain*, 82 Ind. 532; *State*
v. Cook, 30 Kan. 82; *State v. Murphy*,
55 Vt. 547.

Practice—Judgment on Demurrer to In-
formation.—Where a demurrer to an in-
formation for additional punishment of a
convict is overruled, *respondere oster*
is not the necessary judgment, but judg-
ment in chief may be rendered. *Evans v.*
Com., 3 Metc. (Mass.) 453. Generally
see *State v. Stanford*, 20 Ark. 145; *Hill*
v. Davis, 4 Mass. 137; *Com. v. Water-*
borough, 5 Mass. 257; *Cushing v.*
Hackett, 10 Mass. 163; *Brimmer v.*
Proprietors of Long Wharf, 5 Pick.
(Mass.) 131; *U. S. v. Lyman*, 4 Mason
(U. S.) 482; *State v. Taylor et al.*, 1
Root (Conn.) 226; *Ward v. Tyler*, 1 N.

usurpation of a public office or corporate franchise.¹ (See *QUO WARRANTO*).

INFORMATION (Definition).—Instances of the legal use of the word information in the sense of a communication of knowledge are cited in the notes.²

& McC. (S. Car.) 22; Parris v. People 76 Ill. 274; Atty. Gen. v. Brown, 24 N. J. Eq. 89; U. S. v. 130 Barrels of Whiskey, 1 Bond (U. S. C. C.) 587; Demott v. Com., 64 Pa. St. 302; State v. McKinney, 31 Kan. 570; Clipper v. State, 4 Tex. 246; Goddard v. State, 12 Conn. 452.

1. High on Extraordinary Leg. Rem., § 591.

"An information in the nature of a writ of *quo warranto* is a substitute for that ancient writ which has fallen into disuse, and the information that has superseded the old writ is defined to be a criminal method of prosecution as well to punish the usurper by a fine for the usurpation of the franchise, as to oust him and seize it for the crown. It has for a long time been applied to the mere purpose of trying the civil right, seizing the franchise or ousting the wrongful possessor, the fine being nominal only." People v. Utica Ins. Co., 15 Johns. (N. Y.) 387.

2. **Giving Information.**—Where an indictment charges that the defendant knowingly deposited in the mail a letter *giving information* when, how and of whom an article or thing designed and intended to prevent conception could be procured, and the letter was in answer to a fictitious letter and addressed to a person who had no existence, the letter was *held* not to be within the act of congress of July 12th, 1876, prohibiting mailing obscene books, etc. The court say: "The letter written and received by defendant was addressed to a person who had no existence. *On its face it did not show that it was within the prohibited statute.* If it had been suffered to go through the mail to the place to which it was addressed it would not have been called for, but would have been sent to the dead letter office, and could not have given to any person the prohibited information. The defendant doubtless intended to give the inhibited information, but the statute does not apply to a letter merely intended by the writer to give such information, but to a letter 'actually' giving the information." If a

letter of enquiry had been written by an actual person, although under a feigned name, an answer in reply, giving such information would present a case distinguishable from the present." Per DILLON, J., United States v. Whittier 5 Dill. (U. S.) 41.

In Statute—Physician Prevented from Giving.—The word "information," as used in the statute of New York providing that "no person authorized to practice physic or surgery shall be allowed to disclose any information which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon," comprehends the knowledge which physicians acquire in any way which, while attending the patient, whether by their own insight or by verbal statements from him or from members of his family, or from nurses or strangers, given in aid of the physician in the performance of his duty. Knowledge, however communicated, is information." Per GILBERT, J., Edington v. Mut. Life Ins. Co. of N. Y., 5 Hun (N. Y.) 8.

Under a statute making a reward payable "to the person . . . who shall make discovery and give information against . . . persons guilty of such crime," etc., one who is the means of convicting the guilty party, though an accomplice substantially made the discovery and gave the information, is entitled to the reward. In the Matter of Kelly, 39 Conn. 162.

Where by a public advertisement a reward was offered to any person who would give such information as should lead to the apprehension and conviction of the party guilty of the offence, and B, whom the plaintiff had taken into custody on suspicion of being concerned in the offence, offered to make disclosures if furnished with something to eat and drink, and the plaintiff communicated this offer to a sub-inspector of police, to whom B made a confession which resulted in his conviction. *Held*, the plaintiff was entitled to the reward.

INFORMATION OF INTRUSION—INFORMERS.

INFORMATION OF INTRUSION.—Information of intrusion is a proceeding by the State prosecuting officer against intruders upon the public domain.¹

INFORMERS.

- I. Informers—Definition, 711.
- II. Who May be, 712.
- 1. *Officers of the United States*, 714.
- III. Informer's Right to Share in the Proceeds of Forfeiture, 715.
- 1. *When Not Entitled to Compensation*, 716.
- 2. *Awards—Law Governing*, 717.
 - a. *Informer's Interest—When It Vests*, 717.
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- IV. When Informers are Interested—Prosecution of Suit, 720.
- V. Forfeiture—Pardon by the President—Effect of, 721.
 - 1. *Remission by Secretary of the Treasury*, 721.
- VI. Statutes, 722.
- VII. Informer—Incompetency as a Witness, 724.
 - 1. *Depositions Taken Before the Trial*, 725.

I. INFORMERS—DEFINITION.—An informer is one who, with the intention of having his information acted upon, first gives such information of a violation of the law as induces prosecution and contributes to the recovery of the fine, penalty or forfeiture.²

Smith v. Moore, 1 M. G. & S. 438.

A hired driver of a cabriolet having brought home the horse apparently much ill used by him, the owner's son (in the owner's absence) called in a policeman and told him that the driver had ill used the horse. The policeman said that if the complainant charged the driver with cruelty to the horse he would arrest him; the complainant said "I do," and the policeman apprehended the driver under the statute (5 and 6 W. 4, ch. 5909) imposing penalties upon persons wantonly and cruelly ill treating any horse, etc. *Held*, that the complainant must be considered not as a party giving information to the officer, in consequence of which the driver was arrested; but as a principal causing the arrest to be made. *Hopkins v. Crowe*, 1 Ad. & El. 774.

When a defendant answers that he has not any knowledge or information of a fact charged in the plaintiff's bill, he is not bound to declare his belief one way or the other. It is only when he states a fact upon information or hearsay that he is required to state his belief or unbelief. *Morris v. Parker*, 3 Johns. Ch. (N. Y.) 297. See BELIEF; HEARSAY.

Informers and Believes.—An affidavit that deponent is "informed and believes" . . . is sufficient to hold defendant to bail in *England*. *Scuerhop v. Schmanuel*, 4 Dowl. & Ry. 180.

An affidavit to found a motion for *quo warranto* is sufficient if it states the deponent's "information and belief" that the party against whom the application is made has exercised the office. *King v. Slythe*, 6 Barn. & Cress. 240.

1. 1 Bouv. Law Dict. (15th ed.) 797. *In England* it is filed in*the exchequer by the king's attorney general for any trespass committed upon the lands of the crown. It is grounded on no writ under seal, but merely on intimation of the king's officer who "gives the court to understand and be informed" of the matter in question. 3 Bl. Com. 261; Cro. Jac. 212.

In America.—In Massachusetts and Virginia the remedy is resorted to in case of an intrusion upon escheated lands. *Com. v. Andre*, 20 Mass. (3 Pick.) 224; *Com. v. Hite*, 6 Leigh (Va.) 588.

Massachusetts Gen. St., ch. 141, authorizes information of intrusion to be filed by the district attorney in case of any intrusion upon lands held by the State in this county for the benefit or use of any tribe of Indians or any individual thereof, or any descendants of them.

2. *Sawyer v. Steele*, 3 Wash. (U. S.) 464; *City Bank v. Bangs*, 2 Edw. Ch. (N. Y.) 95; *Lancaster v. Walsh*, 4 M. & W. 16; 100 Barrels of Whiskey, 2 Ben. (U. S.) 14.

The fact that a person has procured testimony, be it never so valuable, does not entitle such person to an informer's share where a fraud has been disclosed by others, and proceedings have been commenced in consequence of such information.¹

No exertion which one may make under a supposition that he is entitled to a part of the penalty as informer can constitute him an informer, unless he actually gave information which led to a seizure.²

II. WHO MAY BE.—It is provided by the United States statute that whenever any person not an officer of the United States shall furnish to a district attorney or to any chief officer of the customs, original information concerning any fraud upon the customs revenue, perpetrated or contemplated, which shall lead to the recovery of any duties withheld, or of any fine, penalty or forfeiture incurred, whether by importers or their agents, or by any officer or person employed in the customs service, such

1. U. S. v. Simons, 7 Fed. Rep. 709.

2. Brewster v. Gelston, 1 Paine (U. S.) 426.

Contest Between Informers.—In a contest between informers, he is informer who, with the intention of having his information acted upon, gives information of a violation of law, which induces the prosecution and contributes to the recovery of a fine, penalty, or forfeiture, which is eventually recoverable. •

The authority to compromise conferred on the secretary of the treasury by the 10th section of the Act of March, 1863—12 U. S. Stat. at L. 740—is not an authority to compromise criminal prosecution. The rights of custom house officers and informers are rights which should be carefully protected. United States v. George, 6 Blatchf. (U. S.) 406.

The master of a vessel, while in a foreign port, becoming convinced that it was the intention of certain persons on board to employ her in the slave trade, brought the vessel to a port in the United States. When he arrived at the port for which he had sailed, he was towed into the harbor by a steamer, the master of which, learning from some person or persons of the vessel that she had been intended for the slave trade, went immediately upon landing to the United States district attorney, gave information of the intended slaver, and made a sworn statement thereupon. The master of the vessel, on the following day, also gave the intelligence to the attorney,

having on the day previous presented the ship's papers at the custom house, and made known the facts to the revenue officer. After the decree of distribution awarding the prosecutor's moiety to the captain of the intended slaving vessel, and after the payment of the moiety in conformity to the decree, a petition was filed by the master of the steamer to open and set aside the decree of distribution; it was held that the award had been properly made under the act of the 20th of April, 1818, and that this being the case, it was not necessary to decide whether it was competent for the court to open the decree and take jurisdiction of the second petitioner's claim. United States v. Isla de Cuba, 2 Cliff. (U. S.) 458.

In admiralty seizures a court cannot award a proportion of the proceeds of the property condemned to informers unless the case be within some statutory provision. But it will allow compensation for expenses in securing and preserving the property. *Ex parte Cahoon*, 2 Mason (U. S.) 85.

Joint Acts.—Though the first information of a fraud on the customs was communicated to the government from an individual discovery and knowledge of one of the claimants, yet if the act of information subsequently assumed the form of authoritative communication in being reduced to writing, and put in the name of all, it became the joint act of all, and gave to each individual inchoate interest in the results. *Janyues v. United States*, 21 Ct. Cl. 311.

compensation may, upon such recovery, be paid to such person so furnishing information as shall be just and reasonable.¹

No payment shall be made to any person furnishing information in any case wherein judicial proceedings shall have been instituted, unless his claim to compensation shall have been established to the satisfaction of the court, or judge having cognizance of such proceedings, and the value of his services, duly certified by the said court or judge for the information of the secretary of the treasury.²

The fact that a person has procured valuable testimony, making a strong case against the offenders, but for which it is indeed doubtful whether any conviction could have been had, or any money recovered from them, does not entitle the person procuring such testimony to any portion of the fine, when the fraud has been discovered by others and by them disclosed, and proceedings have been commenced in pursuance of that information. The statute gives the informer's share to the one who furnishes the original information which shall lead to the recovery of the fine, but whether justly or unjustly, awards nothing to those who furnish evidence to confirm the truth of the statements of the original informer, and this, although the applicant may have spent much time and expended money in ferreting out the details of the fraud, since their action cannot be said to have induced the prosecution.³

1. Act of June 22nd, 1874, § 4; 18 Stat. at L. 186.

2. Act of June 22nd, 1874, § 6; 18 Stat. at L. 186.

3. U. S. v. George, 6 Blatchf. (U. S.) 406, 418.

What Information Is Necessary.—An informer, in the legal as well as the ordinary sense of the term, whether the information he gives applies to customs, internal revenue, criminal matters, or forfeitures for any other reason, is he who gives the information which leads directly to the seizure and condemnation, regardless of the question of evidence furnished, or interest taken in the prosecution. 100 Barrels of Whiskey, 2 Ben. (U. S.) 14; Wescat v. Bradford, 4 Wash. (U. S.) 492.

It must be information upon which the seizure is made. Van Ness v. Buel, 4 Wheat. (U. S.) 74.

If the officer acts upon the information and makes the seizure, that action invests an inchoate right in the informer who has given the information upon which the seizure was made, which is consummated by a condemnation. Jones v. Shores, 1 Wheat. (U. S.) 462; Wescat v. Bradford, 4 Wash. (U. S.) 492.

The entire crew of a vessel, which was afterwards seized and forfeited, met the consular agent upon his leaving the ship, and demanded an audience, and made a statement of their suspicions, and the facts upon which they were founded, and protested against proceeding on the voyage, at which meeting the first mate took a prominent part, but no steps were taken by the consul looking to the seizure of the vessel, but an arrangement was made to proceed on the voyage. After the departure of the consul, the crew held another meeting, and drew up a formal written protest, setting up the facts before stated, and refusing to proceed on the voyage under any circumstances, which protest was not in the handwriting of the mate, and was signed by all the crew. Upon the receipt of this protest, the consul began the first official interference in anticipation of seizure, took the crew ashore, and took the sworn testimony of each of the crew upon the charges preferred by them against the officers and passengers of the vessel, at which hearing other members of the crew took as prominent part as did the mate. After this investigation, a man-of-war was

1. **Officers of the United States.**—It seems that any person receiving pay from the government of the United States, whose duty it is to disclose any information he may receive, is an officer of the United States, within the meaning of the act of 1874, and, therefore, cannot be an informer. A person whose duty it is to disclose information, and who violates such duty if he does not disclose it, cannot be an informer, and that person who imparted the information so as to be informer must be one who has imposed upon him no official duty to impart the information.

If a party is under pay of the government and receives a salary or wages of any kind for his services in endeavoring to ferret out frauds, any information he receives it will be his duty to disclose to the collector or other officer of the treasury department, and he cannot be considered an informer; but if he be simply employed by the special agent of the department to unearth smuggling transactions, with the understanding that he should depend for his compensation solely upon his right to the informer's share, then he should receive it.¹

sent for, and the seizure was made. It was *held* that the entire crew, and not the mate, were the informers, so as to entitle them to the informer's moiety. *U. S. v. City of Mexico* (Fla.), 32 Fed. Rep. 105 (June 14th, 1887). This case was decided under the law for the prevention of the violation of neutrality. *U. S. Rev. Stat.*, § 5283. The court says: "In this case I am satisfied that the crew were the informers, both technically and actually; and, although some were more prominent than others it is impossible to discriminate in their favor. I think every name was signed to the written protest, and all are entitled to share.

"The naval officers and consular agent in whose behalf a petition has been filed did their duty as officers in conveying the information received to other official authority, but no information was given by any one of them but what had been received in the regular discharge of his duty. It was in the performance of duty touching the subject-matter, and under special orders to investigate, that their knowledge was acquired, and reporting the same cannot certainly give rights as informers."

The term "informer," as used in the *U. S. Rev. Stat.*, § 5294, includes the plaintiff in a popular action, or a person suing for a penalty given by statute to any person suing for the same. *Pollock v. The Laura*, 5 Fed. Rep. 133.

1. *U. S. v. Simons*, 7 Fed. Rep. 709.

Before the act of 1874 officers might

be considered as informers where they incidentally, and not in the direct prosecution or course of their duty, or of any special retainer for that purpose, made a discovery.

"As if an inspector, put on board a vessel merely to keep the cargo safely discovers smuggled goods concealed, or where an officer sent to enquire into a particular charge discovers something entirely different and before unsuspected, or where he is told by someone as a friend and not as an officer, or the facts which his informant, not wishing to be known, refuses to bring forward himself, but tells him for the very purpose of enabling him to give the information in his own name. In these cases an officer could be an informer. *U. S. v. 100 Barrels of Distilled Spirits*, 1 *Low*. (*U. S.*) 244.

Before the act of 1874 an officer could not always be considered an informer merely because he, as an officer, acquires information useful to the government. If this knowledge is acquired in the ordinary discharge of his duty touching the very subject matter, or under a special retainer to investigate that matter, he could not be *held* entitled to a gratuity. *U. S. v. 34 Barrels of Whiskey*, 9 *Int. Rev. Rec.* 169; *U. S. v. Funkhauser*, 4 *Biss*. (*U. S.*) 176, 183.

Under the present law, United States naval officers and a consular agent who conveyed information received by them leading to the seizure of a vessel to other official authorities, but gave no

III. INFORMER'S RIGHT TO SHARE IN THE PROCEEDS OF FORFEITURE.—The informer's right to share in the proceeds of forfeiture, under acts of congress of June 30th, 1864, and July 13th, 1866, 13 Stat. at Large, 305; and 14 Stat. at Large, 145, has been decided, and the court holds that the informer's share in a fine, penalty or forfeiture does not vest until money was recovered; but the act of 1872 did not prohibit payment for prior services, nor does it deprive such informer of compensation fairly earned under provisions of the statute.¹

Where a person, pursuant to the U. S. Rev. Stat., § 3491, has sued another in the name of the United States for defrauding the government by making false claims, defraying all the expenses of the suit, and obtained judgment for a large amount, the secretary of the treasury cannot, under § 3469, authorize a compromise of claims in favor of the United States, and satisfy the judgment for a mere nominal amount, and thus confiscate the prosecutor's right to the costs and one half the recovery as provided by § 3491 of the U. S. Rev. Stat.²

information except what had been received in the regular discharge of their duty, are not informers. A consular officer who furnishes the officers with a statement of facts regarding the sailing and the objects and intentions of a vessel and tries to prevent her departure and after her seizure furnishes assistance to the government, is not an informer. Neither would be a detective employed by such officer to obtain information. *U. S. v. City of Mexico (Fla.)*, 32 Fed. Rep. 105.

Before the act of 1874 the fact that a person obtained the information on a communication of which he bases his claim as informer, while in the discharge of his official duty as a revenue officer of the government, does not debar him from claiming a share of the fine as informer. 8 Int. Rev. Rec. 20: *U. S. v. 64 Barrels of Whiskey*, 9 Int. Rev. Rec. 169; 13 Op. Atty. Gen. 369.

Neither could an officer always be considered an informer merely because he as an officer acquired information useful to the government. If his knowledge was acquired in the ordinary discharge of his duty touching the very subject matter, or under a special order to investigate that matter, the government was entitled to the benefit of it. *U. S. v. 100 Barrels of Distilled Spirits*, 1 Low. (U. S.) 244; 8 Int. Rev. Rec. 20; 4 Cutting Machines, 3 Ben. (U. S.) 220; 9 Int. Rev. Rec. 144.

So before the law of 1874, mere diligence in conducting a search originating upon definite information from a

third party, and in communicating results to his superior, could not constitute an officer an informer. A deputy collector who receives information by a telegram addressed to the collector that a certain vessel within his district had goods on board liable to forfeiture, and who sent the telegram to the collector, did not become the informer as against the person sending the telegram, by having verified some of its statements and having sent information of such verification to the collector. 50,000 Cigars, 1 Low. (U. S.) 22; *U. S. v. 100 Barrels of Distilled Spirits*, 1 Low. (U. S.) 244; 8 Int. Rev. Rec. 20.

So also a special agent of the government appointed to investigate a fraud, was not an informer in respect to facts found in the ordinary and regular discharge of his duty, and could not claim an informer's share of a forfeiture enforced on the results of his investigation. *U. S. v. 278 Barrels of Distilled Spirits*, 4 L. & Eq. Rep. 237.

1. *Ramsay v. U. S.*, 21 Ct. Cl. 443.

2. *U. S. v. Griswold*, 30 Fed. Rep. 762.

Joint Informers.—Where the officers of a revenue cutter could sue for an informer's share, at common law, there is no question but what they could share as joint and common informers. *Sawyer v. Steele*, 3 Wash. (U. S.) 464.

Where a crew of a vessel were adjudged informers, it was ordered that after the payment from the fund then in the hands of the register of the court of the proper costs in the hearing of the

1. When Not Entitled to Compensation.—Sums recovered on forfeited bail bonds are not fines and penalties or forfeitures within § 4 of the act of June 22nd, 1874, and the petitioner is not entitled, under its provisions, to compensation as an informer. Neither is the secretary of the treasury authorized to give rewards to informers under the act of June 16th, 1880, which makes provisions for the expenses of the government in bringing to trial and conviction persons engaged in counterfeiting and other felonies. The act of June 22nd, 1874, § 6, providing for a certificate by the judge or court to the secretary of the treasury as to the value of an informer's service, has no application to the act of June 16th, 1880.¹

cause, the balance should be paid to those who were the crew of the steamship, as it appeared from the pay roll as filed in the case, in the petition for seamen's wages, and the sum be divided between the members of the crew in proportion to the several rates of monthly wages therein stated. *U. S. v. City of Mexico*, 32 Fed. Rep. 105.

The proviso in the duties-collection act of 1799, § 91, 1 Stat. at L. 697, that where property forfeited is less than \$250 the share of the United States shall be applied toward the costs of prosecution, is of general application and affects forfeitures under the internal revenue laws. So much of the treasury regulation of September 2nd, 1860, as forbids a *pro rata* application for such purpose of the government's share is unauthorized by law. 1 Water Tub, 3 Ben. (U. S.) 436; 10 Int. Rev. Rec. 139.

Must be First Informer.—The party claiming to share in the judgment must be the first informer, and his information must be substantial and capable of proof. The share of the informer must be taken from the net, not from the gross, proceeds. *United States v. Funkhauser*, 4 Biss. (U. S.) 176.

The court cannot award a proportion of the proceeds of the property condemned to the informer unless the case be within some statutory provision. It will allow compensation for expenses incurred in preserving the property. *The Langdon Cheeves*, 2 Mason (U. S.) 85.

Under the act of March 2, 1867, 14 Stat. at L. 546, the determination of disputes as to shares of a fund arising from forfeiture for violation of custom laws, belongs to the court having the custody of such funds, and it

will decree how the same shall be distributed, under the direction of the secretary of the treasury, as a ministerial officer. *United States v. Com-mack*, 7 Int. Rev. Rec. 51.

1. *In re Brittingham*, 5 Fed. Rep. 191.

Under the Confiscation Act.—Although under the act of August 6th, 1861, to confiscate property used for insurrectionary purposes, an informer may file an information along with the attorney general, and so make the proceedings enure under the act to his own benefit equally as to the benefit of the United States; yet, after the proceedings have been instituted by the attorney general alone, and wholly for the benefit of the United States, and after issue has been joined and proofs furnished by other parties, no person can come in asserting that he was the informer and share the benefits of the proceedings. *Francis v. U. S.*, 5 Wall. (U. S.) 338.

An informer does not acquire a right to a moiety under the Confiscation act of August 6th, 1861, in regard to land informed against, after a complete title to the property has been acquired by conquest, as in a case where the information was filed after the conquest has been settled, and the property in the possession of the military forces of the United States. In such case the government is not estopped from denying an informer's claim to a moiety because, first, by the fact that its district attorney has allowed proceedings in confiscation to be carried on under the act and the land to be sold, and the purchase money to be received; second, by the fact that the commissioner of the Freedmen's Bureau, to whom, as agent of the United States, congress gives the

2. Awards—Law Governing.—Courts are not at liberty to grant rewards in cases where a party has performed a public duty, unless there be some positive regulation which provides for such cases. To found a title for compensation there must be some direct, extraordinary assistance or service, or expense, which the law recognizes as a just charge *in rem*, independent of any notion of official duty, or some positive statutory provision in point. So an informer cannot be awarded a proportion of the proceeds of the property condemned unless the case be within some statutory provision. But the law will allow compensation for expenses incurred in securing and preserving the property.¹

a. Informer's Interest—When it Vests.—An informer has no vested interest in the subject matter of a suit instituted upon information given by him. The attorney general may properly ask leave to dismiss the information against the interest and objection of the informer, or may ask for a reversal of the decree in the court below, which has been given in favor of the United States, and that the cause be remanded with a view to its dismissal.² An informer's share is not fixed by verdict; it does not attach until final judgment.³

control and management of all captured and abandoned land, never claimed the land itself, but after it had been sold and the price paid into court, and a moiety adjudged to the informer, has taken the other moiety without question.

An informer's interest in such a case stands on a very different footing, and is to be judged of by very different principles of estoppel, from that of a purchaser of the land who has paid his money to the United States in consequence of their offer to sell under the act. An informer, to entitle himself to the statutory reward for his services, must inform against property which is the subject of judicial condemnation. There can be nothing to divide if there is nothing to condemn. In this case the land, when informed against, was already the property of the United States. The title had passed by the completed conquest and there was nothing to reach by judicial process. Information, in the statutory sense, could do no good; it was captured property and needed no judicial sentence of forfeiture to make it absolutely the property of the United States. *Titus v. U. S.*, 20 Wall. (U. S.) 475.

1. *The Langdon Cheeves*, 2 Mason (U. S.) 85.

In England there are certain cases in which the law awards compensation to

persons for service rendered to the public, independent of contract or statutory provisions. Such are the cases of maritime salvage, granted upon recapture of public vessels. *The Aquila*, 1 Rob. 37.

The informer of a violation of the revenue laws, by virtue of which a seizure is made and condemnation of the property is obtained, can entitle himself to a reward or portion of the property only in cases provided for by some statutory provisions. Such services do not create a legal or equitable title to compensation. A party who gives material information is not entitled, at common law or in chancery, to a part of the proceeds of any property seized and condemned by means of such information, or to any particular compensation for such information when given to officers of the government. It is the duty of every citizen to aid in detecting violations of the laws and enforcing the administration of public justice. No compensation will be allowed except when some statute holds out from public policy a specific reward that the public faith is pledged to allow it. *Robinson v. Hook*, 4 Mason (U. S.) 139.

2. *Confiscation Cases*, 7 Wall. (U. S.) 454.

3. *U. S. v. 25,000 Gallons of Distilled Spirits*, 7 Int. Rev. Rec. 206.

An informer's share may be subjected

b. Informer—Disclosing a Conspiracy—His Share.—When an informer procures the arrest and conviction of certain members of a conspiracy who, upon their examination, confess and implicate

to a charge of a proportionate share of the costs of the proceedings. *U. S. v. 12 Barrels of Paraffine Oil*, 6 Int. Rev. Rec. 203.

Compensation.—The court will not award a proportion of the proceeds of property condemned to officers of the government for their services as informers, unless the case be within some statute provision. But it will allow compensation for expenses incurred in securing and preserving the property. The giving information of violations of the laws is a duty of every citizen, and especially of officers. *The Langdon Cheeves*, 2 Mason (U. S.) 85.

When Sold by the Marshal.—The interest of an informer in the proceeds of forfeited property sold by the marshal under a *venditioni exponas* for a forfeiture under the internal revenue laws, becomes vested at the time when the proceeds of the sale are paid to the marshal, and cannot be affected by any regulations subsequently made. *U. S. v. 25,000 Cigars*, 5 Blatchf. (U. S.) 500; *8 Barrels of Distilled Spirits*, 1 Ben. (U. S.) 472.

Money Recovered on Bond.—Money recovered in a suit on an export bond given under the internal revenue laws being exclusively to the United States the same as money recovered in a suit on any other contract with the government, and neither revenue officers nor informers can have any share therein. *Internal Rev.*, 13 Op. Atty. Gen. 115.

Acts of Claimant—No Waiver.—The consent of the claimant that a vessel seized for a violation of the non-intercourse laws, upon his information, should be sent into another district for settlement, or a disavowal by him of having instituted the suit does not amount to waiver by him of his rights to share of the forfeiture. *Sawyer v. Steele*, 3 Wash. (U. S.) 464.

When the Right of an Informer Vests.—The right of an informer, under the internal revenue laws, vests only when the money representing the forfeited property is paid over and is ready for distribution. Until then his rights are liable to be divested by the government. *25,000 Gallons of Distilled Spirits*, 1 Ben. (U. S.) 367.

In case of a change of the law pending suit the amount of the informer's

share must be determined by the law as it stands at the time of the final decree of forfeiture. *25,000 Gallons of Distilled Spirits*, 1 Ben. (U. S.) 367.

So under a former law allowing custom officers a portion of forfeitures and penalties until final judgment of condemnation no part of the forfeiture vested absolutely in the collector; but after final judgment his share vested absolutely, and could not be remitted by the secretary of the treasury. If, during the proceedings, a remission be made of the whole property forfeited, the collector's share was gone; if of part only, his title attaches to the remainder, and by a judgment of condemnation becomes vested and indissoluble. *The Margaretta*, 2 Gall. (U. S.) 515. See also *The Hollen*, 1 Mason (U. S.) 431; *U. S. v. Lancaster*, 4 Wash. (U. S.) 64.

Under the duties-collection act of 1799, § 91, whose provisions allow one-half of fines, penalties and forfeitures to be paid to the collector and other officers, it has been decided that where the claimant of property seized elects to give a bond and pay or secure the payment of the duties, and on condemnation of the vessel and goods he loses both the duties and the property seized, the duties thus paid constitute no part of the proceeds of the goods forfeited, within the meaning of the statute. The right of the collector acquired by the seizure is a right only in the goods themselves which have been seized and forfeited. *Hoyt v. United States*, 10 How. (U. S.) 109.

The right of a collector to share under a previous law in the proceeds of forfeitures *in rem* attaches on seizure, and in case of personal penalties, on suit brought. In each case it is ascertained and consummated by the judgment; that the collector dies before or after the judgment is immaterial. *Jones v. Shore*, 1 Wheat. (U. S.) 462.

Under the law giving the collector of revenue a share of forfeiture for his services in making seizure, his right is only inchoate. If the forfeiture has been justly incurred, yet the government reserves to itself the right to release it either in whole or in part, and until the proceeds have been actually received for distribution. But whatever is reserved to the government out

others engaged in the same fraudulent transaction, and these in turn are also arrested, convicted and fined solely upon such information, the original informer is entitled to share in such fines.¹

of the forfeiture is reserved as well for the seizing officer as for itself, and is distributable accordingly. The government cannot release the collector's share, as such, and yet retain to itself the other part of the forfeiture. Thus, where after a seizure congress specially authorized a remission of the forfeiture with the exception of a sum equal to double duties, the collector is entitled to one moiety of the whole amount reserved as the condition of the remission. *McLane v. U. S.*, 6 Pet. (U. S.) 404. In *Hoyt v. U. S.*, 10 How. (U. S.) 109, this case is distinguished.

Under the act of 1799, called the duties-collection act, the right to share in forfeitures and penalties is given to the collector who made the seizure, or who brought the suit, and not to the collector who was in office at the time of the decree or judgment, or the receipt of the forfeiture, if there had been any intermediate appointment. *Van Ness v. Buel*, 4 Wheat. (U. S.) 74.

The proper rule of distribution, under act of March 2nd, 1867, ch. 188, of proceeds of fines, penalties and forfeitures among custom officers of ports of entry and ports of delivery in the same collection district, is explained in *Hahn v. United States*, 14 Ct. Cl. 305, and this decision is affirmed in 107 U. S. 402. But the act of March 2nd, 1867, ch. 188, was repealed by act of June 22nd, 1874, ch. 391, which makes extensive changes in previous laws governing enforcement, compromise and remission of penalties for violation of the duty laws, compensation of officers and informers, and regulating these subjects anew. 18 Stat. at L. 186.

Three several suits were instituted *in rem* by the United States for the forfeiture of certain distilled spirits, and such proceedings resulted in a decree of forfeiture. The sum of money obtained by compromise was paid into the registry of the court. In two of the cases the informers were designated and *held* entitled to a portion of the proceeds. Final orders of distribution were made and checks issued to the collector accordingly. He paid the informers their respective shares. A suit on the collector's official bond was brought to recover the several sums of money alleged to have been received

by him, and to be due to the United States.

The sums fixed upon by the compromise were based partly upon penalties and partly upon taxes due, and in the suit against the collector the commissioner was of the opinion that the informers should receive nothing from that part of the gross sum paid, which was designed to cover taxes. The court *held* that the right of the informers to their portion of the sum paid was not affected by the fact that a part of such sum is designated to cover taxes, and that the collector cannot be held liable on his official bond for the amounts so paid to the informers, whether they are legally entitled thereto or not. *U. S. v. Roum*, 3 McCrary (U. S.) 381.

After a final decree has been made and executed by paying the penalty imposed into the United States treasury, a petition filed in the court which has made the decree, by a party claiming to be the original informer in said case, cannot be considered, though the certificate prays the court to ascertain the amount he is entitled to for his services for the information of the secretary of the treasury, because the court has no jurisdiction. The original suit had been determined and the power of the court in the premises was at an end. *Ex parte Gaus*, 5 McCrary (U. S.) 393.

1. *U. S. v. Simons*, 7 Fed. Rep. 709.

A conspirator may earn immunity from punishment by his voluntary confession, and by the district attorney consenting to make use of his testimony against the conspirators, but equitably he is entitled to nothing more. *Whiskey Cases*, 99 U. S. 594.

The original informer ought not to lose his share of the fine which would have been imposed upon the parties he informed against directly, by their confessing and inculpatory others, and thus securing immunity. The interest of the informer ought to be identical with that of the government. The interest of the government requires the leading members of the conspiracy to be punished. *U. S. v. Simons*, 7 Fed. Rep. 713. No. 4 head note of this case reads: "Hence, where A informed against B, C and D, for smuggling, and

IV. WHEN INFORMERS ARE INTERESTED.—PROSECUTION OF SUIT.

—The provisions of § 179 of the act of June 30th, 1864, as amended by the act of July 13th, 1866, 14 Stat. at Large 111, 145, relating to informers' shares, are expressly applicable only to cases not otherwise provided for; but where it is not otherwise provided for, they are applicable whether the fine, penalty or forfeiture is recovered or is recoverable by indictment or information or action of debt. The form of prosecution is immaterial in respect to the rights of any person claiming as informer; and under the statutes in force May, 1870, the fact that a fine or penalty can be recovered only by indictment is no objection to the claim of any person to be declared informer.¹

Where a statute creates a new offence and affixes a specific pecuniary penalty, appropriating one-half thereof to the informer, it adopts by implication those remedies by which alone the informer can sue; but the absence of an informer does not authorize a change in the nature of the remedy and the substitution of one not contemplated in the statute.²

these, or one of them, confessed and implicated E for receiving the property smuggled, and E was arrested, and, acting upon the advice of a third party, also confessed and implicated F and G, as his principals in the transaction, who were convicted and fined." *Held*, that A was entitled to the informer's share of the fine imposed. See *Wescot v. Bradford*, 4 Wash. (U. S.) 492.

How the amount of an informer's share is to be computed, under certain statutes, see 1 Still, 1 Ben. (U. S.) 374; *U. S. v. Hook*, 3 Pittsb. (Pa.) 54; 14 Pittsb. Law Jour. 361.

1. 18 Int. Rev. Rec. 29; 9 Int. Rev. Rec. 169; 9 Int. Rev. Rec. 145; 13 Op. Atty. Gen. 228.

2. *U. S. v. Tilden*, 11 L. Rep., N. S. 598.

If an informer, in his libel, unites his rights with those of the United States, in the manner of a *qui tam* action, it is, at most, only an irregularity, not affecting the nature of the proceedings. If the informer cannot take any interest, condemnation will take place to the United States. The *Emulous*, 1 Gall. (U. S.) 563. Note—this case was reversed on another ground and under the name of *Brown v. U. S.*, 8 Cranch (U. S.) 110.

The sum recovered upon a forfeiture recognizance for the appearance of a person charged with a violation of the duty laws, does not take the place of a fine which would be imposed upon conviction in any such sense that it is sub-

ject to a share to informers, if the fine itself would be. *U. S. v. Fanjul*, 1 Low. (U. S.) 117.

Parol Evidence.—On a petition by an informer for his share of the proceeds of forfeited property, although he gave information in writing, he may give evidence by parol that he gave other information leading to further seizures, more extensive than the information given in writing. *Wescot v. Bradford*, 4 Wash. (U. S.) 492.

An Informer Need Not Assist in the Suit.—An informer is not obliged to assist in prosecuting the suit for a forfeiture, and does not lose his rights as an informer by misconduct as an agent in the care of the property seized. *Wescot v. Bradford*, 4 Wash. (U. S.) 492.

Qui Tam Actions.—The action authorized by the U. S. Revised Statutes, §§ 3490, 3491, 3492 and 3493, to recover a penalty and damages for making a false claim against the United States, is a *qui tam* one, and may be commenced by any person who will, without the previous authority or consent of the district attorney of the United States. Hence the complaint in such an action need not be subscribed by the district attorney. It is sufficiently subscribed by the party or his attorney within the meaning of the Oregon Civil Code, §§ 79 and 81, when it is subscribed by the attorney of the person who brings such action. *United States v. Griswold*, 5 Sawyer (U. S.) 25.

V. FORFEITURE.—PARDON BY THE PRESIDENT.—EFFECT OF.—The power of the president of the United States to pardon from fine, penalty, or for forfeiture after judgment, by which the rights of an informer to share in the amount have become vested or fixed, does not extend to remit the informer's share. The president can discharge the share of the government only.¹ And a pardon by the president granted, as to all interests of the United States in the forfeiture incurred by violation of the embargo law, and a direction that all further proceedings on behalf of the United States be discontinued, does not remit the interest of a vested moiety.²

1. Remission by Secretary of the Treasury.—The power of the president to pardon for offences does not preclude congress from

The United States alone can sue for the penalty imposed by section 2 of the Steamboat act of July 7th, 1838. *Briscoe v. Hinman*, 10 Int. Rev. Rec. 53.

1. U. S. v. Harris, 1 Abb. (U. S.) 110.

2. U. S. v. Lancaster, 4 Wash. (U. S.) 64.

So a pardon by the president for a violation of the revenue laws for which the accused has been indicted and sentenced to fine and imprisonment, which recites conviction of conspiracy to defraud the revenue as the offence pardoned, does not entitle the offender to have a remission of a forfeiture of property involved in the offence, which has been adjudicated under some other provision of the statute. *Re Weimer*, 7 Rep. 38. See also *U. S. v. Roello*, 24 Int. Rev. Rec. 332.

When an offender's property has been confiscated by the United States government, for acts done and permitted in aid of the late civil war, and the proceeds had not been actually paid to the party entitled to receive them as informer, or into the United States treasury, such funds are within the control of the court, and the offender, upon being pardoned for such acts by the president, and having complied with the conditions of the pardon, is entitled to have such proceeds restored to him. *Brown v. U. S.*, *Woolw.* (U. S.) 198; *McCahon* (U. S.) 229.

A vessel was seized by the collector and libelled for forfeiture for a violation of the Embargo act, and released on a bond for her value. She was condemned as forfeited, and a suit was brought by the United States on the bond. Afterwards the president remitted to the defendant all the rights and interest of the government in and

to said bond, and required all proceedings on the part of the United States to be forthwith discontinued. *Held*, that the terms of the pardon were such as to remit only the interest of the United States, and not the rights of the officers. *U. S. v. Lancaster*, 4 Wash. (U. S.) 64.

In case a vessel condemned as forfeited to the United States for a violation of the Slave-trade act, the president was advised to remit only the interest of the United States, on the ground that his pardon could not defeat the vested rights of the seizing officer. 4 Op. Atty. Gen. 573.

On the question whether the president has the power to pardon offences committed by the owners or masters of steam vessels in respect to the transportation of passengers in violation of the statute, it is adjudged that he can. 6 Op. Atty. Gen. 393.

A party was convicted and fined for violating the internal revenue law. Afterwards the court adjudged a certain person as the informer, and that one-half of the fine should be for his use and the remainder for the use of the United States. Afterwards the president, by a pardon, remitted to the offender the payment of two-thirds of the fine. One-third of the fine with interest was paid into court. The informer claimed, and was allowed by the court, the whole of the amount adjudged to him, on the ground that the president had no right to remit any of the part of the fine so adjudged to the informer, and that he was entitled to the whole of such part as if there had been no remission. The conviction was under the act of June 30th, 1864, §§ 41; 13 Stat. at L. 239. *U. S. v. Harris*, 1 Abb. (U. S.) 110.

giving the secretary of the treasury authority to remit penalties and forfeitures.¹

Whatever power of remission in the secretary of the treasury congress chooses to annex, as a condition to the grant of the penalties given, is not a power to pardon, but simply a restriction, limitation or condition annexed to the grant of the penalty.²

VI. STATUTES.—Except in case of smuggling, it shall not be lawful for any officer of the United States, under any pretence

1. *The Laura*, 114 U. S. 411.

2. *United States v. Lancaster*, 4 Wash. (U. S.) 66.

In a case of a vessel being seized for violating a statute in regard to the transportation of passengers, a remission being applied for to the secretary of the treasury, under section 1 of the act of March 3rd, 1797, the question arose whether the case came within the pardoning power of the president. This was the opinion of the ATTORNEY GENERAL:

1. That the president had power to pardon the imprisonment, fines and forfeitures imposed for violating the provisions in regard to space for and number of passengers, unless, perhaps, as regarded a forfeiture, the right of which had duly vested in the custom house officers or others, except the United States. 2. That it was doubtful whether the president had power to remit such forfeiture. 3. That the secretary of the treasury had power to remit all forfeitures of vessels for carrying an excess of passengers. 4. That the president had power to pardon in all cases of vessels labelled by reason of liens on them for penalties imposed by the statute. 5. That the secretary of the treasury had the concurrent power to remit in the last named cases, but any doubt could be cured by the authority of the president, as no interest but that of the United States was affected. 6. That, as the act of 1797 afforded the means of judicial investigation as to the question of remission, it was more convenient in the cases of seizures and prosecutions instituted by officers of the customs, to dispose of that class of seizures in that way than to refer them to the unaided discretion of the president. 6 Op. Atty. Gen. 488.

The secretary of the treasury may remit claims of informers and of the United States to penalties and forfeitures incurred under sections 4465 and

4469 of the U. S. Revised Statutes, for carrying a greater number of passengers than the certificate of inspection permits, and such remission will operate as a full discharge. Section 5294 of the U. S. Revised Statutes, providing that the secretary of the treasury may, in certain cases, remit fines and penalties, is not unconstitutional. *The Laura*, 8 Fed. Rep. 612.

Under act of March 3rd, 1797, a remission of a forfeiture or penalty by the secretary of the treasury, arising under the revenue laws, after judgment and execution issued, extends to the share of the officer as well as to the interest of the government. *U. S. v. Morris*, 10 Wheat. (U. S.) 246; affirming *1 Paine* (U. S.) 209.

If the secretary recites his authority under a special act, and assumes to remit in pursuance of that act, the remission, if unsupported by such act, cannot be supported under the general act of March 3rd, 1797. *The Margaretta*, 2 Gall. (U. S.) 515.

If the remission is made on the payment of costs, this is a condition precedent, and the remission is inoperative until the costs are paid. *Jungbluth v. Redfield*, 4 Blatchf. (U. S.) 219; *The Palo Alto*, 2 Ware (U. S.) 343.

If the remission be conditional, the secretary has no power to revoke it after the condition has been performed, whether the possession of the goods has been delivered to the claimant or not. *The Palo Alto*, 2 Ware (U. S.) 343; 6 N. Y. Leg. Obs. 262.

The secretary's power to remit or mitigate penalties extends as well to those given to the person suing for the same as to those given to the United States, or partly to the United States and partly to the informer, and can in all cases be exercised after as well as before suit brought, provided the informer's claim has not been actually determined by the court. *Pollock v. The Laura*, 5 Fed. Rep. 133.

whatever, directly or indirectly, to receive, accept or contract for any portion of the money which may, under any of the provisions of this or any other act, accrue to any such person furnishing information; and any such officer who shall so receive, accept or contract for any portion of the money that may accrue as aforesaid shall be guilty of a misdemeanor, and on conviction can be fined not exceeding \$5,000, or imprisoned for not more than one year, or both, in the discretion of the court, and he cannot thereafter be eligible to any office of honor, trust or emoluments. The person making such forbidden payment may recover it back by action.¹

Extra compensation for detection of smuggling, or for information, may be paid in certain cases by the secretary of the treasury.²

1. Act of June 22nd, 1874, ch. 391, § 7; 18 Stat. at Large, pt. 3, 186.

2. 18 Stat. at Large, pt. 3, 186; act of June 22nd, 1874, ch. 391, §§ 3, 4.

Statutes authorizing offers of reward for discovery of frauds upon internal revenue are cited and reviewed in Sanborn, Contract, 15 Op. Atty. Gen. 133.

Repeal of former laws authorizing payment of moieties to informers and custom house officers. Act of June 22nd, 1874, §§ 1, 2, ch. 139; 18 Stat. at Large, pt. 2, 186; Rev. Stat. Supp. No. 1.

Provisions authorizing employment of persons to aid the officers of the United States in collecting money due the government, under the customs revenue laws, or for smuggling. Act of June 22nd, 1874, ch. 391, §§ 2 to 8; Rev. Stat. Supp. No. 1, 77.

For a new regulation of laws governing enforcement, compromise, and remitting of penalties for violation of the duty laws, and the like, see act of June 22nd, 1874, ch. 391; Rev. Stat. Supp. No. 1, 76.

No officer of the United States can compromise or abate any claim of the government under the custom laws, for any fine, penalty or forfeiture incurred by a violation thereof. If any officer attempts to make such compromise he shall be deemed guilty, and on conviction thereof shall be imprisoned not exceeding ten years and be fined not exceeding \$10,000. The secretary of the treasury has power to remit fines and penalties, or to compromise the same in accordance with existing laws. Act of June 22nd, 1874, ch. 391, § 19; 18 Stat. at Large, pt. 3, 109.

Whenever an application is made to the secretary of the treasury for such remission, which amount shall not fall

below \$1,000, the applicant shall notify the district attorney of the United States and the collector of customs of said district, who shall furnish the secretary of the treasury all practicable information necessary to enable him to protect the interests of the United States. Act of June 22nd, 1874, ch. 391, § 20; 18 Stat. at Large, pt. 3, 190.

The secretary of the treasury may remit, on application therefor, or mitigate any fine or penalty provided for in laws relating to steam vessels, or discontinue any prosecution to recover penalties denounced in such laws, excepting the penalties of imprisonment or removal from office, using his own discretion. But he cannot remit or mitigate the fine after the share of the informer has been determined by a suitable court. U. S. Rev. Stat., § 5294.

Title 52 of the Federal Statutes, in which sections 4465 and 4469 are found, is entitled "Regulations of Steam Vessels." These sections and section 5294 were originally enacted as part of the act of February 28th, 1871, entitled, "An act to provide for the better security of life on board of vessels propelled in whole or in part by steam, and for other purposes;" section 4469 being a part of section 48 of that act, section 4467 being a part of section 49, and 5294 being, in substance, section 64.

The act of August 6th, 1861, provides, in substance, that if, during an insurrection against the government of the United States, any person should, after the prescribed proclamation, purchase or acquire, sell or give, any property of whatsoever kind or description, with intent to use or employ the same, or suffer the same to be used or employed, in aiding or abetting or promoting such

VII. INFORMER—INCOMPETENCY AS A WITNESS.—The general rule is, under the common law, in criminal cases as well as in civil, that a person interested in the event of the suit or prosecution is not a competent witness. But there are exceptions to this, as for instance where, from the nature of the offence, there can be no conviction if the party interested be not a witness.¹

An informer, who is entitled to any part of the penalty, is, in general, incompetent to give evidence; but in some instances the testimony of informers has been received where a statute could receive no execution unless the party seeking to recover the penalty was admitted as a witness.² An informer is a competent witness, although he receives a part of the penalty on the ground of necessity and of public policy, and of attaining the manifest objects of the statute and the ends of justice.³

insurrection; or if any person, being the owner of such property, should knowingly use or employ, or consent to the use or employment of the same for such purposes, all such property should be lawful subject of prize and capture wherever found, and the president is, required to cause it to be seized, confiscated and condemned. The proceedings for condemnation are to be had in the courts of the United States having jurisdiction of the amount, or in admiralty in any district in which such "prize and capture" might be seized, or into which they might be taken and proceedings first instituted.

The attorney general or the district attorney of the United States for the district in which the property might at any time be, is authorized to institute the proceedings of condemnation, and in such case they are to be wholly for the benefit of the United States; or, any person may file an information with such attorney, and then the proceedings are to be for the use of an informer and the United States. [This act was intended for private, not public property.] 12 Stat. at Large. 319.

Popular Actions.—Blackstone says, in regard to the application of these penalties and forfeitures:

"The usual application of these penalties or forfeitures is either to the party aggrieved, or else to any of the queen's subjects in general. But more usually the forfeitures created by statute are given at large to any common informer; or, in other words, to any such person or persons as will sue for the same; and hence such actions are called *popular actions*, because they are given to the people in general. Sometimes one part is given to the crown, to the poor,

or to some public use, and the other part to the informer or prosecutor." 3 Kerr's Bl. Com. (4th Eng. ed.) 149; 3 Cooley's Bl. Com. 159.

England has an act to redress disorders in common informers, and for better execution of penal laws which applies only to *popular actions*. 18 Eliz., ch. 5.

Speaking of these statutes, an able writer says:

"Owing to the number of penal statutes which now existed, and the encouragement which they held out to needy persons to bring information for the sake of the forfeitures, two statutes were made in this reign, namely, in the 18th and 31st years of this queen [Elizabeth] for the purpose of regulating this troublesome description of people, and in some instances inflicting corporal punishment on such persons if convicted of malicious or oppressive proceedings. Among other things, compounding informations on penal actions—that is, taking any money or promise from the defendant without leave of court by way of making a composition with him not to prosecute—subjected the offender to a penalty of £10, two hours standing in the pillory, and to be forever disabled from suing such *popular actions*." Crabb's Hist. Eng. Law 509.

The term "informer," as used in the United States Revised Statutes, § 5294, includes plaintiff in a *popular action*, or a person suing for a penalty given by statute to any person suing for the same. Pollock v. The Laura, 5 Fed. Rep. 133.

1. 1 Phill. on Ev., ch. 8, § 7.

2. 4 Phill. on Ev. 166; Howard v. Shipley, 4 East 180; Mead v. Robinson, Willes 425.

3. U. S. v. Murphy, 16 Pet. (U.S.) 213.

An informer is a competent witness, although he may receive a part of the penalty. This is not strictly the rule at the common law, but is founded on necessity and policy, and is now fully established.¹

1. Depositions Taken Before the Trial.—A deposition, taken before the trial, of an informer who is entitled, under the act of congress, to a portion of a fine, forfeiture or penalty, is not admissible evidence. The act of congress only makes such informer a competent witness when "he shall be necessary as a witness on the

1. *U. S. v. Patterson*, 3 McLean (U. S.) 53.

The informer is a competent witness in a prosecution on Stat. 21, Geo. 3, ch. 37, providing against exporting machinery.

So a prosecution for penalties under Stat. 9 Anne, ch. 14, § 5, the loser of money at cards may prove loss.

On a prosecution under Stat. 23, Geo. 2, ch. 13, § 1, for seducing artificers to go out of the kingdom, the prosecutor is a competent witness, although entitled to a moiety of the penalty.

An informer who receives one half of the penalty on conviction is, notwithstanding, a competent witness. This rule is chiefly founded on the ground of public policy. *U. S. v. Patterson*, 3 McLean (U. S.) 299.

At common law, in cases of summary convictions, where a penalty is imposed by statute, and the whole or a part is given to the informer or prosecutor, who becomes entitled to it forthwith upon the conviction, he is not a competent witness for the prosecution. *Rex v. Williams*, 9 B. & C. 549; *Rex v. Tilley*, 1 Stra. 316; *Com. v. Paull*, 4 Pick. (Mass.) 251.

Where the penalty is to be recovered by the witness in a subsequent civil action, he is not an incompetent witness upon the indictment. *Rex v. Luckup*, Willes 425, *n*; 9 B. & C. 557, 558.

The circumstances that a witness for the prosecution will be entitled to a reward from the government upon conviction of the offender, or to a restoration as owner of the property stolen, or to a portion of the fine or penalty inflicted, are not admitted as a valid objection to his competency. By the very statute conferring a benefit upon a person who, but for the benefit, would have been a witness, his competency is virtually continued, and he is as much a witness after that benefit as he would have been before. The case

is clear upon grounds of public policy, with a view to the public interest, and because of the principle on which rewards are given. The public has an interest in the suppression of crime and the conviction of criminals; it is with a view to stir up greater vigilance in apprehending that rewards are given; and it would defeat the object of the legislature to narrow the means of conviction by means of these rewards, and to exclude testimony which would otherwise have been admissible. *Rex v. Williams*, 9 B. & C. 549, 556; 1 Lofft's Gilb. Ev. 245, 250; *U. S. v. Murphy*, 16 Pet. (U. S.) 203; *U. S. v. Wilson*, 1 Baldw. (U. S.) 99; *Rex v. Teasdale*, 3 Esp. 68, *n*; *Salisbury v. Connecticut*, 6 Conn. 101; *Com. v. Moulton*, 9 Mass. 30.

Where the general question of the admissibility of witnesses, to whom a reward was offered by the government, being admitted, to the twelve judges, it was decided in the affirmative. *Case of the Rioters*, 1 Leach, Cr. Cas. 353, note *a*.

The general rule of incompetency does not apply in those cases, by reason of interest, where the informer and prosecutor, in divers summary convictions and trials for petty offences, are interested in the fine or forfeiture. 1 Greenl. Ev. (13th ed.), § 415.

The rule is settled that, in a public prosecution, no question can be put which tends to reveal who was the secret agent of the government. *Atty. Gen. v. Briant*, 15 Law Jour., N. S. Ex. 265; 5 Law Mag., N. S. 333.

The law does not require that the information shall be as full as the evidence which may ultimately be given at the trial, or which may be necessary to establish a forfeiture. It is sufficient if it be acted upon, induces the prosecution, and contributes to the recovery. If the information furnishes ground of inquiry, prosecution and recovery, the informer is entitled to the reward.

trial," of which necessity the court shall be the judge after hearing the other testimony.¹

INFRINGEMENTS—(In Patent Law).

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I. DEFINITION.—Infringement of a patent right is a copy of the thing described in the specifications of the patentee, either without variations or with such variations as are consistent with its being in substance the same thing.² It takes

Sawyer v. Steele, 3 Wash. (U. S.) 464.

1. The Schooner Thomas v. U. S., 1 Brock. (U. S.) 367.

This case was decided under a law which provides that if any officer, or other person, entitled to a part or share of any of the fines, penalties, or forfeitures, shall be necessary as a witness, on the

trial, for such fine, penalty, or forfeiture, such officer or other person, may be a witness upon such trial; but in such case he shall not receive any part or share of the said fine. Act of 1799, ch. 128, § 91; 1 Story's Laws of the U. S., p. 656.

2. Burr v. Duryee, 1 Wall. (U. S.) 531.

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| <p>(a) <i>What May be Evidence</i>, 758.</p> <p>(b) <i>Where Plaintiff's Invention Is Used in Conjunction with Other Devices</i>, 759.</p> <p>(c) <i>Profits of Defendant as Measure of Damages</i>, 760.</p> <p>(4) <i>Increase of Damages</i>, 761.</p> <p>(5) <i>Forfeiture of Damages by Failure to Mark in Accordance with Statute</i>, 761.</p> <p>(6) <i>Ignorance of Existence of Patent — Conduct of Patentee as Mitigating Damages</i>, 762.</p> <p>(7) <i>Interest on Damages</i>, 762.</p> <p>3. <i>Profits</i>, 762.</p> <p>(1) <i>Principle on Which Award</i></p> | <p><i>ed</i>, 762.</p> <p>(2) <i>Definition</i>, 763.</p> <p>(3) <i>Profits Where Complainant's Device Is Used with Other Devices or Is Merely an Improvement</i>, 764.</p> <p>(4) <i>Measure of Profits—Construction</i>, 765.</p> <p>(5) <i>Measure of Profits—Use</i>, 765.</p> <p>(6) <i>Licence Fee as Measure of Profits</i>, 767.</p> <p>(7) <i>Time to be Included in Accounting</i>, 767.</p> <p>(8) <i>Deductions to be Allowed Infringer</i>, 767.</p> <p>(9) <i>Interest on Profits</i>, 768.</p> <p>4. <i>Damages in Suits in Equity Under Rev. Stat., Sec. 4921</i>, 769.</p> |
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place whenever a party avails himself of the invention of the patentee without such variation as will constitute a new discovery.¹

II. INFRINGEMENT GENERALLY.—1. Mode of Operation.—Where the machine used by the defendants is substantially and in its mode of operation like the plaintiff's, it is an infringement.²

1. Curtis on Patents (4th ed.) 369.

Carter v. Baker, 1 Sawy. (U. S.) 512; Foss v. Herbert, 1 Biss. (U. S.) 121; Rich v. Lippincott, 2 Fish. Pat. Cas.; May v. Fond du Lac Co., 27 Fed. Rep. 691.

Only Substantial Agreement Necessary.—To constitute infringement the plaintiff's invention need only be substantially adopted. Cox v. Griggs, 1 Biss. (U. S.) 362; Sewall v. Jones, 91 U. S. 171. It is not necessary that it should be adopted in every particular. Sewall v. Jones, 91 U. S. 171; Waterbury Brass Co. v. N. Y. Brass Co., 3 Fish. Pat. Cas. 43.

If the machine complained of were a copy in form of the machine described in the specification, it would at once seem to be an infringement. It could be nothing else. It is only ingenious diversities of form and proportion, presenting the appearance of something unlike the thing patented that give rise to questions. Winans v. Denmead, 15 How. (U. S.) 330.

2. Sewall v. Jones, 91 U. S. 171; Gray v. James, Pet. (C. C.) 394; s. c., 1 Robb. Pat. Cas. 120; Imlay v. R. R.

Co., 1 Fish. Pat. Cas. 340; s. c., 4 Blatchf. (U. S.) 227.

Substantial Identity.—One machine or manufacture is not a violation of another unless it is substantially the same. It need not be identical, but it must be similar in its mode of operation. Smith v. Downing, 1 Fish. Pat. Cas. 64. See note 83.

Doing Same Work in Substantially Same Way.—The use of a device doing the same work in substantially the same way and accomplishing substantially the same results as another patented device, is an infringement of the patent. Shaver v. Skinner Mfg. Co., 30 Fed. Rep. 68; Sewing Machine Co. v. Frame, 24 Fed. Rep. 596; Cantrell v. Wallick, 117 U. S. 689; s. c., 35 Pat. Office Gaz. 871.

A structural difference will not avoid infringement. Sewing Machine Co. v. Frame, 24 Fed. Rep. 596; s. c., 28 Pat. Office Gaz. 96.

Such arrangement would have embodied his invention, and its use now would infringe his third claim, because it would affect the result indicated, for the object indicated, by substantially the same means and mode of operation. McComb v. Beard, 10 Blatchf. (U. S.)

2. Similarity of Principle and Idea.—An infringement is a copy made after and agreeing in principle with the article described in the *Letters Patent*,¹ the word principle meaning the mode of

350; s. c., 6 Fish. Pat. Cas. 254; s. c., 3 Pat. Office Gaz. 33.

"Essential Elements."—If the defendants have embodied the essential elements of the plaintiff's invention in their device, they infringe. *Sessions v. Romadka*, 28 Pat. Office Gaz. 721; s. c., 21 Fed. Rep. 124.

Substantial Similarity.—The sole enquiry is whether the mode or process used by the defendant is substantially the same, in whole or in part, with the plaintiff's. *Tilghman v. Werk*, 1 Bond (U. S.) 511. Whether that identity is described by the terms "the same principle," "the same *modus operandi*," or any other. *Foss v. Herbert*, 1 Biss. (U. S.) 121; *Rich v. Lippincott*, 2 Fish. Pat. Cas. 1; *Carter v. Baker*, 1 Sawy. (U. S.) 512.

Inasmuch as the plaintiff's actual invention is substantially reproduced by the defendant, and there is a substantial identity in the means by which the material portion of the result was accomplished, I am of the opinion that the mode of operation which the defendant has adopted is within the limits of the patent and is included in the first claim. *Schillinger v. Gunther*, 14 Blatchf. (U. S.) 152; *Halliday v. Covell*, 37 Pat. Office Gaz. 785; s. c., 27 Fed. Rep. 217.

Infringement requires: 1st. Similarity of design; 2nd. Substantially the same result or purpose. *Henderson v. Cleveland Co-operative Stove Co.*, 12 Pat. Office Gaz. 4. The accomplishment of substantially the same result in substantially the same way. *Foss v. Herbert*, 2 Fish. Pat. Cas. 31; s. c., 1 Biss. (U. S.) 121. Producing the given result by the same mode of operation or same combination of powers. *Odiorne v. Winkley*, 2 Gall. (U. S.) 51.

Similarity of design being established an infringement occurs, if a result incident to the construction of the device is the same as that of the complainant, even though the primary purpose of the construction is a different object. *Henderson v. Cleveland Co-operative Stove Co.*, 12 Pat. Office Gaz. 4; s. c., 2 Bann. & Ard. Pat. Cas. 604.

Infringement where all obtain a like result by substantially the same means. *Gottfried v. Bartholomae*, 8 Biss. (U.

S.) 219; s. c., 3 Bann. & Ard. Pat. Cas. 308; s. c., 13 Pat. Office Gaz. 1128.

Infringement Not Dependent Upon Names.—In determining the question of infringement, the court or jury are not to judge about similarities or differences by the names of things, but are to look at the machines or their several devices or elements in the light of what they do or what office or function they perform, and to find that one thing is substantially the same as another if it performs substantially the same function in substantially the same way to obtain the same result. *Machine Co. v. Murphy*, 97 U. S. 120; s. c., 13 Pat. Office Gaz. 366; *Cantrell v. Wallick*, 117 U. S. 689; s. c., 35 Pat. Office Gaz. 871.

If a device operates in substantially the same way as the device in the patentee's invention it is an infringement, although it was not known or in use at the date of that invention. *Potter v. Stewart*, 18 Blatchf. (U. S.) 561; s. c., 7 Fed. Rep. 215.

Substantial Adoption of Plaintiff's Methods.—A substantial adoption of the plaintiff's methods is infringement. *Kidd v. Spence*, 4 Fish. Pat. Cas. 37.

Substance of Operation.—A patented machine is infringed by a machine which incorporates in its structure and operation the substance of the operation; that is, by an arrangement of mechanism which performs the same service or produces the same effects in the same way. *Hoffheins v. Brandt*, 3 Fish. Pat. Cas. 218; *Sewall v. Jones*, 91 U. S. 171; *Werner v. King*, 96 U. S. 218; s. c., 13 Pat. Office Gaz. 176. To constitute infringement the patentee's devices must substantially be adopted. *Waterbury Brass Co. v. New York etc. Brass Co.*, 3 Fish. Pat. Cas. 43.

Word "Substantial."—The word "substantial," as applied in actions for an infringement, is not susceptible of an exact definition. *Brooks v. Bicknell*, 3 McLean (U. S.) 250; s. c., 2 Rob. Pat. Cas. 118.

Same "in Substance"—Meaning.—One machine is the same in substance as another if the principle be the same in both, although the forms may be different. *Sickels v. Borden*, 3 Blatchf. (U. S.) 535.

1. *Haselden v. Ogden*, 3 Fish. Pat.

operation of the machine, or an embodiment in the defendant's device of the same idea as the patentee's, and its arrangement carrying it out.¹

Cas. 378; *Page v. Ferry*, 1 Fish. Pat. Cas. 298; *Halliday v. Covel*, 37 Pat. Office Gaz. 785.

All modes, however changed in form, which act on the same principle and effect the same end, are within the patent. *McComb v. Brodie*, 2 Pat. Office Gaz. 117; 1 Woods (U. S.) 153.

It is a familiar rule that to copy the principle or mode of operation described in a patent is an infringement, although such copy should be totally unlike the original in form or proportions. *Winans v. Denmead*, 15 How. (U. S.) 330. An infringement is a copy made after and agreeing with the principle laid down in the specification. *Galloway v. Bleaden*, Webs. Pat. Cas. (Eng.) 523; *Walton v. Potter*, Webs. Pat. Cas. (Eng.) 586; *Page v. Ferry*, 1 Fish. Pat. Cas. 298, and agreeing substantially and in principle with the articles described in letters patent. *Haselden v. Ogden*, 3 Fish. Pat. Cas. 378.

Arrangement by Defendant of Device "On Same Principle."—If the defendant has arranged his machinery on the same principle as claimed by the plaintiff he is guilty of infringement. *Parker v. Haworth*, 4 McLean (U. S.) 370.

Whoever uses the principle of an invention covered by a patent will be held to have infringed it, under whatever forms or modifications he may have adopted it. *McComb v. Brodie*, 1 Woods (U. S.) 153.

What Patentee Means by the Description in his Specification.—Where a patentee has described one mode of practicing his invention as the law requires him to do, he must be understood as merely describing the best mode and not as excluding a method different from it only in a single detail which produces the same result and is distinctly within its object. *Lorrillard & Co. v. McDowell & Co.*, 2 Bann. & Ard. Pat. Cas. 531.

"Substantial Identity" Defined by "Principle."—"If the operative principle of two machines be the same, the substantial identity required by the patent law exists." *Parker v. Styles*, 1 Fish. Pat. Rep. 319. The identity that is to be looked to in an action of infringement respects the application of the principle. *Wintermute v. Redington*, 1 Fish. Pat. Cas. 239.

In order to ascertain the true nature and value of an invention, the substance and principle of it must be separated from its accidents, its essence from its modes. A mere change in the latter while the former were retained would not avoid an infringement. *Blanchard v. Reeves*, 1 Fish. Pat. Cas. 103.

A patent in calling for a specific mode embraces in law all mechanical equivalents or modes which operate on the same principle; consequently all modes which act substantially on the same principle and effect the same end are within the patent. *Pitts v. Edmonds*, 2 Fish. Pat. Cas. 57; *Odiorene v. Denney*, 3 Bann. & Ard. 287.

1. By principle of a machine is not meant the original elementary principles of motion which philosophy and science have discovered, but the *modus operandi*, the peculiar device or manner of producing any given effect. *Whitmore v. Cutter*, 1 Gall. (U. S.) 478. It means the peculiar mode, manner or device by which the proposed result or effect is produced. *Pitts v. Wemple*, 2 Fish. Pat. Cas. 10; s. c., 1 Biss. (U. S.) 87; *Judson v. Cope*, 1 Fish. Pat. Cas. 615; s. c., 1 Bond (U. S.) 327. The *operative cause* by which a certain effect is produced, the combination of powers, is called the principle of the machine. *Brooks v. Jenkins*, 3 McLean (U. S.) 432; *Parker v. Stiles*, 5 McLean (U. S.) 44.

Whatever is essential to produce the appropriate result of a machine independently of its mere form is a matter of principle. *Olcott v. Hawkins*, 2 Am. L. J., N. S. 19.

Here was a great leading principle in the feed of the machine devised and invented by Wilson. He, to be sure, describes the particular manner in which he carries out that idea, but once get that in mind and it is clear that you can carry it out in a variety of forms.

This is, it may be said, an ingenious variation, or difference, by which the idea of Wilson is carried out.

It is clear that that does not change the principle of the invention, and it is clear, too, as already stated, that a mechanic, once having the idea in his mind, could apply it by adopting a great variety of forms and devices, this among others. *Potter v. Schenck*,

3. Superiority or Inferiority of Mechanical Skill or of Machine.—

That the device may be an infringement it must be substantially the same in kind though not necessarily in degree.¹ It may infringe, although not so perfect as the plaintiff's,² and superior mechanical skill or better mechanism,³ or the performance by the

1 Biss. (U. S.) 515. *McCormick v. Seymour*, 2 Blatchf. (U. S.) 240.

So long as Wilson's ideas were found in the construction and arrangement of a device, the party using it is appropriating his invention and must be held as an infringer. *Potter v. Wilson*, 2 Fish. Pat. Cas. 102.

Whether one machine is an infringement of another does not necessarily depend upon whether the mechanical constructions are different, but upon whether the new idea is completely embodied in the structure as found. *May v. Fond du Lac Co.*, 27 Fed. Rep. 691.

Where the construction and elemental idea and principle of the alleged infringement differ essentially from the plaintiff's patent there is no infringement. *Turrill v. Ill. Cent. R. Co.*, 5 Biss. (U. S.) 344.

If the defendant's machine involves some new idea in its construction not to be found in the plaintiff's, or whether the plan used by the defendant is in substance the same as the plaintiff's, the differences introduced being merely differences in things not material or important; in other words, whether the defendant's is in substance and effect a colorable evasion of the plaintiff's rights, or is a new and substantially different thing. . . . The true question involved is whether the device embodies the same idea as that of the former patent, and its arrangement carries out that idea. *McCormick v. Seymour*, 2 Blatchf. (U. S.) 240. Whether it embodies same plan. *Sewall v. Jones*, 91 U. S. 171.

The use of the words "idea" and "principle" has been severely criticised in the case of *Burr v. Duryee*, 1 Wall. (U. S.) 531; and have been not much used in the opinions of the court since. In that case, however, the criticism was directed against their use in description of an invention. See INVENTION PRINCIPLE. But the words principle and idea in connection with infringement are freely used, and older decisions quoted in *Sewall v. Jones*, 91 U. S. 171.

1. *Whipple v. Middlesex Co.*, 4 Fish. Pat. Cas. 41; *Adams v. Joliet Mfg. Co.*, 3 Bann. & Ard. Pat. Cas. 1.

2. It is no defence that the result is not as good, if it is substantially the same in kind and is produced by substantially the same means. *Roberts v. Harnden*, 2 Cliff. (U. S.) 500.

It is not necessary that the defendant should employ the plaintiff's invention to as good advantage as he employed it, or that the result should be the same in degree, but it must be the same in kind. *Winans v. Denmead*, 15 How. (U. S.) 330.

A device may infringe, although not so perfect as the plaintiff's. *Potter v. Empire Sewing Machine Co.*, 3 Fish. Pat. Cas. 474; *Roberts v. Harnden*, 2 Cliff. (U. S.) 500.

An imperfect infringement, because the machine is imperfect, is still an infringement. *Union Paper Bag Co. v. Binney*, 5 Fish. Pat. Cas. 166.

Reason of This Rule.—It is no defence that the machine is not as good as that of the patentee. The rights of an inventor are oftentimes affected as injuriously by the sale of poor machines in the market as by those made strictly in accordance with his patent. *Roberts v. Harnden*, 2 Cliff. (U. S.) 500; *Waterbury Brass Co. v. Miller*, 5 Fish. Pat. Cas. 48; s. c., 9 Blatchf. (U. S.) 77; *Chicago Fruit House Co. v. Busch*, 4 Fish. Pat. Cas. 395; s. c., 2 Biss. (U. S.) 472.

3. Superior mechanical skill embodied in a form different in appearance and reality will not avoid infringement if the idea which gives the machine its value is appropriated. *Blanchard v. Beers*, 2 Blatchf. (U. S.) 411; *Brainard v. Cramme*, 12 Fed. Rep. 621. Nor where the mode of operation and mechanical structure being the same but the arrangement being better, the infringement is not avoided. *Wheeler v. Clipper etc. Co.*, 2 Pat. Office Gaz. 442; s. c., 10 Blatchf. (U. S.) 181; s. c., 6 Fish. Pat. Cas. 1; although the arrangement is *much more useful*. *McComb v. Brodie*, 5 Fish. Pat. Cas. 384; s. c., 1 Woods (U. S.) 153; s. c., 2 Pat. Office Gaz. 117; although it presents great simplicity and cheapness as compared with original device. *Evory v. Burt*, 23 Pat. Office Gaz. 2121; s. c., 15 Fed. Rep.

device of functions in addition to those of the defendant do not avoid infringement.¹ But the greater utility of a device may be evidence that there is a substantial difference between the two devices.²

The right of an inventor does not depend upon the degree of perfection of his invention nor slight changes in arrangement or finish of parts, but upon whether the machinery constructed as described will or will not accomplish practically and usefully the end pointed out, and one using his principle but with superior mechanical skill in construction and arrangement will be guilty of infringement. *Parkhurst v. Kinsman*, 1 Blatchf. (U. S.) 488.

Nor is infringement a question which is best or most perfect. *Howe v. Abbott*, 2 Story (U. S.) 191; and if the defendant's machine, though better, appropriates what the plaintiff has, it is an infringement. *Cownir v. Rumsey*, 8 Cas. Blatchf. (U. S.) 36; s. c., 4 Fish. Pat. 275. For it is no defence that the defendants have improved the patented device. *Converse v. Cannon*, 2 Woods (U. S.) 7. Even though an infringer has greatly improved a machine, if he uses the principle of it he does not escape liability. *McComb v. Brodie*, 1 Woods (U. S.) 153; *Converse v. Cannon*, 2 Woods (U. S.) 7; *Miller's Falls Co. v. Ives & Co.*, 14 Blatchf. (U. S.) 169.

If the patent describes the invention as embodied in a cheap and rude form, this will not relieve those who construct the machine with more expensive fixtures from the charge of infringement, however useful they may be. (*Brown v. Guild*, *Brown v. Selby*), *Corn Planter Patent*, 23 Wall. (U. S.) 181.

Where two machines are the same in principle it is no defence for using the prior invention that the defendant has improved it. *Gray v. James*, Pet. (C. C.) 394.

Where the machinery constructed after the patent will accomplish the end sought, anyone using the principle embodied in it is guilty of an infringement, "however he may have perfected the machinery by superior skill in the mechanical construction and arrangement of the parts. Such perfecting is but the skill of the mechanic, not the genius of the inventor." *Kinsman v. Parkhurst*, 1 Blatchf. (U. S.) 488; *aff'd* in 18 How. (U. S.) 289; *Le Roy v. Tatham*, 2 Blatchf. (U. S.) 474; *aff'd* in 14 How. (U. S.) 156; *Tracy v. Torrey*, 2 Blatchf.

(U. S.) 275; *Wilbur v. Beecher*, 2 Blatchf. (U. S.) 132.

A patentee is entitled to use all modifications resulting from experience which do not involve any new or useful invention. *Decker v. Grote*, 10 Blatchf. (U. S.) 331; s. c., 3 Pat. Office Gaz. 65.

1. *Sarven v. Hall*, 9 Blatchf. (U. S.) 524. The mere fact that the device of the defendants has a function additional to that accomplished by the patented invention will not justify the use of the latter without liability. *Strobridge v. Lindsay*, 2 Fed. Rep. 692; s. c., 5 Bann. & Ard. Pat. Cas. 411. The mere addition of a useless appendage in a machine does not avoid infringement. *Poppenhuser v. Falke*, 5 Blatchf. (U. S.) 493; s. c., 2 Fish. Pat. Cas. 181. Or any mere addition. *Hays v. Sulson*, 1 Bond (U. S.) 279.

2. The greater utility which may be regarded as evidence tending to show that some new principle or mechanical power or mode of operation producing a new kind of result has been introduced, must be derived from the changes introduced, and not from any better material used or greater skill and care in manufacturing. *Many v. Sizer*, 1 Fish. Pat. Cas. 17.

Superior Utility Important Only as Showing Substantial Difference.—The superior utility of the defendant's machine is not of itself a certain test, because it may contain the whole substance of the patentee's invention and something in addition. *Pitts v. Wemple*, 2 Fish. Pat. Cas. 10; s. c., 1 Biss. (U. S.) 87. And its superiority in any respect to that of the patentee is immaterial, except so far as it goes to show a substantial difference between them. *Alden v. Dewey*, 1 Story (U. S.) 336; s. c., 2 Robb. Pat. Cas. 17.

Substantial Improvement Substantial Difference.—Two things are not the same, under the patent law, when one is in practice substantially better than the other, in a case where the second improvement is not gained by the use of the same means or mechanical equivalents. *Mitchell v. Tilghman*, 19 Wall. (U. S.) 287. And if the result of the mechanism used by the defendants is greatly superior to that described

4. Differences in Form as Affecting Infringement.—Where substance and form are inseparable, where form is “the essence of the invention,” if the form is not copied, the invention is not used, and there is no infringement;¹ but where the two are separable, and the invention may be copied in a different form, change of form does not avoid an infringement.²

and claimed by the patentee, this fact may be considered by the jury as tending to prove that the mechanism of the defendants is a new invention, substantially different from that described by the plaintiff. *Singer v. Walmsley*, 1 Fish. Pat. Cas. 558; *Carter v. Baker*, 1 Sawy. (U. S.) 512; s. c., 4 Fish. Pat. Cas. 404. The difference of result is sometimes coupled with mechanical differences. The mechanical difference may be sufficient to show that the two machines are not substantially the same. The differences of result and utility may be so great as to be satisfactory proof of the same fact. It may, however, be that neither of these would be satisfactory, yet the mechanical difference and the difference of utility, taken together, may be sufficient to satisfy the mind. *Johnson v. Root*, 1 Fish. Pat. Cas. 351.

Example.—If one paper file holds the paper better than another which is patented, and has driven it out of the market, that is *prima facie* evidence that the mechanism is different and is a new invention, and the use of it does not violate the plaintiff's monopoly. *Smith v. Woodruff*, 1 McA. (Sup. Ct. D. C.) 459; s. c., 6 Fish. Pat. Cas. 476; s. c., 4 Pat. Office Gaz. 635.

1. Unless the same certain circular lines were adopted as are described in the specification, there is no infringement, but if the imitation be so nearly exact as to satisfy the jury that the imitator intended to copy the model and make some almost imperceptible variation for the purpose of evading the right of the patentee, this may be considered as a fraud in law, and such slight variations be disregarded. *Davis v. Palmer*, 2 Brock. (U. S.) 298. Undoubtedly there may be cases where letters patent include only the particular form described and claimed. *Davis v. Palmer*, 2 Brock. (U. S.) 298, seems to have been one of them, but “The reason why such a patent covers only one geometrical form is not that the patentee has described and claimed that form only, but because it is the only form capable of embodying his inven-

tion, and consequently if the form is not copied the invention is not used.” *Winans v. Denmead*, 15 How. (U. S.) 330.

2. Where substance and form are inseparable it is enough to look at form only. Where they are separable, where the whole substance of the invention may be copied in a different form, it is the duty of courts and juries to look through the form of the invention for that which entitled the inventor to his patent, and which his patent was designed to secure. Where that is found there is an infringement, and it is not a defence that it is embodied in a form not described and in terms claimed by the patentee. *Winans v. Denmead*, 15 How. (U. S.) 330.

Rule Where Form Is Not “Essence of Invention.”—Except where form is the essence of the invention it has but little weight in the decision of such an issue (infringement), the correct rule being that the court or jury, as the case may be, are not to judge about similarities or differences by the names of things, but are to look at the machines or their several devices or elements in the light of what they are, or what office or function they perform, and how they perform it. *Machine Co. v. Murphy*, 97 U. S. 120, quoted 34 Fed. Rep. 133.

In infringement the thing to be discovered is whether by a variation of form, or by the use of a thing which bears a different name, the defendant accomplishes by his machine the same purpose or effect as that accomplished by the patentee, or whether there is a real change of structure or purpose. *Converse v. Cannon*, 2 Woods (U. S.) 7.

Form and Size.—Structural differences in form and size do not avoid infringement. *Sewing Machine Co. v. Frame*, 28 Pat. Office Gaz. 96.

Infringer Though Other Parts Must be Modified.—If a party make a formal change in the important part of a machine he is an infringer, although he has to modify the other parts of the machine in order to meet such change and attain the results which were

5. Equivalents—(1) *Definition*.—An equivalent means something that does substantially the same thing in substantially the same way as another device.¹

(2) *Requisites of Equivalents*.—Equivalents must be known as a proper substitute for the original device at the date of the patent.² They need not be of the same name or form,³ and may perform functions additional to those in the patent.⁴

(3) *Mechanical Equivalents*.—One device is a mechanical equivalent of another when its substitution for it is a matter of "judgment of construction;⁵" one which a skilful and experienced workman would know would produce the same result.⁶ It does not mean a device which merely produces the same effect.⁷

attained by the patented machine. *Union P. B. M. Co. v. P. & W. Co.*, 15 Pat. Office Gaz. 423.

If the defendants use a substantial part of the invention patented, although with some modification of form or apparatus, it is a violation of a patent right. So if the patent be for two machines, and each is a new invention, and the defendant use only one of the machines. *Wyeth v. Stone*, 1 Story (U. S.) 273.

The patentee is protected from obvious modes readily adopted *without invention* for accomplishing the same end. *Union Paper Bag Co. v. Nixan*, 6 Fish. Pat. Cas. 402; s. c., 4 Pat. Office Gaz. 31.

1. *Cahoon v. King*, 1 Fish. Pat. Cas. 397. Equivalents are to be known by an inference drawn from all the circumstances of the case, by attending to the consideration whether the new contrivance is used for the same general purpose, performs the same kind of duties, or is applicable to the same object as the old device. *In re Nutting*, 1 McA. Pat. Cas. (Sup. Ct. D. C.) 455. The same result must be accomplished or effect produced by substantially the same mode of operation. *Conover v. Roach*, 4 Fish. Pat. Cas. 12; *Merriam v. Drake*, 9 Blatchf. (U. S.) 336. To be an equivalent one device must perform the same function in substantially the same way as another. *Peard v. Johnson*, 23 Fed. Rep. 507; *Cahoon v. King*, 1 Cliff. (U. S.) 592; *Waterman v. Thomson*, 2 Fish. Pat. Cas. 461.

2. *Babcock v. Judd*, 17 Pat. Office Gaz. 1351; s. c., 5 Bann. & Ard. Pat. Cas. (C. C.) 127; *Storrs v. Howe*, 4 Cliff. (U. S.) 388; s. c., 2 Bann. & Ard. Pat. Cas. 430; s. c., 10 Pat. Office Gaz. 421.

3. *Machine Co. v. Murphy*, 97 U. S. 120; 13 Pat. Office Gaz. 366; *Carter v. Westlake*, 4 Pat. Office Gaz. 636. Although a handle is not in general an equivalent for a lever, yet if it may be used to perform the same functions in substantially the same way, it may be an equivalent. *Brown v. Guild* (Corn Planter Patents), 23 Wall. (U. S.) 181.

The application of known mechanical powers which will produce certain results, although different in form from the means employed by the original patentee, is a mechanical substitute and equivalent for the same. *Wilt v. Grier*, 19 Pat. Office Gaz. 427; s. c., 5 Fed. Rep. 450.

4. *Wheeler v. Clipper Mower etc. Co.*, 10 Blatchf. (U. S.) 181; *Atlantic Giant Powder Co. v. Goodyear*, 13 Pat. Office Gaz. 45; s. c., 3 Bann. & Ard. Pat. Cas. 162. The new features producing an additional result might be patentable as an improvement, but would not be the less equivalents. *Maynadier v. Tenney*, 2 Bann. & Ard. Pat. Cas. (C. C.) 615.

5. *Foster v. Moore*, 1 Curt. (U. S.) 279; *Wheeler v. Morris*, 36 Pat. Office Gaz. 822.

6. *Carter v. Baker*, 4 Fish. Pat. Cas. 494; s. c., 1 Sawy. (U. S.) 512; *Johnson v. Root*, 1 Fish. Pat. Cas. 351.

7. The term equivalent has two meanings; the one relates to results that are produced, and the other to the mechanism by which those results are produced. Two things may be equivalent, that is, the one equivalent to the other as producing the same result when they are not the same mechanical means. Mechanical equivalents are spoken of as different from equivalents that merely produce the same result. A mechanical equivalent, as generally understood, is where the one may be adopted instead

(4) *Equivalent of Substance and Chemical Equivalents.*—An equivalent of any substance is another substance having similar properties and producing substantially the same effect.¹ The substances need not have been equivalents for any previous pur-

of the other by a person "skilled in the art from his knowledge of the art." But there may be equivalents in producing the same result, each of which is an independent matter of invention, and in that sense they are not mechanical equivalents. *Johnson v. Root*, 1 Fish. Pat. Cas. 35. Alternative but different mechanisms, which produce in whole or in part the same or similar useful effects, are not mechanical equivalents in that their use constitutes an infringement. *Wells v. Hagaman*, 29 Leg. Int. 405. Mechanical equivalents are not merely those which produce the same result. *Smith v. Marshall*, 2 Bann. & Ard. Pat. Cas. 371; *Conover v. Roach*, 4 Fish. Pat. Cas. 12; *Merriam v. Drake*, 9 Blatchf. (U. S.) 336.

The same result obtained by means other than that claimed by patentee is no infringement. *Carver v. Hyde*, 16 Pet. (C. C.) 513; *Dryfoos v. Wiese*, 19 Fed. Rep. 315. By entirely different means. *Seymour v. Osborne*, 3 Fish. Pat. Cas. 555. By different means does not constitute infringement. *Dryfoos v. Wiese*, 19 Fed. Rep. 315. By means different in the essential elements of organization. *Merriam v. Van Nest*, 13 Pat. Office Gaz. 597. A device is not necessarily an equivalent of another merely because it performs the same result. *Merriam v. Blake*, 9 Blatchf. (U. S.) 336. That two machines that produce the same result will not justify the assertion that the devices used by one are mere equivalents of the devices used by another. *Burr v. Duryee*, 1 Wall. (U. S.) 531.

When Not Equivalent.—A device which has apparently different mechanical adaptabilities cannot be considered a mechanical equivalent. *Smith v. Marshall*, 2 Bann. & Ard. Pat. Cas. 371.

The fact that the same result is obtained by a later patent does not, therefore, make the latter an infringement of the other. *Fuller v. Yentzer*, 6 Biss. (U. S.) 203; *Dryfoos v. Wiese*, 27 Pat. Office Gaz. 639; s. c., 19 Fed. Rep. 315.

Although several inventors might obtain substantially the same result, if it is obtained by means substantially

different in character, construction, arrangement and mode of operation from any prior invention adapted to the same general purpose, the use of such means for a similar or even the same purpose will not infringe the rights of a prior patentee. *Burden v. Corning*, 2 Fish. Pat. Cas. 477.

If the change introduced by the appellant (who was seeking to obtain a patent for his device) constitutes a mechanical equivalent in reference to the means used by a patentee, and besides being such an equivalent it accomplishes some other advantages beyond the effect or purpose accomplished by the patentee, such further advantages may make it a patentable subject as an improvement on the former invention. *In re Hebbard*, 1 McA. Pat. Cas. (Sup. Ct. D. C.) 543.

1. *Matthews v. Skates*, 1 Fish. Pat. Cas. 602; *Atlantic Giant Powder Co. v. Goodyear*, 3 Bann. & Ard. Pat. Cas. 161; s. c., 13 Pat. Office Gaz. 45; *Storrs v. Howe*, 2 Bann. & Ard. Pat. Cas. 420. Will perform the same function in the same way. *Storrs v. Howe*, 4 Cliff. (U. S.) 338; s. c., 2 Bann. & Ard. Pat. Cas. 420.

Since the case of *Crane v. Rice*, 1 Web. Pat. Cas. (Eng.) 409, it has not been considered safe to invoke the ordinary doctrine of equivalents in construing patents for new manufactures or compositions of matter. *Rumford Chemical Works v. Hecker*, 10 Pat. Office Gaz. 289.

The substitution in a patented mixture of an ingredient which, although not precisely the same in its action, produces all the valuable and beneficial results attending that for which it was substituted, and in substantially the same manner, is to be regarded as an equivalent and an infringement of the patent. *Powder Co. v. Mowbray*, 12 Pat. Office Gaz. 3.

Substance in Chemical Process.—In order to constitute an infringement of a patent for a chemical process, the equivalent need not possess all the properties of the ingredient for which it is substituted, but it must have substantially the same effect in the process. *Woodward v. Morrison*, 1 Holmes (U.

pose.¹ It is unimportant that the substituted ingredient does something more or better;² but the two substances must have been known as equivalents at the date of the patent.³ These rules apply generally both to physical and chemical equivalents, but the properties and effect in the one case are physical, in the other chemical.⁴

6. Infringement of Combination.—(1) *Special Definition—Principle.*—A combination of old elements is not infringed by the use of less than the entire combination;⁵ no element, however use-

S.) 124. Patent for process of electroplating nickel.

Defendant's solution (for bath) was amenable to the same laws, and to give the same results must be used under the same conditions and freed from the same impurities, and was made according to the same principles as that of the plaintiff. *Held*, it was a chemical equivalent. *United Nickel Co. v. Pendleton*, 24 Pat. Office Gaz. 704.

The term equivalent, when used with regard to the chemical action of such fluids as can be discovered only by experiment, only means *equally good*. *Tyler v. Boston*, 7 Wall. (U. S.) 327. This was before "the new chemistry."

Chemical Equivalents in Process.—

Now it is obvious that, for all purposes and in combination with all other substances, the chloride of zinc is no more a chemical equivalent of the chloride of sodium than, under all possible conditions, the sulphate of copper would be a chemical equivalent for the chloride of zinc; but it is equally obvious from the testimony in this case that, for the purposes of manufacturing the product of a preserved and innocuous paste, the chloride of sodium and the chloride of zinc are, when used as described in the respective patents, *practically the equivalents of each other, because in the process of manufacture they practically produce the same results*. Starting from the platform of the complainant's patent with the advantages of his discoveries, it is plain the defendant could, by inquiring of any chemist, have learned that the one could have been used in this process in place of the other, with like results. *Woodward v. Morrison*, 1 Holmes (U. S.) 124.

1. *Goodyear D. V. Co. v. Preterre*, 14 Pat. Office Gaz. 346.

2. *Giant Powder Co. v. Goodyear*, 2 Bann. & Ard. Pat. Cas. (U. S.) 161.

Chemical equivalents are not less equivalents although improvements.

Woodward v. Morrison, 1 Holmes (U. S.) 124.

3. *Storrs v. Howe*, 4 Cliff. (U. S.) 388; s. c., 2 Bann. & Ard. Pat. Cas. 420; *Woodward v. Morrison*, 1 Holmes (U. S.) 124; s. c., 2 Pat. Office Gaz. 120; s. c., 5 Fish. Pat. Cas. 357. If defendant uses an article that was not known as an equivalent for another at the date of the patent, although the article contains the chemical elements which constituted the other. *Wonson v. Gilman*, 2 Bann. & Ard. Pat. Cas. (C. C.) 590. If the defendant uses an article that was not known as an equivalent at the date of the patent in substitution for another in a compound, there is no infringement, although the article contains the chemical elements which constitute the other a new chemical combination; that is, a patent for a paint for preventing the fouling of ships' bottoms composed of (1) a suitable medium, (2) the oxide of copper yielding a poisonous solution in water, and (3) mineral matters separating the particles of oxide, and retarding such solution, is not infringed by a paint containing a similar medium, and similar mineral matters for retarding solution, but in place of oxide containing arsenite of copper. *Wonson v. Gilman*, 2 Bann. & Ard. Pat. Cas. (C. C.) 590; s. c., 11 Pat. Office Gaz. 1011.

4. Physical Though Not Chemical Equivalent.—

Where water is used in a process merely as a fluid, the use of benzine or any other substance possessing that property of water which is available in the process is within the scope of the patent as a manifest equivalent. *Roberts v. Roter*, 5 Fish. Pat. Cas. 295.

5. *Burdett v. Estey*, 16 Blatchf. (U. S.) 105; *Dodge v. Card*, 1 Bond (U. S.) 393; *Rowell v. Lindsey*, 10 Biss. (U. S.) 217; *Storrs v. Howe*, 4 Cliff. (U. S.) 388; *Sanford v. Merrimac Hat Co.*, 4 Cliff. (U. S.) 404; *Sharp v. Tiff*, 18 Blatchf. (U. S.) 132; *Fuller v. Yentzer*, 94 U. S. 288; *Reedy v. Scott*, 23 Wall. (U. S.) 352;

less, can be omitted by the patentee,¹ who makes every element material by including it in his claim;² but a subordinate device

Latta *v.* Shawk, 1 Bond (U. S.) 259; Roberts *v.* Harnden, 2 Cliff. (U. S.) 500; Washburn *v.* Gould, 3 Story (U. S.) 122; Parker *v.* Haworth, 4 McLean (U. S.) 370; Moody *v.* Fiske, 2 Mason (U. S.) 112; Sarven *v.* Hall, 1 Pat. Office Gaz. 437. A combination is not infringed unless all the parts are used. Eames *v.* Godfrey, 1 Wall. (U. S.) 78; Dodge *v.* Card, 1 Bond (U. S.) 393. A combination of old elements can only be infringed by using them *all*. Lee *v.* Blandy, 1 Bond (U. S.) 361. By using the *whole combination*. Case *v.* Brown, 1 Biss. (U. S.) 382; Gill *v.* Wells, 22 Wall. (U. S.) 1; Pitts *v.* Wemple, 6 McLean (U. S.) 558; Vance *v.* Campbell, 1 Black (U. S.) 427. Or sale. Fuller *v.* Yentzer, 94 U. S. 288.

Reason for the Rule.—The elements of a combination being old, *per se*, the essence of the invention consists in the novelty of the combination, and the adaption to the use to which it is intended, and its infringement will consist in the use of the machine substantially embodying the combination in its entirety for the same purpose. Smith *v.* Marshall, 10 Pat. Office Gaz. 375.

A combination is only infringed by the use of all the elements. Prouty *v.* Draper, 1 Story (U. S.) 568; Gage *v.* Herring, 107 U. S. 640; Howe *v.* Neemes, 18 Fed. Rep. 40; New *v.* Warren, 22 Pat. Office Gaz. 587; Wicke *v.* Ostrum, 103 U. S. 461; Fisher *v.* Craig, 3 Sawy. (U. S.) 69; Case *v.* Brown, 1 Biss. (U. S.) 382; Blanchard *v.* Putnam, 2 Bond (U. S.) 84; Pitts *v.* Wemple, 1 Biss. (U. S.) 87; Rice *v.* Heald, 13 Pac. L. J. 3; Foote *v.* Silsby, 1 Blatchf. (U. S.) 445; Barrett *v.* Hall, 1 Mason (U. S.) 447; Smith *v.* Downing, 1 Fish. Pat. Cas. (C. C.) 64; Wallace *v.* Holmes, 1 Pat. Office Gaz. 117; Sarven *v.* Hall, 1 Pat. Office Gaz. 437; Matteson *v.* Cains, 17 Fed. Rep. 525.

It is well settled that a combination is not infringed by the use of any number of elements less than the whole. Brown *v.* Hinkley, 3 Pat. Office Gaz. 384. Densmore *v.* Schofield, 4 Fish. Pat. Cas. 148; Roger *v.* Schultz Belting Co., 28 Fed. Rep. 850; Fisher *v.* Craig, 3 Sawy. (U. S.) 69.

Three Parts—Two Used.—A combination of three elements is not infringed by the use of two. Haselden *v.* Ogden, 3 Fish. Pat. Cas. 378; Gorham *v.* Mixer,

1 Am. L. J., N. S. 543; Gould *v.* Rees, 15 Wall. (U. S.) 187.

If a combination have three different known parts, and the result is proposed to be accomplished by the union of all these parts arranged with reference to each other, the use of two of these parts only, combined with a third which is substantially different in the manner of arrangement and connection with the others, is not an infringement. Brooks *v.* Fiske, 15 How. (U. S.) 212; Wilcox *v.* Komp, 7 Blatchf. (U. S.) 126.

When the Omitted Element Has Its Own Function.—A claim for the combination of three elements is not infringed by the use of only two of them where the omitted element has a function of its own not performed by the elements used in the device claimed to infringe. Tobey Furniture Co. *v.* Colby, 26 Fed. Rep. 100.

1. And it is no infringement to make the useful parts, leaving the useless one out. Coolidge *v.* McCone, 2 Sawy. (U. S.) 571.

Modification of Rule.—A combination is not infringed if any of the material parts of a combination are left out. Water Meter Co. *v.* Desper, 11 Otto (U. S.) 332; Watson *v.* Cunningham, 4 Fish. Pat. Cas. 528. A combination of the material parts of a combination is not infringed by the use of less than the entire combination. Brown *v.* Guild (corn planter patent), 23 Wall. (U. S.) 181.

2. If a patentee claims a combination of certain elements or parts, none of them can be declared to be immaterial; the patentee makes them all material by the restricted form of his claim. Water Meter Co. *v.* Desper, 101 U. S. 332; Vance *v.* Campbell, 1 Black (U. S.) 427; a patentee cannot repudiate one of the parts of his combination after another inventor has taught him how to dispense with it. Hale *v.* Stimpson, 2 Fish. 565; Coolidge *v.* McCone, 2 Sawy. (U. S.) 571; s. c., 5 Pat. Office Gaz. 458; s. c., Bann. & Ard. Pat. Cas. 78. In a claim for a combination, if the patentee specifies any element as entering into the combination, either directly or by the language of the claim, or by reference to the descriptive part of the specifications as carries such element into the claim, he makes such element material

is not an element.¹ If the principle of the patentee's combination is embodied in that of the defendant, it is infringed.²

(2) *Formal Change in Combination or Addition of Elements.*—Any slight or formal change³ of location,⁴ form, direction⁵ of elements, except where form is an essential part of the invention,⁶ does not avoid infringement, nor does using other elements in addition to the elements of the old combination.⁷

(3) *Equivalents in Combinations.*—Where one or more of the elements are dropped and another or others known at the date of the patent as common substitutes for it or them employed, infringement is not avoided;⁸ even though the substituted ele-

to the combination and the court cannot declare it to be immaterial. *Fay v. Cordesman*, 109 U. S. 408; s. c., 2 Pat. Office Gaz. 1277, *cited*. *Shepard v. Carugan*, 116 U. S. 593. For further cases on restriction of invention by claims, see *infra*, CONSTRUCTION OF PATENTS.

1. A subordinate device is not an element within the rule which requires the use of all the elements of a combination. *Smith v. Fay*, 6 Fish. Pat. Cas. 446. If a part is not an essential or material element of the invention, a party cannot evade the patent by not using it, although the patent is for a combination. *Latta v. Hawk*, 1 Fish. Pat. Cas. 465; s. c., 1 Bond (U. S.) 259; *McWilliams Mfg. Co. v. Blundell*, 22 Pat. Office Gaz. 177; s. c., 11 Fed. Rep. 419.

Where a party uses one or two of the parts of a combination of old devices, but not all of them, to produce the same results as all, either by themselves or by the aid of other devices, he does not escape infringement. *Schneider v. Poultney*, 29 Pat. Office Gaz. 84.

2. **Where Principle of Complainant's Combination Is Embodied in Defendant's Device.**—If the principle of the patentee's combination is embodied in the defendant's machine, there is an infringement although it has been so constructed as to perform but one of the functions of the combination. *Blanchard v. Beers*, 2 Blatchf. (U. S.) 411. If the defendant has a patent for a combination which contains, as one of its elements, the principle embodied in the complainant's patent, it is an infringement. *Cleveland v. Towle*, 3 Fish. Pat. Cas. 525.

3. *Sands v. Wardell*, 3 Cliff. (U. S.) 277.

4. A mere change in the location of a part, in a combination where there is no new function performed by the changed member in its new location, will not evade a patent. *Adams v. Joliet*

Mfg. Co., 3 Bann. & Ard. Pat. Cas. 17; s. c., 12 Pat. Office Gaz. 93; *Knox v. Great West. etc. Co.*, 14 Pat. Office Gaz. 897.

Where the result attained and the mode of operation are the same, so far as the essential purpose of the invention is concerned. *Kirk v. Dubois*, 42 Pat. Office Gaz. 297.

5. The essential character of a machine is not varied by a mutual interchange of form and direction between the two elements of which it is a combination, while both object and effect remain as before. *Wilson v. Barnum*, 1 Wall. Jr. (C. C.) 347; s. c., 2 Fish. Pat. Cas. 635.

Combining two of the devices of a combination into one does not avoid the patent. *American Whip Co. v. Lombard*, 14 Pat. Office Gaz. 900.

6. A change of form destroys the combination when the form is necessary to attain the result, and when, of course, a change of form of one of the things combined works a different result. *American etc. Co. v. Elizabeth*, 4 Fish. Pat. Cas. 189.

7. *Williams v. Boston etc. R. Co.*, 16 Pat. Office Gaz. 907; s. c., 17 Blatchf. (C. C.) 21; s. c., 4 Bann. & Ard. Pat. Cas. 441.

8. *Sands v. Wardell*, 3 Cliff. (U. S.) 277.

If anyone uses all the elements of a patented combination, except one, and, instead of that, employs what was known at the date of the patent to be a proper substitute for the omitted element, he is liable for an infringement of the patent. But he is not liable if he uses any other substitute, or even an old one which performs a new function. *Gill v. Wells*, 22 Wall. (U. S.) 17; *Rowell v. Lindsay*, 19 Pat. Office Gaz. 1565; s. c., 10 Biss. (U. S.) 217; s. c., 6 Fed. Rep. 290.

ment performs the functions better or other functions besides.¹ But if the substituted element is new, performs substantially different functions, or was not known at the date of the patent as a proper substitute, infringement is avoided.²

The withdrawal of one ingredient (from a combination) and the substitution of another, which was well known at the date of the patent as a proper substitute for the one withdrawn, is a mere formal alteration of the combination, if the ingredient substituted performs substantially the same function as the one withdrawn. *Seymour v. Osborne*, 11 Wall. (U. S.) 516. "Ingredients" used to mean mechanical parts.

A combination of old elements is infringed by the use for one of the elements of the device which was at the date of the first patent a well known substitute for such omitted element. *Sands v. Wardell*, 3 Cliff. (U. S.) 277; *Gill v. Wells*, 22 Wall. (U. S.) 1.

Doctrine of Equivalents Applied to Combination.—*Bona fide* inventors of a combination are as much entitled to equivalents as the inventors of other patentable improvements, by which is meant that a patentee in such a case may substitute another ingredient for any one of the ingredients of his invention, if the ingredient substituted performs the same function as the one omitted and was well known at the date of his patent as a proper substitute for the one omitted in the patented combination. *Gould v. Rees*, 15 Wall. (U. S.) 187.

A patented combination will not be defeated by a mere substitution of something for one of the parts which performs the same, or substantially the same, function, and no other, as the part for which it was substituted. *Whitelsey v. Ames*, 9 Biss. (U. S.) 225.

The infringement of a patent is not avoided by the substitution, for one of the combination, of an old ingredient performing the same function and well known at the date of the patent as a proper substitute for the one omitted. *Fuller v. Yentzer*, 94 U. S. 299; *Water Meter Co. v. Desper*, 101 U. S. 332.

Well known mechanical equivalents, or substitutes employed for one of the elements of a combination, does not avoid infringement. *Carter v. Baker*, 1 Sawy. (U. S.) 512; *Brighton v. Wilson*, 18 Fed. Rep. 378; *Brooks v. Jenkins*, 3 McLean (U. S.) 432; *Reay v. Raynor*, 19 Fed. Rep. 308.

Formal Differences Do Not Make Things Non-Equivalent.—Different devices, or devices differing in form and having different names, employed for the same purpose as those of the complainant, and in which the plan, or idea, or arrangement, combination and result are the same, *held* to be equivalents therefor. *Howe v. Williams*, 2 Cliff. (U. S.) 245.

The substitution for one part of the operating mechanism of a combination of the equivalent of the omitted does not avoid an infringement. *Robertson v. Blake*, 94 U. S. 728.

1. Equivalent Although Performing Additional Service.—One part in a combination is an equivalent of another when, "besides the functions of such other, it performs some one of the offices more effectively, or better, so long as it performs them in substantially the same way and uses substantially the same means." *Wheeler v. Clipper etc. Co.*, 6 Fish. Pat. Cas. 1. If a defendant has substituted an equivalent for one of the elements of the patented combination, he infringes it, although his combination includes other functions and produces other effects not attainable by the patentable combination. *Sarven v. Hall*, 5 Fish. Pat. Cas. 415; s. c., 9 Blatchf. (U. S.) 524; *Wheeler v. Clipper etc. Co.*, Fish. Pat. Cas. 1; s. c., 10 Blatchf. (U. S.) 181. A substitute for an element of a combination which performs other functions which are novel and useful, is an equivalent for it. *Zeun v. Kaldenberg*, 23 Pat. Office Gaz. 2514; s. c., 14 Fed. Rep. 539; *Maynadier v. Tenney*, 2 Bann. & Ard. Pat. Cas. 616.

2. Smith v. Woodruff, 1 McArthur (D. C.) 459; *Rowell v. Lindsay*, 10 Biss. (U. S.) 217; *Welling v. Rubber Harness Trimming Co.*, 7 Pat. Office Gaz. 606; *Webster v. New Brunswick Carpet Co.*, 5 Pat. Office Gaz. 522; *Fuller v. Yentzer*, 94 U. S. 299; *Woodward v. Morrison*, 2 Pat. Office Gaz. 120. Or if the substituted part is substantially different in its construction and operation. *Eames v. Godfrey*, 1 Wall. (U. S.) 78; *Merriam v. Drake*, 5 Fish. Pat. Cas. 259; s. c., 9 Blatchf. (U. S.) 336; *Prouty v. Ruggles*, 16 Pet. (U. S.) 336; *Stimpson v. Balt. etc. R. Co.*, 10 How. (U. S.) 329; *Eddy v. Dennis*, 95 U. S. 363.

(4) *Different Combination of Same Elements.*—It is not infringement to make a new combination containing all the *old* elements of the combination;¹ but if the invention consists besides the combination in the improvement of some of the parts,² or if some of the parts,³ or a portion of the combination,⁴ are new, the use of such is an infringement *pro tanto*.

(5) *When Patentee is Restricted to Combination.*—If the patentee

They (patentees of a combination) cannot suppress improvements which are substantially different, whether the new improvements consist in a new combination of the same ingredient, or the substitution of some newly discovered ingredient, or of some old one, performing some new function, not known at the date of the letters patent, as a proper substitute for the ingredient withdrawn from the combination constituting their invention. *Seymour v. Osborne*, 11 Wall. (U. S.) 516.

A combination of old elements held not infringed by a combination of some of its elements with another element, substantially different in form or in manner of arrangement and connection. *Stimpson v. Baltimore etc. R. Co.*, 10 How. (U. S.) 329; nor where one of the operative parts was omitted and another substituted therefor, substantially different in its construction and operation, but serving the same purpose. *Eames v. Godfrey*, 1 Wall. (U. S.) 178. The use of two parts of a combination consisting of three parts, with a third part substantially different in its manner of arrangement and connection with others, is not an infringement. *Brooks v. Fiske*, 15 How. (U. S.) 212; *Wilcox v. Komp*, 7 Blatchf. (U. S.) 127. Where defendant does not use same combination and employs no device as an equivalent and substitute for omitted element, no infringement. *Water Meter Co. v. Desper*, 101 U. S. 332; *Gage v. Herring*, 107 U. S. 640; *Yale Lock Co. v. Sargent*, 117 U. S. 536; s. c., 35 Pat. Office Gaz. 385.

1. No one, by combining several devices, each of which is old, can deprive others of the right to use them in new combinations. *Halles v. Van Wormer*, 7 Blatchf. (U. S.) 443; *Pattee v. Moline Plow Co.*, 10 Biss. (C. C.) 377; s. c., 22 Pat. Office Gaz. 173; s. c., 9 Fed. Rep. 821.

If the elements are not connected and arranged in the same manner, there is no infringement. *Singer v. Wamsley*, 1 Fish. Pat. Cas. 558. Where a combination is for a particular purpose, the field

is open for another to invent a combination of same elements differently arranged and effecting the same result by a different mode of operation. *Railway Reg. Mfg. Co. v. Third Ave. R. Co.*, 42 Pat. Office Gaz. 379.

"The error alleged is the refusal of the court to give certain instructions, the substance of which, when extracted from the mass of verbiage with which it is encumbered, seems to be that the plaintiff had a right to claim any mode of combining the various mechanical devices in an improved machine which would produce the same effect or result as mere equivalents for those described in his patent. The court refused to give this instruction," and the judgment was affirmed. *Case v. Brown*, 2 Wall. (U. S.) 320. If the change in the mode of arranging the elements of a patented combination produces a better result, there is no infringement. *Habeman v. Whitman*, 5 Bann. & Ard. Pat. Cas. 530.

2. If the invention consists not only in the combination but also in the improvement of several of the parts of which the combination is composed, the violation of one of them is an infringement. *Parker v. Haworth*, 4 McLean (U. S.) 370.

Where a party has invented a new element and a new combination of elements, previously used and well known, his property consists in the element and the combination and his patent is infringed by the use of either. *Union Sugar Refin. Co. v. Mathiesen*, 2 Fish. Pat. Cas. 601.

3. Where some parts of a combination are new, and those parts are taken and used in the same manner but with different things from the rest of the combination patented, a part of the patented invention is taken although the whole is not, and it is an infringement to that extent. *Sharp v. Tift*, 5 Bann. & Ard. Pat. Cas. 399; s. c., 2 Fed. Rep. 697; s. c., 18 Blatchf. 132; s. c., 17 Pat. Office Gaz. 1282.

4. *La Rue v. Western Electric Co.*, 28 Fed. Rep. 45; s. c., 36 Pat. Office Gaz. 453.

tee claims only the combination in his patent, he cannot set up the invention of the parts, and he is also restricted to any material or shape claimed.¹

(6) *Use of Combination for Different Purpose.*—The use of the combination for a different purpose from that for which it was designed is an infringement.²

7. Infringement of Process.—(1) *Special Definition.*—The infringement of a process takes place where a certain kind of work is done in substantially the same manner and by substantially the same mechanism as that set forth in the patent;³ or, as expressed in the older cases, by substantial identity in the application of the principle in the patented process and alleged infringement.⁴

1. Where a party claims as his invention only the combination which he describes, the separate constituent parts of such combination must be regarded as old or common and public. *Rowell v. Lindsay*, 19 Pat. Office Gaz. 1565; s. c., 10 Biss. (U. S.) 217; s. c., 6 Fed. Rep. 290.

It is not necessary, in order to constitute an infringement of a combination, patented as such, that the whole combination should be used. If a part of it only, that separated from the rest, was new and patentable to the inventor, is used, taking that part is an infringement *pro tanto*. *Adair v. Thayer*, 5 Bann. & Ard. Pat. Cas. 118; s. c., 17 Blatch. (U. S.) 468; 4 Fed. Rep. 441; *LaRue v. Western Elect. Co.*, 36 Pat. Office Gaz. 453.

2. The defendant used the combination as constructed by patentee, and without any change or modification but for another purpose. *Held*, infringement. The patentee's exclusive right is to the manufacture, use and sale of his invention, and for any and all purposes. *Cincinnati Ice Machine Co. v. Foss Schneider Brewing Co.*, 31 Fed. Rep. 469.

The defendant had employed none of the elements of the patent, but the equivalent of each of them. *Held*, an infringement results when defendant employs the equivalents of the combination claims of the patent in suit for substantially the same purposes with substantially the same results. *Barnes v. Rattenburg*, 40 Pat. Office Gaz. 693.

Where the parts in the defendant's combination could not be used in the plaintiff's machine there is no infringement. *Gray v. Bangs*, 40 Pat. Office Gaz. 812.

3. A patent for a method of doing a certain kind of work is not infringed unless the work is done in substantially the same manner and by substantially the same mechanism. *Goss v. Cameron*, 23 Pat. Office Gaz. 741; s. c., 14 Fed. Rep. 576.

4. Where a person has invented some mode of carrying into effect a law of natural science or a rule of practice, he is entitled to protect himself from all other modes of making the same application. *The substantial identity, therefore, that is to be looked to respects that which constitutes the essence of the invention, namely, the application of the principle.* If the mode of carrying the same principle into effect still shows that the principle admits of the same application in a variety of forms or by a variety of apparatus, such mode is a piracy of the invention. But if the defendant has adopted variations that show that the application of the principle is varied, that some other law of science or rule of practice is made to take the place of that which the patentee claims as the essence of his invention, then there is no infringement. *Wintermute v. Redington*, 1 Fish. Pat. Cas. 239; *Tilghman v. Werk*, 2 Fish. Pat. Cas. 229.

As the object of the patentees is the same, the only enquiry is whether the object is obtained by substantially the same means. The idea of Whitney was undoubtedly arresting the contraction before any remediless strain has commenced and regulating the cooling so that the parts of the wheel may maintain an equal temperature at all stages of cooling.

Manifestly the process of the defendant embodied the same idea and carried it out by means identical in principle.

(2) *Omission of Step or of Use of Ingredient—Formal Change.*—A process which omits one of the elements in a patented process and does not employ an equivalent¹ in the place of the step omitted, or ingredient disused, is not an infringement. But formal changes do not avoid the patent.²

It reheats the wheels when removed from the molds to the chamber or pit. It prolongs the cooling in connection with the reheating, and it subjects the rapidity of cooling to the control of the operator. *Mowry v. Whitney*, 14 Wall. (U. S.) 620.

Where an individual has discovered a new principle and a process by which it is made practical and operative, his patent covers all modes and processes by which the principle of his invention is made operative in practice and is infringed by adopting the principle to an available or practical extent. *Tilghman v. Werk*, 1 Bond (U. S.) 511; s. c., 2 Fish. Pat. Cas. 229.

Manufacture and Sale of Article Made by Process.—If a patent is for a process, the manufacture and sale of an article made according to the process is an infringement. *Bridgeport etc. Co. v. Hooper*, 5 Fed. Rep. 63; s. c., 18 Blatchf. (U. S.) 459; s. c., 20 Pat. Office Gaz. 156. Anyone who produces the result contemplated by the patentee by such use only of the described means as is essential to that end, uses his process and is an infringer. *Roberts v. Roter*, 5 Fish. Pat. Cas. 295.

It would seem that where a patent is obtained without a claim to the invention of the machinery through which a valuable result is produced, a precise specification is required, and the test of infringement is whether the defendant has used substantially the same process to produce the same result. *LeRoy v. Tatham*, 14 How. (U. S.) 159.

1. *Dittmar v. Rix*, 17 Pat. Office Gaz. 973; s. c., 5 Bann. & Ard. Pat. Cas. 240; s. c., 1 Fed. Rep. 342; *VanCamp v. Maryland Pavement Co.*, 43 Pat. Office Gaz. 884.

Where defendant's process is not the patented process, but omits a patented step and includes in its stead one which the patentee desired to avoid, it is not an infringement. *Cotter v. New Haven Copper Co.*, 13 Fed. Rep. 234.

Parts Claimed Must be Employed.—Every successive step that is enumerated in a process must be regarded as an essential part, and must be employed by the defendants to render

them liable. *Hammerschlag v. Garrett*, 10 Fed. Rep. 479; s. c., 21 Pat. Office Gaz. 1199. Especially when that step is emphasized. *VanCamp v. Mayland Pavement Co.*, 43 Pat. Office Gaz. 884; s. c., 34 Fed. Rep. 740.

Where a claim was for a complete method, and part of it only was used, held, that it was not infringed. *Byam v. Farr*, 1 Curt. (U. S.) 260.

Chemical Process.—Omission of one essential part of a process without substituting a chemical equivalent is not infringement. *Dittmar v. Rix*, 17 Pat. Office Gaz. 973; s. c., 5 Bann. & Ard. Pat. Cas. 240. See also *supra*, this title, EQUIVALENTS OF SUBSTANCE.

Omission of one essential part of a process without substituting a chemical equivalent is not infringement. *Dittmar v. Rix*, 17 Pat. Office Gaz. 973; s. c., 5 Bann. & Ard. Pat. Cas. 240; s. c., 1 Fed. Rep. 342.

A machine which omits an essential element of another does not infringe it. *Hammerschlag v. Garrett*, 10 Fed. Rep. 479; s. c., 21 Pat. Office Gaz. 1199.

The omission of an article which is not essential without introducing any new essential element is a colorable alteration. *Conover v. Dohrmann*, 6 Blatchf. (U. S.) 60; s. c., 3 Fish. Pat. Cas. 382.

2. Formal Changes in Process Equivalent.—Where the defendant did not vary the process or mode of working, or its essential conditions, but applied a new solution, worked in the same way and under the same conditions as the solutions of the plaintiff, it is an infringement of the plaintiff's claim. *United Nickel Co. v. Pendleton*, 15 Fed. Rep. 739; s. c., 21 Blatchf. (U. S.) 226; s. c., 24 Pat. Office Gaz. 704.

Change in Degree.—That a process requiring a certain degree of heat was not limited to the exact degree, and that a slight lowering of the heat, counteracted by extending the process a fraction of the time, or other departures not substantially different, would not avoid infringement. *American Wood Paper Co. v. Glen Falls Paper Co.*, 8 Blatchf. (U. S.) 513.

(3) *Process—How Far Independent of Machinery.*—An inventor of a process is entitled to cover all machinery which effects substantially the same result in the same way.¹

(4) *Process and Product.*—A patent for an article made by a certain process is not infringed by the use of another process.² But an article *not patented as a mere product* of a process is infringed by its manufacture by another process.³

8. Infringement by Use of Part of Patented Machine.—A patent for an entire machine which is substantially new is infringed by the use of a part,⁴ and a patent for several distinct improvements⁵ by one of the improvements.⁶

Seable, the substitution of heated air or fire heat for steam heat, as claimed in a process, is an evasion. *American Wood Paper Co. v. Glen Falls Paper Co.*, 8 Blatchf. (U. S.) 513.

Two Steps out of One.—A process of one step is not avoided by the use of a process of two steps, one of which is the same as that of the patented process. *American etc. Co. v. Fibre etc. Co.*, 6 Blatchf. (U. S.) 27.

Where the same process was used, for the same purpose and with the same results, although with a higher degree of heat; it was *held* an infringement of the patented process. *Cary v. Wolff*, 32 Pat. Office Gaz. 257.

Where a patent stated that a certain process conducted at a certain pressure and temperature would involve the saving of a certain quantity of the chemical used, which saving would increase with an increase of pressure, it was *held* infringed by a process employing heat below the minimum given. *American Wood Paper Co. v. Heft*, 3 Fish. Pat. Cas. 316.

1. *Bridge v. Brown*, 1 Holmes (U. S.) 53.

In considering the question as to the infringement of a process, it is immaterial whether defendant's machinery is the same as that described by the plaintiff, as that forms no part of the invention; the enquiry is, does the defendant, whatever his machinery is, produce the same result according to the plaintiff's process. *Tilghman v. Mitchell*, 9 Fish. Pat. Cas. 18.

2. *Merrill v. Yeomans*, 1 Bann. & Ard. Pat. Cas. 47.

A patent for a chemical process is not infringed by a different process, although the same article is produced by it. *Rumford Chemical Works v. Lauer*, 10 Blatchf. (U. S.) 122; s. c., 5 Fish. Pat. Cas. 615; s. c., 3 Pat. Office Gaz. 349.

3. Every patent for a product or composition of matter must identify it so that it can be recognized aside from the description of the process for making it, or else nothing can be held to infringe the patent which is not made by that process. *Cochrane v. Budische Anilin etc.*, 111 U. S. 310; s. c., 27 Pat. Office Gaz. 813.

When a product arrived at by certain defined stages or processes is patented, only those things can be considered equivalents for the elements of the manufacture which perform the same function in substantially the same way. *Goodyear D. V. Co. v. Davis*, 102 U. S. 222; s. c., 19 Pat. Office Gaz. 543.

4. If the defendant made a substantial part of the exclusive invention of the patentee and distinguishable from other parts of the machine, it would be an infringement. *Washburn v. Gould*, 3 Story (U. S.) 122. It is not necessary to take the whole of a patented invention to constitute an infringement. The patent gives exclusive enjoyment of the whole patented invention, and taking one feature is infringement *pro tanto*. *Felter v. Newhall*, 17 Fed. Rep. 841; s. c., 25 Pat. Office Gaz. 502; the use of part of an invention covered by a patent may constitute an infringement. *Mathews v. Spangenberg*, 15 Fed. Rep. 813; s. c., 23 Pat. Office Gaz. 1624.

A patent for an entire machine which is substantially new is infringed by the use of a part. *Moody v. Fiske*, 2 Mas. (U. S.) 112; s. c., 1 Rob. Pat. Cas. 312; to constitute infringement the whole of the patented machine need not be used, but only a part. *Foss v. Herbert*, 1 Biss. (U. S.) 121; s. c., 2 Fish. Pat. Cas. 131.

5. A patent for several distinct improvements, which are clearly specified, is infringed by the use of one of the improvements. *Moody v. Fiske*, 2 Mas. (U. S.) 112; s. c., 1 Rob. Pat. Cas. 312.

6. See also *supra*, this title INFRINGE-

9. Rights of Improver and Original Patentee to Improved Machine.—Where an original machine and an improvement are both patented, neither patentee can use what does not belong to him.¹ The improver cannot use the original patent,² and has no right to sell or make it, even if his invention is useless without it. The original patentee, on the other hand, cannot use the improvement.³

10. Construction of Patent.—(1) *Construction Generally*—Who to

MENT OF COMBINATION. Where a machine is patented in the aggregate, third parties may not deny an infringement on the ground that they omit material parts or use fewer elements or substitute equivalents. The question is, is the alleged infringement substantially the same machine? *Rich v. Close*, 8 Blatchf. (U. S.) 14. Where two machines were patented conjointly the patent is infringed by the use of either. *Wyeth v. Stone*, 1 Story (U. S.) 273.

1. *Robertson v. Blake*, 94 U. S. 728; s. c., 11 Pat. Office Gaz. 877.

Applied to Combinations.—A patent for a combination involving a former patented combination cannot confer upon the holder even a *prima facie* right to make the prior combination any more than the patent to the latter can confer upon its holder the right to make, without the consent of the former, the combination covered by the patent to the former. *Goodyear v. Evans*, 6 Blatchf. (U. S.) 121.

A patented improvement does not, *per se*, give the right to use the thing improved and the patentee of the thing improved may not use the improvement. *Arkill v. Hurd Paper Bag Co.*, 7 Blatchf. (U. S.) 475.

2. *Gray v. James, Pet.* (U. S.) 394; *Colt v. Mass. Arms Co.*, 1 Fish. Pat. Cas. 108; *Star Salt Castor Co. v. Crossman*, 4 Cliff. (U. S.) 568; *Waterbury Brass Co. v. N. Y. etc. Brass Co.*, 3 Fish. Pat. Cas. 43; *Winans v. New York etc. R. Co.*, 4 Fish. Pat. Cas. 1; *Whipple v. Baldwin Mfg. Co.*, 4 Fish. Pat. Cas. 29; *Nathan v. N. Y. Elevated R. Co.*, 2 Fed. Rep. 225; s. c., 5 Bann. & Ard. Pat. Cas. 280; *Cook v. Howard*, 4 Fish. Pat. Cas. 269; *Carter v. Baker*, 1 Sawy. (U. S.) 512; s. c., 4 Fish. Pat. Cas. 404.

A patented improvement on a patented invention does not confer the right to use the invention. *Spaulding v. Tucker*, 1 Deady (U. S.) 649; *Hartshorn v. Tripp*, 7 Blatchf. (U. S.) 120. Or any right whatever to the

first invention. *Hays v. Sultor*, 1 Bond (U. S.) 279; s. c., 1 Fish. Pat. Cas. 532.

Letters patent for an improvement made to a patented machine by additional features having no material effect upon the character, operation or result produced do not confer upon the subsequent patentee a right to use the original device. *Bostock v. Goodrich*, 29 Pat. Office Gaz. 278; s. c., 21 Fed. Rep. 316.

An improvement embodying the patented device improved on gives no right to such a device without a licence from the patentee of the original device. *Hartshorn v. Tripps*, 7 Blatchf. (U. S.) 120; *Blake v. Stafford*, 6 Blatchf. (U. S.) 195; *Goodyear v. Mullee*, 3 Fish. Pat. Cas. 420; *Carr v. Rice*, 1 Fish. Pat. Cas. 198. Although a man may make valuable improvements on a patented machine, and obtain patents for them, he cannot use the elements of the original machine without infringing on the first patent. *LaBaw v. Hawkins*, 1 Bann. & Ard. Pat. Cas. 428; s. c., 6 Pat. Office Gaz. 725.

Changes in the details of construction of a patented article may be patentable as improvements, but afford no protection against an infringement of the original patent. *White v. Heath*, 10 Fed. Rep. 291.

3. No one having the right to use an original patented invention can use the improvement thereon without the improver's licence. *Woodworth v. Rogers*, 3 Woodb. & M. (U. S.) 135; s. c., 2 Rob. Pat. Cas. 629.

An improver of a certain part of a known machine cannot treat as an infringer another improver of the previously existing machine or machines, by using a form, construction, device or combination substantially different from that patented and invented by plaintiff, though performing same functions. *Taylor v. Garretson*, 9 Blatchf. (U. S.) 156; s. c., 5 Fish. Pat. Cas. 116.

Construe.—The construction of the patent¹ of the specification² of the words contained therein,³ and the settlement of its meaning,⁴ is always for the court, and the application of this construction to the facts is for the jury.⁵ Generally, a patent should be construed liberally,⁶ and in such a way as to sus-

1. Teese v. Phelps, 1 McAll. (U. S.) 48; Whitney v. Emmett, 1 Bald. (U. S.) 303; Blanchard v. Sprague, 2 Story (U. S.) 164; Davoll v. Brown, 1 Woodb. & M. (U. S.) 53; Nat. Car etc. Co. v. Terre Haute etc. Car Co., 19 Fed. Rep. 514.

2. Parker v. Hulme, 1 Fish. Pat. Cas. 44; Teese v. Phelps, McAll. (U. S.) 48.

3. Washburn v. Gould, 3 Story (U. S.) 122.

4. Emerson v. Hogg, 2 Blatchf. (U. S.) 1.

Exception.—Except where the patent contains technical words or phrases, or terms of arts which require explanation by parol testimony. Union Sugar Co. v. Mathiesen, 9 Blatchf. (U. S.) 156; s. c., 2 Fish. Pat. Cas. 600.

5. Teese v. Phelps, 1 McAll. (U. S.) 48. To determine whether it has been infringed and the amount of damages, is for the jury. Nat. Car etc. Co. v. Terre Haute Car etc. Co., 19 Fed. Rep. 514.

6. Patents should be construed liberally to support the claims of meritorious inventors. Parker v. Sears, 1 Fish. Pat. Cas. 93. So as to effect, if practicable, the object and end designed. Judson v. Moore, 1 Bond. (U. S.) 285. *Ut res magis valeat quam pereat.* Goodyear v. Providence Rubber Co., 2 Cliff. (U. S.) 351; Schillinger v. Gunther, 14 Blatchf. (U. S.) 152; s. c., 2 Bann. & Ard. Pat. Cas. 544. So as if possible to secure to an inventor what is really his invention. Hale v. Stimpson, 2 Fish. Pat. Cas. 565; Woodman v. Stimpson, 3 Fish. Pat. Cas. 98; Bussey v. Wager, 9 Pat. Office Gaz. 300.

It is the duty of the court to sustain the patent, not to seek reasons to overthrow it. Adams v. Joliet Mfg. Co., 3 Bann. & Ard. Pat. Cas. 4.

Where an inventor was not fully informed as to the peculiar use of an element of his combination, still had pointed it out as best for his purpose, a subsequent discoverer of its peculiar value cannot patent its use in the same combination. Bailey Washing Machine Co. v. Lincoln, 4 Fish. Pat. Cas. 379.

Where a Patent Admits of Two Constructions.—Where a patent admits of two constructions, one of a mere result which would be void and the other of the means of accomplishing such result which would be valid, it should be favorably construed to sustain the patent, if it can fairly be done. Corn Planter Patent (Brown v. Guild), 23 Wall. (U. S.) 181.

A claim, which would be void as merely functional, would be construed in connection with the described means in the reissue, but so as not to embrace any invention broader in its scope than the original. Turbine etc. Mfg. Co. v. Ladd, 2 Bann. & Ard. Pat. Cas. 488. The court prefers to adopt that construction of a patent which, although limiting the scope of the claim, secures to the inventor all that he has actually invented, and no more, rather than to adopt one which would render the patent invalid, or one which, being broader than the invention, would be a barrier in the way of future progress and invention. Goodyear D. V. Co. v. Davis, 3 Bann. & Ard. Pat. Cas. 115.

For Result to be Construed for Means.—That in all cases where the claim is for the result, it must be construed to mean the means by which the result is produced whether there be any reference to the specifications in the claims or not. Henderson v. Cleveland Co-operative Stove Co., 2 Bann. & Ard. Pat. Cas. 604.

Patents for inventions are not to be treated as mere monopolies, and, therefore, odious in the eyes of the law; but they are to receive a liberal construction, and under the fair application of the rule, "*ut res magis valeat quam pereat*," are, if practical, to be so interpreted as to uphold and not to destroy the right of the inventor. Turrill v. Mich. etc. R. Co., 1 Wall. (U. S.) 491; Ryan v. Goodwin, 3 Sumn. (U. S.) 514; Stover v. Halsted, 3 Bann. & Ard. Pat. Cas. 98; s. c., 13 Blatchf. (U. S.) 95; Francis v. Mellor, 1 Pat. Office Gaz. 48. Should be construed in a liberal spirit, to sustain the just claims of the inventor. Rubber Co. v. Goodyear, 9 Wall. (U. S.) 788. Courts should proceed in

tain it and give the patentee what he has really invented.¹

liberal spirit so as to sustain the patent and construction claimed by the patentee himself, if this can be done consistently with the language he has employed. *Klein v. Russell*, 19 Wall. (U. S.) 433; *Kluse v. Stewart*, 37 Pat. Office Gaz. 672.

1. The correct rule of construction is one which will give the patentee what he has really invented so far as is consistent with the language of his description and claim, both of which are to be read together. *Williams v. Boston etc. R. Co.*, 17 Blatchf. (U. S.) 21.

The claims of the patent must be construed, if that can be properly done, so as to cover the real invention. *Barnes v. Straus*, 9 Blatchf. (U. S.) 553; *Bussey v. Wager*, 2 Bann. & Ard. Pat. Cas. 231.

General and sometimes special words in the claims must receive such a construction as may enlarge or contract the scope of the claim so as to uphold that invention, and only that invention, which the patentee has actually made and described, when such construction is not absolutely inconsistent with the language of the claim. *Estabrook v. Dunbar*, 2 Bann. & Ard. Pat. Cas. 427.

Exception.—The rule that a claim should be construed so as to give inventor his invention does not apply where claims are expressed in loose, ambiguous or general terms for fraudulent purpose of covering subsequent inventions. *Taylor v. Garretson*, 9 Blatchf. (U. S.) 156.

Allowance to be Made for Illiteracy of Patentee.—The court will bear in mind that specifications and claims are frequently drawn by persons unaccustomed to the use of exact legal phraseology. *Henderson v. Cleveland etc. Co.*, 2 Bann. & Ard. Pat. Cas. 604; *Page v. Ferry*, 1 Fish. Pat. Cas. 298. In describing his invention, a patentee may misuse words, but in seeking his meaning the ordinary signification of the words he uses must have weight. *Root v. Lamb*, 19 Pat. Office Gaz. 937. But when not absolutely inconsistent with meaning they must be construed to give the patentee his invention, and that only. *Estabrook v. Dunbar*, 2 Bann. & Ard. Pat. Cas. 427; *Fitch v. Bragg*, 8 Fed. Rep. 588; s. c., 20 Pat. Office Gaz. 1589.

Carelessness.—Use of word "warp" for "woof." *Held*, patent to be con-

strued as if word "woof" was used. *Reed v. Street*, 34 Pat. Office Gaz. 339.

Patent Must be Construed with Reference to Prior State of the Art.—A patent will be construed in the light of uncontradicted testimony as to prior devices, in order to determine its scope. *Day v. Combination Rubber Co.*, 2 Fed. Rep. 570. Claims must be construed with reference to the prior state of the art. *Grier v. Wilt*, 38 Pat. Office Gaz. 1365; *Fitch v. Bragg*, 20 Pat. Office Gaz. 1589.

A patent should be construed in view of the prior state of the art, to determine what the inventor has actually accomplished, and this having been found, such construction should be given as will secure the actual invention to the patentee, as far as consistent with giving due effect to the language of the specification and claim. *Van Marter v. Miller*, 15 Blatchf. (U. S.) 562; *Webster Loom Co. v. Higgins*, 15 Blatchf. (U. S.) 349.

Correspondence with the Patent Office.—The construction apparent on the face of a patent may be confirmed by the correspondence of the patentee with the patent office, but not enlarged, diminished or altered. *Goodyear D. V. Co. v. Davis*, 102 U. S. 222.

What Courts Will Take Judicial Notice of in Construing a Patent.—In construing the general language in the description of a patent the commonest knowledge and experience in the business in life should be kept in view, and a patentee with such knowledge should not be presumed to describe an impossibility. *Tilghman v. Mitchell*, 9 Fish. Pat. Cas. 18. Courts will take notice of whatever is generally known within their jurisdiction, and if the judge's memory is at fault he may refresh it by resorting to any means for that purpose which he may deem safe and proper. This extends to such matters of science as are involved in the cases brought before him. *Brown v. Piper*, 91 U. S. 37. The court is permitted to avail itself of common knowledge in regard to matters of science, and by that knowledge of the state of the art to define the scope of the patent. *Knapp v. Benedict*, 35 Pat. Office Gaz. 1226; *Brown v. Piper*, 91 U. S. 37.

The patent should be read by the court as it is read by persons skilled in the art. *Tondeur v. Stewart*, 37 Pat. Office Gaz. 672; s. c., 28 Fed. Rep. 561.

(2) *When Patentee Is Entitled to a Broad Construction.*—Patentees who are original inventors of devices are entitled to a broad construction of their patents,¹ but a mere improver is confined to his particular device,² and a small change will not be ex-

1. Where the patentee is first in the art, his patent may have a broader construction; otherwise it is limited to the particular device. *Rapp v. Bard*, 1 Fiss. Pat. Cas. 196. A party who invents a new machine never before used and procures letters patent therefor, acquires a monopoly as against all merely formal alterations thereof. *Railroad Co. v. Sayles*, 97 U. S. 554.

Where the inventor is first in the field of invention his claims will be construed broadly. *Vogler v. Semple*, 7 Biss. (U. S.) 382; *Worswick Mfg. Co. v. Buffalo*, 27 Pat. Office Gaz. 1239.

Where something elementary has been discovered and constitutes fairly a part of the invention, no other manufacturer ought to be permitted to use that elementary part without paying tribute to the first inventor or originator. *Cornell v. Downer etc. Co.*, 7 Biss. (U. S.) 346.

Schillinger was the first to produce the result accomplished by the tar paper. He is entitled to all means known at the date of his patent by which the same result can be produced. *Kuhl v. Muller*, 28 Pat. Office Gaz. 541.

If he be the original inventor of the device or machine called the divider, he will have a right to treat as infringers all who make dividers operating on the same principle and performing the same functions by analogous means or equivalent combinations, even though the infringing machine may be an improvement on the original and patentable as such. But if the invention claimed be itself an improvement on a known machine by a mere change in form or combination of parts, the patentee cannot treat another as an infringer who has improved the original machine by use of a different form or combination performing the same functions. The inventor of the first improvement cannot invoke the doctrine of equivalents to suppress all other improvements which are not mere colorable alterations of the first. *McCormick v. Talcott*, 20 How. (U. S.) 403.

A party being the first to apply a

valve regulation of any kind to a burner, he is entitled to hold as infringers all valve regulations applied to his combination which perform the same office in substantially the same way as, and are known equivalents for, his form of valve regulation. *Clough v. Barker*, 106 U. S. 166; s. c., 26 Pat. Office Gaz. 2167.

Two Patents, Each Claiming Broadly Same Invention.—Where two patents have been issued, each claiming broadly the same invention, and the earlier patentee is held the first inventor. The claim in the second patent must be restricted to the special devices there specially described. *Richardson v. Noyes*, 10 Pat. Office Gaz. 507.

2. A patent for an improvement merely in a department of mechanics to which it pertains must be limited in scope to the arrangement of devices described and claimed; and cannot be expanded to apply to substituted devices, dissimilar in character and form, merely because they perform the same functions or because the same general result is effected by both. *Dyer v. Nat. Hod Elevating Co.*, 24 Fed. Rep. 182. Where an invention is of an improvement upon a pre-existing machine, the patent for such invention covers only the improvement. *Johnston Ruffler Co. v. Avery Machine Co.*, 28 Fed. Rep. 193. A device accomplishing more perfectly the same thing as a prior device, *held*, the claim must be limited to its precise construction, whereby it accomplished the result more perfectly, and not include other means of doing it. *Matthews v. Shoneberger*, 18 Pat. Office Gaz. 1464.

No one can take something old and apply it in a new way, or in a new form, so as to produce a particular result, and be protected by the patent law beyond the particular way or form or device and the application he has made. *Fuller v. Yentzer*, 1 Bann. & Ard. Pat. Cas. 520.

Limitation of Process Claims by State of the Art.—A claim for a process consisting of several steps may be limited by the state of the art and the description in the patent to the instrumentalities or their equivalents as described,

tended beyond the change,¹ and where the advance towards the thing desired is gradual, each inventor is entitled only to his specific form of device.²

which are essential to the carrying out of the process claimed. *Lawther v. Hamilton*, 124 U. S. 1; s. c. (in lower court), 21 Fed. Rep. 811; s. c., 29 Pat. Office Gaz. 449.

Various mechanical equivalents of a device had previously been used. *Held*, the patent covered only the specific device. *Zane v. Soffe*, 110 U. S. 200; s. c., 26 Pat. Office Gaz. 737.

Where the state of the art shows that there was no room for a great original discovery, patentee *held* to his specific improvement. *Root v. Lamb*, 19 Pat. Office Gaz. 937; s. c., 7 Fed. Rep. 222.

Where a slight change is made in a machine by which a new result is obtained, and which might be the subject of a patent, courts do not feel inclined to extend the invention beyond the mere change; but where something elementary is discovered and constitutes fairly a part of the invention of the patentee, then I do not think that any other inventor or manufacturer ought to be permitted to use that part without paying tribute to the first inventor or originator. *Cornell v. Downer etc. Co.*, 2 Bann. & Ard. Pat. Cas. 514.

Where a machine is limited by state of the art, a machine which can be forced to produce a similar result will not be *held* an infringement. *Buzzell v. Andrews*, 34 Pat. Office Gaz. 830.

1. Where there is a slight change in a machine, by which a new result is brought about, and which might be a subject of a patent, courts do not feel inclined to extend the invention beyond the mere change, although they may be inclined to support the patent; but where something elementary has been discovered, and constitutes fairly a part of the invention of the patentee, no other manufacturer ought to be permitted to use that elementary part without paying tribute to the first inventor or originator. *Cornell v. Downer etc. Co.*, 7 Biss. (U. S.) 346.

Where an invention is simply an improvement on a known machine by a mere change of form or combination of parts, the inventor is only entitled to the specific form of device which he produces, and he cannot evoke the doctrine of equivalents to suppress other improvements not colorable invasions

of his own. But where an inventor precedes all the rest, and his machine performs a function never performed by any earlier machine, the court will treat as infringers all who accomplish the same result by substantially the same or substantially equivalent means. *Morly Machine Co. v. Lancaster*, 23 Fed. Rep. 344; *Mann v. Baytiss*, 10 Pat. Office Gaz. 787; *Burr v. Duryee*, 2 Fish. Pat. Cas. 275; *Aff'g 1 Wall. (U. S.) 531*.

Where a patent has been issued for an invention which consists in a peculiar arrangement of old elements or parts, it must be construed strictly and the monopoly limited to substantially the special character of the parts and the peculiar organization described. *Buzzell v. Andrews*, 34 Pat. Office Gaz. 830; *McCormick v. Talcott*, 20 How. (U. S.) 403; *Refiner Co. v. Mathiesen*, 9 Blatchf. (U. S.) 156.

Merit of Embodying Idea Only.—An inventor entitled to the merit only of embodying the idea with machinery and adapting it to practical use in a new and superior mode to any that preceded it, in order to establish an infringement against the defendants, must show that they are employing substantially the same description of machinery. If they employ machinery of a different description, a different mode of accomplishing the same result, the patentee has no ground of complaint. *Smith v. Higgins*, 2 Fish. Pat. Cas. 97.

Where the state of the art is such that the field of invention is limited and circumscribed, not admitting of any great original discovery, the patent must be strictly confined to its claim. *Adams v. Bellaire Stamping Co.*, 36 Pat. Office Gaz. 567. Patent limited to form of device. *Duff v. Sterling Pump Co.*, 107 U. S. 636; s. c., 23 Pat. Office Gaz. 1622.

2. A party who invents a new machine never before used, and procures letters patent therefor, acquires a monopoly as against all merely formal variations thereof; but if the advance towards the thing desired is gradual and proceeds step by step so that no one can claim the complete thing, each inventor is entitled only to his own specific form of device. *Railroad Co. v. Sayles*, 97 U. S. 554.

(3) *When Patentee Limited to Precise Invention by Action of Patent Office.*—Where the patentee, in order to get his patent, accepts one with a narrower claim than that contained in his original application, he cannot extend his invention beyond his claim.¹

III. INFRINGERS²—I. Making, Selling, Using Patented Device.—Infringement consists in making, selling or using a patented machine,³ or in any of them separately.⁴ And, as a gen-

1. *Shepard v. Carrigan*, 116 U. S. 593; *Blades v. Rand*, 37 Pat. Office Gaz. 99; s. c., 27 Fed. Rep. 93; *Roemer v. Peddie*, 37 Pat. Office Gaz. 338; s. c., 27 Fed. Rep. 702; *Phoenix Caster Co. v. Spiegel*, 26 Fed. Rep. 272.

A patentee is not at liberty to insist upon a construction of his patent which he was expressly required to abandon and disavow as a condition of the grant of the letters by the office. *Sutter v. Robinson*, 119 U. S. 531; *Otes Bros. Mfg. Co. v. Crane Bros. Mfg. Co.*, 27 Fed. Rep. 550; *N. Y. Belting etc. Co. v. Sibley*, 23 Pat. Office Gaz. 1445.

In patents for combinations of mechanism, limitations and provisos, especially when such were introduced into an application after it had been persistently rejected, must be strictly construed against the inventor and in favor of the public, and are looked upon in the nature of disclaimers. *Sargent v. Hall Lock etc. Co.*, 114 U. S. 63. This rule holds where the inventor has acquiesced in a rejection made by the patent office under a practice afterwards overruled by the supreme court. *Blades v. Rand*, *McNally & Co.*, 37 Pat. Office Gaz. 99.

A limitation in a patentee's specification to a bustle made of wire, held to allow the public to make and sell a rattan bustle made for all practical purposes in imitation of it. *Shaver v. Skinner Mfg. Co.*, 30 Fed. Rep. 68.

2. See also *infra*, this title, INTENTION AS AFFECTING INFRINGEMENT.

3. *Whittemore v. Cutter*, 1 Gall. (U. S.) 429; *Brooks v. Bicknell*, 3 McLean, U. S. 250. Or things patented generally. *Rich v. Lippincott*, 2 Fish. Pat. Cas. 1. But it can only occur by actual making, using or selling the patented device. *Allis v. Stowell*, 19 Pat. Office Gaz. 727.

4. **Making.**—Making alone constitutes infringement. *Whittemore v. Cutter*, 1 Gall. (U. S.) 429. Although it is neither used nor sold. *Bloomer v. Gilpin*, 4 Fish. Pat. Cas. 50. Even though the maker never use it. *Haul-*

den v. Ogden, 3 Fish. Pat. Cas. 378.

Making for Philosophical Experiments Not Infringement.—The making of a patented machine for philosophical experiments or for the purpose of ascertaining the sufficiency of the machine to produce its described effects, is not an infringement. *Whittemore v. Cutter*, 1 Gall. (U. S.) 432.

Contra.—Experimental making and using of a patented invention is a technical infringement. *Albright v. Celuloid Harness Trimming Co.*, 12 Pat. Office Gaz. 227; s. c., 2 Bann. & Ard. Pat. Cas. 629.

Must be Strictly Experimental.—An experimental use, where there has been no profit and no sale, will not render one liable for infringement; but where, as a matter of business, products of so-called experiments have been thrown on the market for sale, it constitutes an infringement. *Poppenhusen v. New York etc. Co.*, 2 Fish. Pat. Cas. 62.

Making for Use Abroad.—Damages will be allowed on machines made in the United States, in violation of a United States patent, for sale abroad. *Ketchum Harvester Co. v. Johnson Harvester Co.*, 19 Blatchf. (U. S.) 367.

The preparation and sale of an article for the purpose of being used in a manner that will occasion a conflict with the claims of a patent, places the person so doing in the attitude of an infringer. *Rumford Chemical Works v. Hecker*, 10 Pat. Office Gaz. 289; s. c., 2 Bann. & Ard. Pat. Cas. 251.

Sale.—The sale to one for use of machines embodying the patented inventions of another is an invasion of the patentee's rights, and such a conversion of his property as will render the party so selling liable in an action for a tort. But in such case the patentee may waive the tort and sue in *assumpsit* for money received from the sale. *Steam Stone Cutter Co. v. Sheldon*, 15 Fed. Rep. 608.

Where the defendant makes some parts of a device which are useless

eral rule, anyone¹ guilty of contributing to an infringe-

without the rest, and sells them to be used with the rest, in infringement of the plaintiff's device, he is clearly guilty of infringement. *Wallace v. Holmes*, 9 Blatchf. (U. S.) 65.

To sell a patented article to others when manufactured by another is an infringement of the patent. *Haselden v. Ogden*, 3 Fish. Pat. Cas. 378.

Sale of Materials by Sheriff.—The sale of the materials of a patented machine on execution is not an infringement. *Sawin v. Guild*, 1 Gall. (U. S.) 485.

Where the infringement shown was by proof of the sale by defendants of a can purchased for and by direction of the orators, but in the usual course of defendant's business, it was held that they were dealing in the infringing cans in such a manner that they were liable to an account and to be enjoined. *De Florez v. Reynolds*, 14 Blatchf. (U. S.) 505.

Use.—To use a patented article, though made by another, is an infringement. *Haselden v. Ogden*, 3 Fish. Pat. Cas. 378.

Machine Constructed Before Patent Granted.—A patent is infringed by the use of a machine constructed before the issuance of the patent, where there has been no abandonment of the invention to the public and in the absence of actual or implied permission from the inventor. *Kendal v. Winson*, 21 How. (U. S.) 322.

An invention was an advertising hotel register. Held that the keeper of a hotel who kept such a register was a user of the invention and liable as such, and that he was not the less liable although he did not intend to violate the rights of the patentee and desisted when notified. *Hawes v. Washburne*, 5 Pat. Office Gaz. 491.

No recovery can be had upon a patent for using a machine which is neither described nor claimed in it, although the machine was originally devised by the patentee in the course of experiments which resulted in producing the patented machine, and although it has been the most extensively adopted. *Everts v. Ford*, 5 Pat. Office Gaz. 58; s. c., 6 Fish. Pat. Cas. 587.

1. Corporations.—Corporations are responsible for an infringement. *Kneass v. Schuylkill Bank*, 4 Wash. (U. S.) 9.

I am of the opinion that the only

persons who can be held for damages are those who should have taken a licence, and that they are those who own or have some interest in the business of making, using or selling the thing which is an infringement, and that an action at law cannot be maintained against the directors, shareholders or workmen of a corporation which infringes a patented improvement. *United Nickel Co. v. Worthington*, 23 Pat. Office Gaz. 939.

Liability of Officers.—Directors without control are not liable for infringement. *Jones v. Osgood*, 6 Blatchf. (U. S.) 435; s. c., 3 Fish. Pat. Cas. 591.

The president of a corporation was named as a defendant in a suit against a corporation, but was not served. Appearance entered for defendants generally. The said president signed and swore to answer as one of defendants and owned all the stock. Held, he was personally liable for the infringement. *Smith v. Standard Laundry Mach. Co.*, 27 Pat. Office Gaz. 393.

An infringement by a corporation for the benefit of the corporation must be held authorized by it. *Poppenhusen v. N. Y. etc. Co.*, 2 Fish. Pat. Cas. 62.

Counties are liable for infringement. *May v. County of Fond du Lac*, 27 Fed. Rep. 691; *May v. Saginaw Co.*, 32 Fed. Rep. 629; *May v. Ralls Co.*, 31 Fed. Rep. 473; s. c., 40 Pat. Office Gaz. 575; *May v. Logan Co.*, 30 Fed. Rep. 250; s. c., 41 Pat. Office Gaz. 1387; *May v. Mercer Co.*, 30 Fed. Rep. 246; s. c., 41 Pat. Office Gaz. 815. *Contra*, *May v. Juneau Co.*, 30 Fed. Rep. 241; s. c., 41 Pat. Office Gaz. 578; *Jacobs v. Hamilton Co.*, 1 Bond (U. S.) 500.

Municipal Corporations.—A city is not liable for the use of a patented article by its school committee. *Allen v. Brooklyn*, 4 Fish. Pat. Cas. 598.

A city is liable for the use of seats used in its schools in violation of a patent. *Allen v. New York*, 17 Blatchf. (U. S.) 350. For a patented article by its fire department. *Brickill v. New York*, 18 Blatchf. (U. S.) 273.

Infringement by Contractor Does Not Render Other Party Liable.—Infringement by a contractor does not render the corporation liable for infringement. *Lightner v. Brooks*, 2 Cliff. (U. S.) 287.

County commissioners of Ohio are not liable for infringement, but the contractor is. *Jacobs v. Hamilton Co.*, 1 Bond (U. S.) 500.

ment by making, selling or using in any way is an infringer.¹

One who employs a contractor to furnish articles with a specified patented improvement is not liable if, in complying with his contract, the contractor infringes a patent right, and the contractor employed to do the work or furnish the goods is not his agent. *Lightner v. Brooks*, 2 Cliff. (U. S.) 287.

But Contractor Liable.—A contractor for the construction of a gaol is liable for the infringement of a patent used in its construction. *Jacobs v. Hamilton Co.*, 1 Bond (U. S.) 500.

1. A wrong doer cannot set up that he is doing wrong on account of a third person, as a bar to his own responsibility. *Maltby v. Bobo*, 14 Blatchf. (U. S.) 53; s. c., 2 Bann. & Ard. Pat. Cas. 459.

All parties guilty of a tort are deemed principals. *Baldwin v. Sibley*, 1 Cliff. (U. S.) 150.

In an action at law all parties who participate in the infringement are liable, although some are acting only as officers of a corporation. A man cannot escape liability for an infringement in which he actively participated because acting officer of a corporation. *Nat. Car Brake Shoe Co. v. Terre Haute Car & Mfg. Co.*, 28 Pat. Office Gaz. 1007.

Employees Making Infringing Machines.—Persons making the infringing machines are held liable for an infringement, although employed by a third party. *Bryce v. Dorr*, 3 McLean (U. S.) 582.

It may be that any workman on an infringing machine, though not interested in it, is liable to be restrained, in order to prevent evasions by treating all as principals who are aiding. *Woodworth v. Hall*, 1 Woodb. & M. (U. S.) 248.

Where defendants were paid by the pound and by day's work, to put an armor on a government vessel, the application of which to such purpose was patented and the vessel did not belong to the defendants, *held* not a vending of it to the government. *Heaton v. Quintard*, 7 Blatchf. (U. S.) 73. And, generally, where one acts solely as employee and has no pecuniary interest in the product of his labor, and is simply employed by the owner to supervise the work of general repair, he cannot be charged as an infringer on account of his connection with the machine repaired. *Young v. Foerster*, 37 Fed. Rep. 203.

Liability of Employer for Employee.—Where the defendants employed a man who was paid by the piece, who furnished his own tools, one of which was an infringement of a patent, *held*, it was an infringement on their part to which they were to some extent liable. *Wooster v. Marks*, 17 Blatchf. (U. S.) 368.

An employer who procures a workman to make a patented thing is liable for infringement. *Andrews v. Creegan*, 19 Pat. Office Gaz. 1140; s. c., 19 Blatchf. (U. S.) 113; s. c., 7 Fed. Rep. 477.

Where infringing machine is used by father and son and the son was a superintendent in the shop where a machine was used, no action for infringement will lie against the son. *McDonald v. Whitney*, 32 Pat. Office Gaz. 1465.

Salesmen Liable Selling on Commission.—Keeping and selling an infringing machine, as salesmen or agents for the owners, renders the persons selling infringers. *Patter v. Crowell*, 1 Abb. (U. S.) 89. *Moss v. Davis*, 5 Blatchf. (U. S.) 40.

Selling a machine on commission renders the seller liable for infringement. *Steiger v. Heidelberger*, 18 Blatchf. (U. S.) 426; s. c., 18 Pat. Office Gaz. 1463; s. c., 4 Fed. Rep. 455.

Agent Not Affected by Infringement of Principle.—Infringement by a corporation does not affect an agent who was not concerned in its use. *Lightner v. Kimball*, 1 Lowell (U. S.) 211.

Infringement by Replacing Worn Out Parts.—Where the patent is for the whole machine, and some parts "will wear out sooner than others," it is not infringement to replace those parts as often as necessary, so long as the identity of the machine is retained. If, however, the patent is for the part which wears out, and there is no patent upon the other parts of the machine, it is infringement to replace that part by putting in another like it, for that is what is covered by the patent. *Gottfried v. Conrad et al.*, 10 Biss. (U. S.) 368; *Young v. Foerster*, 37 Fed. Rep. 203. And if the machine is made up of various patented parts, one who replaces a worn out part covered by a separate patent infringes. *Singer Mfg. Co. v. Springfield Armory Co.*, 34 Fed. Rep. 393. A purchaser has the right to discard useless parts

2. Intention as Affecting Infringement—(1) *Manufacture and Sale of Part of Patented Device with the Intent to Procure Infringement*.—It is infringement to furnish means by which a device becomes and is intended to become an infringement.¹ This intention may be shown either by the actual fact of the intention,² or by putting an article on the market which would be

and add new ones to improve the action of the machine. *Young v. Foerster*, 37 Fed. Rep. 203.

Agents and Workmen.—Agents of a corporation, who have nothing to do with the use of a patented article, do not infringe. *Lightner v. Kimball*, 1 Lowell (U. S.) 211; *Williams v. Empire Transportation Co.*, 14 Pat. Office Gaz. 523; s. c., 3 Bann. & Ard. Pat. Cas. 523.

A mere workman, employed by a person who is not the patentee to make parts of a patented machine, is not liable as an infringer. *Delano v. Scott*, 1 Gilp. (U. S.) 89; *Young v. Foerster*, 37 Fed. Rep. 203.

Owners and Lessees of Real Estate for Infringing Machine Thereon.—A decree for an injunction and an account will be rendered against a defendant whose wife owned a piece of land on which a patented device was located and used by them; against a landlord who rented premises on which the patented device was located for use; against an owner of a piece of property on which a patented device was located when the property came into his possession; against a tenant who rented property on which was located a patented device, and used the device; against one who paid half the expense of erecting the patented device in a property belonging to his wife; but not against one who boarded on a property on which the patented device was located and paid his board by furnishing, with another, the expenses of the table. *Green v. Gardner*, 22 Pat. Office Gaz. 683.

Where, on the sale of a machine, a bunch of duplicate patented articles went with it, *held*, that it was an infringement to make new articles when the others were worn out. *Aiken v. Manchester Print Works*, 2 Cliff. (U. S.) 435.

1. *New York Bung etc. Co. v. Hoffman*, 20 Blatchf. (U. S.) 3; *Geis v. Kimber*, 44 Pat. Office Gaz. 107.

2. Different parties may all infringe by respectively making or selling, each of them, one of the elements of

a patented combination, provided those separate elements are made for the purpose and with the intent of their being combined by a party having no right to combine them. *Saxe v. Hammond*, 1 Bann. & Ard. Pat. Cas. 629; s. c., 1 Holmes (U. S.) 456 *cited*; *Cotton Tie Co. v. Simmons*, 106 U. S. 95.

Defendants made and sold to dealers in the completed article one of the parts of a completed combination which was of no practical utility or value except for the special purpose of the patentee, and which of necessity, and to the knowledge of defendants, was to be used for the purpose of infringing the patent. *Held*, they were intentional promoters of the ultimate act of infringement, and therefore answerable as infringers. *Travers v. Beyer*, 26 Fed. Rep. 450.

Article Made and Put on Market Useful Only in Combination — Liability of Joint Infringers.—Where a person makes and puts on the market an article which of necessity, and to the knowledge of such person, is to be used for the purpose of infringing the patent, such person is liable for infringement. *Snyder v. Bunnell*, 38 Pat. Office Gaz. 1130.

Two or more persons cannot engage in the construction and sale of a machine patented as a combination and protect themselves from the charge of infringement by showing that each makes and sells one part only, which is useless without the others, and a third puts the parts together. In that case each is liable for all the damages. *Wallace v. Holmes*, 9 Blatchf. (U. S.) 651. 1 Pat. Office Gaz. 117.

Where Full Effect Could be Obtained Only by Infringement.—Where the invention consisted in a combination having only its full effect when applied in a certain relation, it was *held* infringed by the combination ready to be so applied. *Barnes v. Straus*, 9 Blatchf. (U. S.) 553; s. c., 5 Fish. Pat. Cas. 531; 2 Pat. Office Gaz. 62.

Compound.—In selling a compound which the seller knows cannot be practically applied without making the user

useless unless used with other articles to make up a patented device or otherwise. But where there is nothing to show that the

a trespasser, such seller renders himself an accessory to the infringement. *Alabastine Co. v. Payne*, 27 Fed. Rep. 559; s. c., 35 Pat. Office Gaz. 1438.

A patent was for a cotton tie composed of a buckle and a band, all made of metal, the band going round the bale, and the two ends confined by the buckle. The buckle was a piece of iron with an oblong hole or aperture cut or punched through the centre, and an arrow-shaped (or equilateral triangle-shaped) head attached to the other to be placed in the slit of the buckle to confine the tie. If the defendants prepare and sell the arrow tie intending that it should be used to bale cotton and to produce the results set forth in the patents, they infringe those patents, but they were not held liable as infringers of either of the three patents merely because they have sold the arrow-shaped head apart from the band or the rest of the structure of the tie. *Cotton Tie Co. v. Simmons*, 106 U. S. 89.

Accompanying Device with Directions.

—Where certain devices capable of several uses were sold for a certain purpose which constituted an infringement, and were accompanied by directions as to the mode of using them, which involved such infringement to which they were especially adapted, *held* that they infringed. *Boyd v. Cherry*, 4 McC. (U. S.) 70.

But it is doubted whether a mere advertisement of the device constitutes an infringement. *Allis v. Stowell*, 19 Pat. Office Gaz. 727; s. c., 9 Fed. Rep. 304.

Even if there is no proof that the defendants had made an actual prearrangement with any particular person to supply the other part of the combination, it will be inferred from the circumstances of the case that it is the intent of the defendants that such other portion should be added to their article of manufacture. *Schneider v. Pountney*, 29 Pat. Office Gaz. 84; s. c., 21 Fed. Rep. 399.

Defendants made and sold dealers in completed article one of the parts of patented combination, which was of no practical value except for the special purpose of patentee, and to knowledge of defendants was to be used to infringe the patent, *held* infringement by defendants. *Travers v. Beyer*, 26 Fed. Rep. 450.

One Party Manufacturing One Part, One Another.

—Where one party manufactures one portion of the device covered by a combination claim and another party manufactures the other part of the combination, and it does not appear that the two parts are capable of separate use, *held* that the parties are joint infringers. *Schneider v. Pountney*, 29 Pat. Office Gaz. 84; s. c., 21 Fed. Rep. 399.

The manufacturers of a part of a combination covered by a patent are nevertheless infringers, if it appears that these parts were manufactured and sold for the express purpose of being used in the combination. *Richardson v. Noyes*, 2 Bann. & Ard. Pat. Cas. 398; *Renwick v. Pond*, 10 Blatchf. (U. S.) 201; s. c., 5 Fish. Pat. Cas. 569.

The patent was for the use of a certain compound as a substitute for leaven in the preparation of farinaceous food. *Held*, a person who prepares and sells self raising flour containing the ingredients, with the intent and purpose of enabling the buyer to turn the compound into bread by the use of heat and water, was an infringer. *Rumford Chemical Works v. Hecker*, 2 Bann. & Ard. Pat. Cas. 351.

Where two parties make each one part only of a patented combination and a third puts those two together, they are all infringers. *Wallace v. Holmes*, 9 Blatchf. (U. S.) 65; *Turrell v. Speath*, 8 Pat. Office Gaz. 986; *Renwick v. Pond*, 5 Fish. Pat. Cas. 569.

Where a party sells an article to persons who intend to use it in the combination claimed in the patent and it is advertised and sold for that very purpose, such sale is an infringement, although the manufacture and sale would not *per se* be an infringement. *Bowker v. Dows*, 3 Bann. & Ard. Pat. Cas. 518; *Geis v. Kimber*, 36 Fed. Rep. 105.

But Not Infringement Where Patentee Limits the Use of His Invention.—If a patent is limited to the use of an article in a certain connection, a party who manufactures the article is not an infringer, although others do so use it. *Keystone Bridge Co. v. Phoenix Iron Co.*, 5 Fish. Pat. Cas. 468.

part made and sold was intended to be used to make up the plaintiff's device, there is no infringement.¹

(2) *Intention Not to Infringe*.—The question of infringement is one irrespective of motive. The defendant is not less an infringer because he infringed unintentionally.²

3. *Extent of Right*.—The patent right does not extend beyond the jurisdiction of the United States.³

1. A defendant made a part of a combination of old parts, and there was nothing to show that he had sold it to other parties with the knowledge that they would make up the plaintiff's machine from it. *Held*, he was not an infringer. *Coolidge v. McCone*, 1 Bann. & Ard. Pat. Cas. 78; s. c., 2 Sawy. (U. S.) 571.

Where, prior to the commencement of the suit, a part only of the complainant's patented device had been made and sold by one of the defendants, and the other part of the device was added by the vendee, also a defendant, after the suit was brought, *held* that no proof having been given that the defendants intended, prior to the suit, to use the part afterwards added, and that the part first sold could be used without it, infringement was not proved. *Maynard v. Pawling*, 5 Bann. & Ard. Pat. Cas. 551.

The making and selling a device useless by itself, and which was not used or intended to be used in any infringing structure, but was used and intended for use in a similar structure not covered by the patent, is not an infringement. *Campbell v. Kavanaugh*, 20 Blatchf. (U. S.) 256.

There is no infringement where the part sold by the defendant is capable of separate use and it does not appear that the defendant intended to have it used with the feature necessary to the plaintiff's machine. *Maynard v. Pawling*, 18 Pat. Office Gaz. 244; s. c., 5 Bann. & Ard. Pat. Cas. (C. C.) 551; s. c., 3 Fed. Rep. 711. But the mere sale of one of the ingredients of a patented composition for brewing, with a recommendation to brewers to use it in the mash tub with the other ingredients of the composition, is not an infringement. *Geis v. Kimber*, 36 Fed. Rep. 105; s. c., 44 Pat. Office Gaz. 108. And the manufacture of one of the elements of a patented combination, not proved to be made for use in connection with the other elements, is not an infringement of the patent for the combination. *Saxe v. Hammond*, 1 Bann. & Ard. Pat. Cas. 629; s. c., 1 Holmes (U. S.) 456;

Snyder v. Bunnell, 38 Pat. Office Gaz. 1130.

Sale of Article to which Patented Device May be Attached.—The mere fact that a person sells an article to which a patented device may be attached does not make him an infringer, provided that the article is not so constructed that the patented device and no other can be used with it. *Bliss v. Merrill*, 42 Pat. Office Gaz. 97.

2. *Parker v. Hulme*, 1 Fish. Pat. Cas. (C. C.) 44. Innocent use is no less infringement. *Hawes v. Washburne*, 5 Pat. Office Gaz. 491.

A man may infringe a patent although he does not know of its existence. *Mathews v. Skates*, 1 Fish. Pat. Cas. 602; *Parker v. Haworth*, 4 McLean (U. S.) 370; s. c., 2 Robbs Pat. Cas. 725; *Parker v. Hulme*, 1 Fish. Pat. Cas. 44.

The question of infringement is one irrespective of motive. The defendant may have infringed without intending or even knowing it, but he is on that account not the less an infringer. *Parker v. Hulme*, 1 Fish. Pat. Cas. 44.

3. The patent statute is not intended to operate beyond the limits of the United States, and as the patentee's right of property and exclusive use is derived from the statute, it cannot extend beyond the limits to which the law itself is confined. The use of the invention outside of the jurisdiction of the United States is not an infringement of his rights. *Brown v. Duchesne*, 19 How. (U. S.) 183.

Foreign Vessel in an American Port.—The use of an invention by a foreign vessel temporarily in a United States port is not an infringement of the patent for which a right of action will lie. *Brown v. Duchesne*, 19 How. (U. S.) 183.

American Vessel on High Seas.—The jurisdiction of the United States extends to the deck of an American vessel on the high seas as much as it does to all the territory of the country, and the use of a thing patented on such vessels is an infringement. *Gardiner v. Howe*, 2 Cliff. (U. S.) 462.

IV. COMPENSATION FOR INFRINGEMENT—1. Generally.—The patentee can recover, as compensation for the invasion of his rights, the damages he has suffered through the infringement, and, under certain circumstances, the profits made by the infringer.¹

2. Damages.—There is no one rule of damages which will apply to all cases.² But the damages must be actual and not speculative or vindictive.³

(1) *Licence Fee as Measure of Damages.*—Sales of licences of machines or an established royalty constitute the primary or true criterion of damages.⁴

1. "A patentee whose rights are infringed has his election (*i. e.* prior to 1870) of remedies; he may treat the infringer, who illegally appropriates his invention to his own use, as his trustee and compel him to account therefor in equity; on the other hand, he may sue at law for the damages he has sustained and those damages he is entitled to recover, whether the defendant has made any profit or not." *Cowing v. Rumsey*, 4 Fish. Pat. Cas. 275; *s. c.*, 8 Blatchf. (U. S.) 36. "Prior to the passage of the act of 1870 two remedies were open to the owner of the patent whose rights had been infringed and he had his election between the two; he might proceed in equity and recover the gains and profits which the infringer had made by the unlawful use of his invention . . . or the owner of the patent might sue at law, in which case he would have been entitled to the pecuniary injury he had suffered by the infringement." Since 1870 damages may be allowed in suits in equity. *Birdsall v. Coolidge*, 93 U. S. 64.

But where the patent has expired a suit cannot be brought in equity merely to collect the profits. In the opinion by MR. JUSTICE CLIFFORD, in *Birdsall v. Coolidge*, 93 U. S. 64, a passage is quoted, slightly altered from Curtis on Patents (§ 341, a., 4th ed., p. 461), which taken by itself might seem to imply that prior to the act of 1870 the owner of a patent had the election to resort to a court of equity for profits or a court of law for damages, irrespective of any other relief of an equitable character; but the language of the passage is to be restrained to mean merely the option to sue at law for past infringement or to seek equitable relief by way of prevention, the damages or profits following, as either jurisdiction is resorted to according to its kind. *Root v. R. R. Co.*, 105 U. S. 189.

2. *Seymour v. McCormick*, 16 How. (U. S.) 480.

3. *New York v. Ransom*, 23 How. (U. S.) 487, *Seymour v. McCormick*, 16 How. (U. S.) 480; *Wilbur v. Beecher*, 2 Blatchf. (U. S.) 132, *Teese v. Phelps*, 1 McAll. (U. S.) 48; *Hazelden v. Ogden*, 3 Fish. Pat. Cas. 378; *Parker v. Hulme*, 1 Fish. Pat. Cas. 44; *Russell v. Place*, 5 Fish. Pat. Cas. 134; *s. c.*, 9 Blatchf. (U. S.) 173; *Kneass v. Schuylkill Bank*, 4 Wash. (U. S.) 9; *Hall v. Wiles*, 2 Blatchf. (U. S.) 194, *Whittemore v. Cutter*, 1 Gall. (U. S.) 478; *s. c.*, 1 Rob. Pat. Cas. 40.

The true course is to leave the jury at large to estimate the actual damage according to the circumstances of each particular case. *Earle v. Sawyer*, 4 Mas. (U. S.) 1; *Carr v. Rice*, 1 Fish. Pat. Cas. 198; *Hubbell v. U. S.*, 5 Ct. of Cl. (U. S.) 1.

4. *Burdell v. Denig*, 92 U. S. 716.

"In an action at law the plaintiff can recover a verdict for only the actual damages he has sustained, and the amount of such royalties or licence fees as he has been accustomed to receive from third persons for the use of his invention, with interest thereon from the time when they should have been paid by the defendants, is generally, though not always, taken as the measure of damages; but the court may, whenever the circumstances of the case appear to require it, inflict vindictive or punitive damages by rendering judgment for not more than thrice the amount of the verdict." *Tilghman v. Proctor*, 125 U. S. 136.

Where the plaintiff has sought his profit in the form of royalty paid by his licences, and there are no peculiar circumstances in the case, the amount recovered will be regulated by that standard. *Philip v. Nock*, 17 Wall. (U. S.) 460.

(2) *When Licence Fee Can be Taken.*—A royalty can be taken as a measure of damages only when there is a fixed and established price at which a licence is granted¹ for that particular patent,² without other inducements,³ and under circumstances fairly similar.⁴ A licence fee is not the proper measure of dam-

The Reason of This Doctrine.—"Where an inventor finds it profitable to exercise his monopoly by selling licences to make or use his improvement, he has himself fixed the average of his actual damages when his invention is used without his licence." *Seymour v. McCormick*, 16 How. (U. S.) 480. This rule has remained the criterion of damages in cases to which it is applicable ever since. *Packet Co. v. Sickels*, 19 Wall. (U. S.) 611. And generally, "If the inventor has an established licence fee, the amount of such fee is his loss or damage for the use of the invention without licence." *Emerson v. Simm*, 6 Fish. Pat. Cas. 281; s. c., 3 Pat. Office Gaz. 293; *Birdsall v. Coolidge*, 93 U. S. 64; *Kellar v. Stolzenbach*, 37 Pat. Office Gaz. 564.

Where Use Has Had Consent of Patentee.—The reason for the rule that the price of an established royalty or licence fee is still stronger when the use of the patented invention has been with the consent of the patentee, express or implied. *Packet Co. v. Sickels*, 19 Wall. (U. S.) 611.

Where There Had Been Former Contract.—The defendants had been manufacturing five years under licence from the plaintiffs, or from those with whom the plaintiffs were privies. *Held*, the royalties then fixed by the parties a true measure of damages. *Starr Salt Castor Co. v. Crossman*, 4 Bann. & Ard. Pat. Cas. 566. But a *rescinded* contract between the parties cannot be used as a measure of damages. *Bussey v. Excelsior Mfg. Co.*, 1 McCreary (U. S.) 161; s. c., 5 Bann. & Ard. Pat. Cas. 135.

1. A royalty can be taken as a measure of damages only where there is a fixed and established price at which a licence is granted; no price can be said to be fixed or royalty established where the patentee varies his price according to the courage or ability of the infringer to resist. *Black v. Munson*, 14 Blatchf. (U. S.) 265; s. c., 2 Bann. & Ard. Pat. Cas. 623; *Matthews v. Spangenberg*, 14 Fed. Rep. 350. The prices of the licences must have been fixed when, there being no liability between

the parties, they are presumed on both sides to have acted voluntarily and to have made up their minds deliberately what was a fair price. *Nat. Car etc. Co. v. Terre Haute Car etc. Co.*, 28 Pat. Office Gaz. 1007; s. c., 19 Fed. Rep. 514.

2. Licence fees for the use of patent in suit and another patent blended together would not establish a royalty as to either of the patents. *Adams v. Bellaire Stamping Co.*, 36 Pat. Office Gaz. 567; s. c., 28 Fed. Rep. 360.

3. If the licence embraces other inducements which actually or probably influenced the licencees to pay the royalty, then the licence would not constitute an established royalty. *Adams v. Bellaire Stamping Co.*, 36 Pat. Office Gaz. 567; s. c., 28 Fed. Rep. 360.

Exceptional Contracts Do Not Establish Royalty.—Where there is no fixed and established royalty, the exceptional contracts cannot be taken as the measure of damages. *Greenleaf & Yale Lock Co.*, 17 Blatchf. (U. S.) 253; s. c., 4 Bann. & Ard. Pat. Cas. (C. C.) 583.

Single Licence Not Sufficient.—Proof of a single licence is not sufficient to establish a market price. *Westcott v. Rude*, 27 Pat. Office Gaz. 719; s. c., 19 Fed. Rep. 830; s. c., *Rude v. Westcott*, 130 U. S. 152.

General Statement of Circumstances That Show an Established Licence Fee.

—A sale of a single licence at an early date is not sufficient to establish a royalty or uniform licence fee. Licence fees must be sufficient in number and be uniform and actually paid or secured to be paid before the infringement of defendants was committed. *Adams v. Bellaire Stamping Co.*, 36 Pat. Office Gaz. 567; s. c., 28 Fed. Rep. 360.

4. The price for which the patentee has sold his rights to a certain territory is no criterion by which to determine the amount of damage sustained by an infringement in other territory. *Campbell v. Barclay*, 5 Biss. (U. S.) 179.

Evidence of Settlements for Past Infringements.—In an account before a master evidence of payments for past infringements, for the purpose of ascertaining the amount which should be

ages,¹ unless apportioned,² where the infringement is only of a part of the invention for which the licence fee was charged, except where the claim not infringed is merely structural and included within those infringed.³ Or where the improvement has been in use to but a limited time or extent.⁴

paid by the defendant, is incompetent; to admit it is contrary to rule *inter alios acta*, etc. *Westcott v. Rude*, 27 Pat. Office Gaz. 719; s. c., 19 Fed. Rep. 830; s. c., 130 U. S. 152; *Nat. Car etc. Mfg Co. v. Terre Haute Car etc. Co.*, 28 Pat. Office Gaz. 1007; s. c., 19 Fed. Rep. 514; *Cornely v. Marckwald*, 47 Pat. Office Gaz. 1353.

Licence Fee Established After Infringement.—The infringement was before any licence fee had been established. Orator insisted that the amount of the licence fee should be applied as a rule of damages, it not appearing that the value of invention was the same then as afterwards. *Held*, "Whether the situation was such that the value was equal to the licence fee before the latter became established was a question of fact for the master," and "The court cannot say, as a matter of law, that the licence fee, which did not become established until afterwards, shall govern." *Wooster v. Thornton*, 34 Pat. Office Gaz. 560; s. c., 26 Fed. Rep. 274.

1. The patentee sold licences to use a device at a certain rate; the defendant used the same devices, omitting a certain part. *Held*, an instruction to the jury that when a person without a licence appropriates the invention of another, the measure of damages, if a royalty has been established, is the regular royalty paid by purchasers and licencees, is erroneous under the circumstances. *Birdsall v. Coolidge*, 93 U. S. 64; s. c., 10 Pat. Office Gaz. 748.

A licence fee is not the proper measure of damages if the infringement is only a part of the invention. *Wooster v. Simonson*, 16 Fed. Rep. 680.

"Of two or more claims in a patent, each of value and distinct from the other, one cannot equal all in value. A licence may, if he choose, bind himself to pay the same price, whether he use the same invention or a part only, but at the same time he acquires the right to use all, and so his agreement may not be unreasonable, but if against an infringer such a licence can have any force, reasonably it must be in the way of establishing a royalty for the whole invention." *Westcott v. Rude*, 19 Fed.

Rep. 830; s. c., 27 Pat. Office Gaz. 719.

2. Where an established licence fee for the use of a patent containing six claims was shown, and the defendant had infringed only two of the six claims, *held* that it was the duty of the master to ascertain the relative value of the different claims, as nearly as the nature and circumstances of the case permitted, and to charge the defendant, for the use of the claims, such proportion of the whole licence fee as the testimony revealed they were relatively worth. *Willimantic Thread Co. v. Clark Thread Co.*, 27 Fed. Rep. 865.

Burden of Proof to Show Relative Value on Plaintiff.—Where complainant seeks to recover damages on basis of an established royalty for use of several claims, only a part of which have been infringed, the burden of proof is upon him to show the relative value of the claims which have been infringed. *Willimantic Thread Co. v. Clark Thread Co.*, 27 Fed. Rep. 865.

3. Where claims not infringed are merely structural and comprehended within infringed no apportionment of licence fee is proper. *Willimantic Thread Co. v. Clark Thread Co.*, 27 Fed. Rep. 865; *Asmuss v. Alden*, 34 Fed. Rep. 902.

4. Reported cases of undoubted authority may be referred to which support that proposition (that established royalty is proper measure of damages), and yet it is believed to be good law that the rule cannot be applied without qualification where the patented improvement has been used only to a limited extent and for a short time; that in such a case the jury should find less than the amount of the licence fee. *Birdsall v. Coolidge*, 93 U. S. 64; *Judson v. Bradford*, 3 Bann. & Ard. Pat. Cas. 539; s. c., 16 Pat. Office Gaz. 171.

Licence Fees Must be for the Infringed Rights.—The sum paid for the "sole and exclusive right and monopoly of manufacturing" is not a licence fee to be used as a measure of damages. *La Baw v. Hawkins*, 2 Bann. & Ard. Pat. Cas. 561. Nor where the infringement consisted in the sale is the licence fee for the use of

(3) *Measure of Damages Where Test of Licence Fee Cannot be Applied.*—Where the test of a licence fee cannot be applied to determine the amount of damages, the patentee will be entitled to an amount which will compensate him for the injury to which he has been subjected by the piracy.¹

an invention or the royalty paid for the right to sell and transfer to purchasers the right to use a measure of damages. *Colgate v. Western Electric Mfg. Co.*, 37 Pat. Office Gaz. 893; s. c., 28 Fed. Rep. 146.

Patentee is not restricted to his licence fee in recovery against an infringer. "It is understood that a licence fee is evidence and not an absolute test of value." *Wooster v. Thornton*, 34 Pat. Office Gaz. 560; s. c., 23 Fed. Rep. 49; s. c., 23 Blatchf. (U. S.) 112. He is not limited to such fees as damages, but in suit in equity may recover instead of damages the profits made by the defendant. *Tilghman v. Proctor*, 125 U. S. 136.

There are few instances in which a patentee ought to be concluded by a former offer to sell. *Bell v. Daniels*, 1 Fish. Pat. Cas. 372; s. c., 1 Bond (U. S.) 212; *Parker v. Hulme*, 1 Fish. Pat. Cas. 44.

1. *Philip v. Nock*, 17 Wall. (U. S.) 460.

Various Statements of the Measure of Damages Where There Is No Established Licence Fee.—What is lost to the patentee is the measure of damages. *Cowing v. Rumsey*, 4 Fish. Pat. Cas. 275; s. c., 8 Blatchf. (U. S.) 36.

In cases where there is no established patent or licence fee, general evidence may be resorted to in order to get at the measure of damages; and evidence of the utility and advantages of the invention over the old modes or devices that had been used for working out similar results is competent and appropriate. *Suffolk Co. v. Hayden*, 3 Wall. (U. S.) 315.

The profit made by the defendant and that lost by the patentee are among the elements which the jury may consider. *Philip v. Nock*, 17 Wall. (U. S.) 460.

The rule is to give the actual damage or loss incurred by reason of the infringement, and that is the profits which the patentee would have made if he had not been embarrassed by the interference of defendant's machine, because the law presumes the patentee would have had the patronage which

was diverted by the defendant. *LeRoy v. Tatham*, 2 Blatchf. (U. S.) 474. "At law the rule of damages is not what the defendant has made, but what the plaintiff has lost by the infringement." *McCombe v. Brodie*, 1 Wood (U. S.) 153; s. c., 2 Pat. Office Gaz. 117; *Cowing v. Rumsey*, 8 Blatchf. (U. S.) 36; s. c., 4 Fish. Pat. Cas. 275.

Damages Must be Direct, Not Remote—Failure to Sell.—The profits lost to the patentee must be the direct and legitimate fruits of the patent. He may sustain damages through his inability to sell another article, but they are too remote. *Carter v. Baker*, 1 Sawy. (U. S.) 512. The watches manufactured by plaintiff and those by defendant were different in structure and appearance. *Held*, it was not made to appear that the plaintiff was entitled to damages, since the damages must be confined to the direct and immediate consequences of the infringement, and not embrace those that are remote and conjectured. *Buerk v. Imhaeuser*, 10 Pat. Office Gaz. 907; s. c., 2 Bann. & Ard. Pat. Cas. 452.

But the patentee of a hotel register having advertisements along the edge of the pages is entitled to recover damages for what he might have obtained from the advertisers as well as from the sale of the book. *Hawes v. Washburne*, 5 Pat. Office Gaz. 491.

Damages Beyond That Caused by Actual Interference of Defendant.—If the patentee has sustained damages beyond those arising from the actual interference of the defendant in making and putting on the market similar machines, he may recover them. The question of damage is very much at large. *McCormick v. Seymour*, 2 Blatchf. (U. S.) 240.

If the patentee has been compelled to carry his stock over from one season to another, the value of the use of his capital may be taken into consideration. *Carter v. Baker*, 1 Sawy. (U. S.) 512; s. c., 4 Fish. Pat. Cas. 404.

If the patent is for an entire machine, the patentee is entitled as damages to the profits he could have made in constructing and vending his machine over and above the mere profits

(a) *What May be Evidence of Damages.*—Loss of profit to the patentee caused by competition of defendant,¹ the loss of sales²

arising out of its manufacture, that is, the mere profits of its mechanical construction, and not the profits that grew out of the exclusive right to manufacture the invention under the patent. The latter belong to the patentee, while the former, the mere mechanical profits, are excluded from the damages. *Seymour v. McCormick*, 3 Blatchf. (U. S.) 209.

Allowance of mechanical profits as deduction in accounting before the master in a suit in equity disallowed. *Rubber Co. v. Goodyear*, 9 Wall. (U. S.) 788.

An Entire New Composition of Matter.—Where an infringing article is made of a patented new material alone, the measure of damages is the entire profit patentee would have made to the extent of the sales of defendant. *Welling v. LeBau*, 34 Fed. Rep. 40.

If the patentee manufactures the article he is entitled to the profits he would have made if the defendant had bought directly from him. *Putnam v. Homax*, 10 Biss. (U. S.) 546; s. c., *Blake v. Greenwood Cemetery*, 16 Fed. Rep. 676.

1. Where a patentee granted no licences had no established royalty, but manufactured his own locks in sufficient numbers to supply the demand, a reduction in the price of his own locks forced by the competition of the defendants, is fair measure of damages. *Yale Lock Co. v. Sargent*, 117 U. S. 536.

What Patentee Must Show to Entitle Him to Damages for Loss of Business Profits.—Where a patentee claims, in a suit, damages for a reduction of his prices caused by the defendant infringing his patent, he must establish not only that a reduction of his prices was caused by the infringement, but how much such reduction was, and how much of it was occasioned by the act of the defendant and how much was due to the fact that the infringing articles contained the invention patented. *Ingersoll v. Musgrove*, 3 Bann. & Ard. Pat. Cas. 304; s. c., 14 Blatchf. (U. S.) 541. It is not necessary to show by direct evidence that the plaintiff would have all or any part of the sales made by the infringer, but he must prove facts and circumstances which legitimately create the presump-

tion he would have made then. *Covert v. Sargent*, 38 Fed. Rep. 237.

Where there was no evidence that the patentee could have constructed and sold any more than he actually did, it is erroneous to take as measure of damages the amount of profits complainant would have made if he had constructed and sold the machines made and constructed by the defendant. *Seymour v. McCormick*, 19 How. (U. S.) 96.

Patentee must establish by satisfactory evidence that he would have sold more of the patented articles than he did sell if the infringing articles had not been sold, and what profit he would have made on them and what part of such profit is to be assigned to the invention patented. *Ingersoll v. Musgrove*, 3 Bann. & Ard. Pat. Cas. 304; s. c., 14 Blatchf. (U. S.) 541.

What May be Taken as Measure of Damages.—Where defendants had at first bought large numbers of a patented article from the complainant, and afterwards, while manufacturing it themselves, as wanton infringers, did not wholly cease from buying it from him, it is a reasonable conclusion, sufficiently free from doubt, that, had they not infringed, they would have purchased from him as many of the articles as they themselves made and used. *Creamer v. Bowers*, 35 Fed. Rep. 206.

2. The defendant made no profits on the manufacture and sale of carpets containing the infringing design. The plaintiff made a certain percentage of profit on the manufacture and sale of carpets containing the patented design. The defendant's carpets were far inferior in quality and market value to those of the plaintiff. The circuit court presumed that the defendant's carpets displaced those of the plaintiff to the extent of the defendant's sales, and held that the entire profit which the plaintiff would have received, at such percentage, from the sale of an equal number of his own carpets was the proper measure of damages. There was no satisfactory evidence that those who bought the defendant's cheap carpets would have bought the plaintiff's higher priced ones or that the design added anything to the defendant's price or promoted his sale of the particular

and reduction in prices¹ caused thereby, may be evidence of the damages suffered by defendant.

(b) *Where Plaintiff's Invention Is Used in Conjunction with Other Devices.*—Where plaintiff seeks to show damages by taking the profit of the defendant as the measure of his loss, he must show that his invention was the cause of the profit by the defendant,² or establish its proportionate value.³

carpet. *Held*, circuit court in error. *Dobson v. Carpet Co.*, 114 U. S. 439.

1. Where patent is for part of machine, defendant is not responsible in damages to same extent as if he had pirated the whole machine. *Seymour v. McCormick*, 16 How. (U. S.) 480. But where the entire commercial value of a machine depends upon a certain patented combination, nothing is to be deducted for the value of the machine. *Fifield v. Whittemore*, 33 Fed. Rep. 835.

2. Where a patent is for an improvement of an existing machine or contrivance, the patentee in a suit for damages must show by reliable, tangible proof that the value of his contrivance as a whole was due to the use of his patented invention. *Garretson v. Clark*, 111 U. S. 120; *Kirby v. Armstrong*, 19 O. G. Pat. Office Gaz. 661.

3. Where an inventor has invented only an improvement, and there is a violation of his right under his patent to use that improvement in connection with the invention of others, or in connection with a machine previously known and used, his damages must be limited to the value of his improvement in connection with the other elements of the machine. *Seymour v. McCormick*, 16 How. (U. S.) 480, *Goulds Mfg. Co. v. Cowing*, 1 Bann. & Ard. Pat. Cas. 375; s. c., 12 Blatchf. (U. S.) 243; s. c., 8 Pat. Office Gaz. 277; *Star Salt Castor Co. v. Crossman*, 4 Bann. & Ard. Pat. Cas. 566.

In a suit in equity for infringement of a patent for a design for carpets, where no profits were found to have been made by defendant, circuit court allowed plaintiff as damages, in respect to the yards of infringing carpets made and sold by defendant, the sum per yard which was the profit of plaintiff in making and selling carpets with patented design. *Held*, that such award of damages was improper, and that only nominal damages should have been allowed. *Dobson v. Carpet Co.*, 114 U. S. 439.

Where Patent Is an "Incident" of Complete Device.—Patent was for a particular feature of a lock on travelling bags. Plaintiff granted no licences, but supplied the trade himself. He proved his profit on a single lock and the number of locks made and sold in connection with bags by defendant. *Held*, only entitled to nominal damages, it not being shown that plaintiff's profits were due to patented feature, and that plaintiff would have had an opportunity to make and sell these locks if defendant had not made and sold them with their bags. "However it may be with articles wholly covered by a patent for which there is no, or no convenient, substitute, it does not follow that a purchaser of the principal thing with a patented incident would go on until he should find that particular kind of incident before purchasing." *Roemer v. Simon*, 40 Pat. Office Gaz. 1456; s. c., 31 Fed. Rep. 41.

No licence fee had been proved, but plaintiff was shown to have made a profit of forty dollars an inch on width of stone breaking machine sold by him. They, however, embraced inventions covered by patents other than that for infringement of which suit was brought. *Held*, in absence of proof how much was profit due to such other patents, and how much was due to manufacturers' profits, he was entitled to nominal damages only against the respondent. *Blake v. Robertson*, 94 U. S. 728.

Damages must be nominal where the infringement of a patent was established, and it appeared that other methods in common use produced the same results with equal facility and costs, and there was no proof of the exaction of a licence fee for the use of the invention and its general payment. *Black v. Thorne*, 111 U. S. 122.

If the patent was useful when invented, and was an improvement of actual value over what then existed, the fact that something else was invented afterwards would not take away its

(c) *Profits of Defendant as Measure of Damages.*—Defendant's profit can only be taken as measure of damages in an action at law under peculiar circumstances, where no other rule can be applied.¹

entire value. A man who has a patent owns it as property, and if anybody sees fit to infringe he is bound to pay its fair value, and the fact that there may be something else just as good as that, or better, does not destroy its value, but it may affect your judgment what its value is. *Nat. Car etc. Co. v. Terre Haute Car etc. Co.*, 28 Pat. Office Gaz. 1007; s. c., 19 Feb. Rep. 514.

Making, Selling and Using, for Which Damage.—It is the making and selling to be used, not the selling or buying, or making alone, for which full damages are usually given. *Hogg v. Emerson*, 11 How. (U. S.) 587.

For the mere making of a machine, without selling or using it, the damages would be nominal. *Carter v. Baker*, 4 Fish. Pat. Cas. 404; s. c., 1 Sawy. (U. S.) 512.

The value of some patents consists chiefly in the right to use; of others, in the right to sell. Infringement by selling and infringement by using the patented article are essentially different invasions of the right of the patented property. *Colgate v. Western Union Telegraph Co.*, 28 Fed. Rep. 146.

Burden of Proof.—The burden of showing the extent of damages rests on the patentee. *Carter v. Baker*, 1 Sawy. (U. S.) 512; *Nat. Car Brake Co. v. Terre Haute Car & Mfg. Co.*, 28 Pat. Office Gaz. 1007. 'If he rests his case after merely proving infringement he may be entitled to nominal damages, but no more. *Burdell v. Denig*, 2 Fish. Pat. Cas. 588; *Calkins v. Bertrand*, 10 Biss. (U. S.) 445; s. c., 8 Fed. Rep. 755. In the absence of all evidence beyond the mere violation of the right, the law presumes a nominal damage. *Whittemore v. Cutter*, 1 Gall. (U. S.) 429. And actual damages must be actually proved and can not be assumed as a legal inference from any facts which do not amount to actual proof of the fact. *Seymour v. McCormick*, 16 How. (U. S.) 480.

The plaintiff must show his damages by evidence. They must not be left to conjecture by the jury. They must be proved, not guessed at. *Philip v. Nock*, 17 Wall. (U. S.) 460; *Carter v. Baker*, 4 Fish. Pat. Cas. 404; *Spaulding v.*

Tucker, 1 Deady (U. S.) 649; *Burdell v. Denig*, 2 Fish. Pat. Cas. 588.

What Accuracy of Proof Required.—A patentee is not able to give the exact amount of damages that he has sustained with utmost accuracy. It is not in his power. He does the best he can. If he is wrong in his calculation the defendant can put him right. *Conover v. Rapp*, 4 Fish. Pat. Cas. 57.

Circumstances Attending Proof.—If a party wilfully infringes a patent, the proof of loss must be interpreted liberally in favor of the patentee. *Bigelow Carpet Co. v. Dobson*, 21 Pat. Office Gaz. 1200; s. c., 10 Fed. Rep. 385. Or if the defendant keeps back facts and shows an unwillingness to let the truth out, then the jury may draw the strongest inferences against him. *Nat. Car etc. Co. v. Terre Haute Car etc. Co.*, 28 Pat. Office Gaz. 1007; *Creamer v. Bowers*, 30 Fed. Rep. 185. But where the defendant produces his books, furnishes all the evidence in his power, and is fairly candid, no inferences except those which can be fairly drawn should be drawn against him. *Nat. Car Brake Co. v. Terre Haute Car & Manufacturing Co.*, 28 Pat. Office Gaz. 1007; s. c., 19 Fed. Rep. 514.

1. It is only where, by the peculiar circumstances of the case, no other rule can be found, the defendant's profits become the criterion of the plaintiff's loss. *Seymour v. McCormick*, 16 How. (U. S.) 480.

Defendant's profits are not the primary or true criterion of damages in an action at law. That rule applies eminently and mainly to cases in equity. In the absence of satisfactory evidence of either class in the forum, to which it is most appropriate, the other may be resorted to as one of the elements on which damages may be ascertained. *Burdell v. Denig*, 92 U. S. 716.

The damages are not to be estimated for the whole term of the patent, but only for the period of the infringement, where the licence fee is not taken as the measure of damages. *Suffolk Co. v. Hayden*, 3 Wall. (U. S.) 315.

The rule of damages should be the value of the use of the machine during the time of the illegal use. *Whitte-*

(4) *Increase of Damages*.—Whenever a verdict is rendered for the plaintiff, the court may enter judgment thereon in any sum above the amount found by the verdict as the actual damage, according to the circumstances of the case, not exceeding three times the verdict.¹

When the Increase Will be Added.—The court will increase the damages when the infringement is deliberate and intentional.² This provision does not extend to profits.³

(5) *Forfeiture of Damages by Failure to Mark in Accordance with Statute*.—(For statute, see note 4.)

more *v. Cutter*, 1 Gall. (U. S.) 478; s. c., 1 Rob. Pat. Cas. 40.

Counsel fees cannot be included in the verdict. *Philip v. Nock*, 17 Wall. (U. S.) 460; *Teese v. Huntington*, 23 How. (U. S.) 2; *Parker v. Hulme*, 1 Fish. Pat. Cas. 44; *Stimpson v. Railroad Co.*, 1 Wall. Jr. (C. C.) 164.

Act of 1870, giving damages in court of equity, does not authorize recovery of counsel fees as damages. *Bancroft v. Acton*, 7 Blatchf. (U. S.) 505.

1. Rev. Stat., § 4919.

2. If the infringement is deliberate and intentional the court will increase the damages. It is not reasonable that an inventor should be compelled to spend his means in protecting himself without indemnity, and so practically lose the benefit of the invention which the law designed to procure him. *Russell v. Place*, 5 Fish. Pat. Cas. 136; s. c., 9 Blatchf. (U. S.) 173. So also where the infringement is "wanton and persevering." *Bell v. McCollough*, 1 Bond (U. S.) 194; s. c., 1 Fish. Pat. Cas. 380. Or where a man manufactured a device knowing that another was the inventor. *Lyon v. Donaldson*, 34 Fed. Rep. 789.

No Increase of Damages Where the Suit Is Merely for Collection.—But the spirit of the act does not include suits brought upon an expired patent which are merely cases of collection, the sole object being the collection of damages. *Bell v. McCollough*, 1 Bond (U. S.) 194; s. c., 1 Fish. Pat. Cas. 380. Nor merely where the defence was active and annoying. *Welling v. La Bau*, 35 Fed. Rep. 302.

Increase of Damages Is for the Court.—

The trebling of damages is a matter that rests in the discretion of the court. *Stimpson v. Railroads*, 1 Wall. Jr. (C. C.) 164; s. c., 2 Robb. Pat. Cas. 595.

The jury should estimate the single damages, and the court, if it sees proper, will treble the damages found by the

jury in awarding the proper judgment. *Whittemore v. Cutter*, 1 Gall. (U. S.) 478; s. c., 1 Rob. Pat. Cas. 40; *Evans v. Hettick*, 3 Wash. (U. S.) 408; s. c., 1 Rob. Pat. Cas. 166; *Motte v. Bennett*, 2 Fish. Pat. Cas. 642; *Livingston v. Jones*, 2 Fish. Pat. Cas. 207; s. c., 3 Wall. Jr. (C. C.) 330.

Not Given to Assignee.—Treble damages will not generally be given to an assignee. *Schwartz v. Holensshade*, 2 Bond (U. S.) 29; s. c., 3 Fish. Pat. Cas. 116.

3. The statute authorizes "increase" of damages only, not of gains and profits. *Campbell v. James*, 5 Bann. & Ard. Pat. Cas. 630; *Holbrook v. Small*, 3 Bann. & Ard. Pat. Cas. 625.

Where a disclaimer is necessary but was not filed before commencement of suit, actual damages would seem, as a general rule, to be all that can be reasonably claimed; but cases may arise where the circumstances are aggravated in which the power to increase the damages should be exercised. *Guyon v. Serrell*, 1 Blatchf. (U. S.) 244.

4. It shall be the duty of all patentees, their assigns and legal representatives, and of all persons making or vending any patented article for or under them, to give sufficient notice to the public that the same is patented either by fixing thereon the word "patented" with the day and year the patent was granted, or when, from the character of the article, this cannot be done, by fixing to it, or to the package wherein one or more of them is enclosed, a label containing the like notice; and in any suit for infringement no damages shall be recovered by the plaintiff except on proof that defendant was duly notified of the infringement, and continued, after such notice, to make, use or vend the article so patented. Rev. Stat., § 4900.

The penalty imposed by the statute for a failure to mark patented articles is only the taking away of the right to

(6) *Ignorance of Existence of Patent—Conduct of Patentee Mitigating Damages.*—Ignorance of the existence of a patent,¹ and the action of the patentee,² may mitigate the damages.

(7) *Interest on Damages.*—Where a royalty is taken as the measure of damages, interest may be allowed from date of infringement,³ and, generally, the jury in estimating damages may take into account the interest if they choose, and allow it as damages.⁴

3. Profits.—(1) *Principle on which Awarded.*—The rule in equity is that the amount of profits received by the unlawful use of the machine is in general the damage done the owner of the patent.⁵ It is said that the infringer is converted into a

recover damages. *Goodyear v. Allyn*, 6 Blatchf. (U. S.) 33; s. c., 3 Fish. Pat. Cas. 374.

The complainant claimed that such marking would be so expensive as to exhaust his profit; it was however shown that the device could have been stamped according to law. *Held*, that the impossibility or impracticability of stamping patented articles is not dependent upon the question of pecuniary loss or gain; hence complainant debarred from recovering damages. *Putnam v. Sudhoff*, 1 Bann. & Ard. Pat. Cas. 198.

But in such case, if the packages containing the articles are stamped according to the statute, it is sufficient. *Sessions v. Romadka*, 28 Pat. Office Gaz. 721; s. c., 21 Fed. Rep. 124.

Where Actual Notice Given.—Where article has not been marked patented when any equivalent notice has been given, the defendant has been notified, and any notice, verbal or written, which includes a specification when the patent was granted is sufficient. *N. Y. etc. Assoc. v. Tilden*, 23 Pat. Office Gaz. 272; s. c., 14 Fed. Rep. 740.

Implied Notice.—The complainant and defendant had been in partnership manufacturing a machine, the patent being owned by plaintiff; the partnership was dissolved and plaintiff sued defendant for continuing the manufacture; defendant alleged that plaintiff had not marked articles patented. *Held*, the statute had no application to such a case. *Herring v. Gage*, 15 Blatchf. (U. S.) 124; s. c., 3 Bann. & Ard. Pat. Cas. 396.

Sale by Others.—If the complainant does not sell the patented articles, the objection that the articles sold by others were not properly marked will be of no avail. *Goodyear v. Allyn*, 6

Blatchf. (U. S.) 33; s. c., 3 Fish. Pat. Cas. 374.

Where infringing machine has been used by two successive companies, the master should ascertain to what degree each infringed. *Turrill v. Ill. Cent. R. Co.*, 3 Biss. (U. S.) 72.

In a suit against three defendants, it is proper to award against all three the profits made by them jointly while partners, and against two of them the profits they had made after their partnership with the third defendant was dissolved, and while they were using the patented invention in conjunction with a third party not a defendant. *Herring v. Gage*, 3 Bann. & Ard. 396; s. c., 15 Blatchf. (U. S.) 124.

1. Ignorance of the existence of a patent does not furnish a reason for allowing no damages; nor does the intent not to injure, though the latter may mitigate them. *Hogg v. Emerson*, 11 How. (U. S.) 587; *Parker v. Corbin*, 4 McLean (U. S.) 462; s. c., 2 Rob. Pat. Cas. 736.

2. Nominal damages only will be given if the jury think the patentee acted in such a manner that the defendant was misled. *Adams v. Edwards*, 1 Fish. Pat. Cas. 1; *Wasburne v. Gould*, 3 Story (U. S.) 122; s. c., 2 Rob. Pat. Cas. 206. Or if the patentee gratuitously authorize a party to manufacture and use the patented invention. *Proctor v. Brill*, 4 Fed. Rep. 415.

3. *Locomotive Safety Truck Co. v. Penn. R. R. Co.*, 5 Bann. & Ard. Pat. Cas. (C. C.) 308; s. c., 2 Fed. Rep. 677.

4. *LeRoy v. Tatham*, 2 Blatchf. (U. S.) 474; *Seymour v. McCormick*, 2 Blatchf. (U. S.) 240.

5. "It takes away the motive of the infringer of patented rights to make him pay the profits of his labor to the owner

trustee as regards the profits made,¹ or rather that the court of equity will award as a substitute for legal damages a compensation measured by the rule that courts of equity apply in the case of a trustee who has wrongfully used trust property to his own advantage.²

(2) *Definition*.—Profits are the gains upon any business when both receipts and payments are taken into account, and are confined to the actual advantage gained by the infringer.³

of the patent.” *Dean v. Mason*, 20 How. (U. S.) 198.

1. The rule in suits of equity, of ascertaining the profits which defendant has made by use of plaintiff's invention, stands on a different principle from that in suits at law. It is that of converting the infringer into a trustee as regards the profits thus made; and the adjustment of these profits is subject to all the equitable considerations which are necessary to do complete justice between the parties, many of which would be inappropriate in a trial by jury. *Packet Co. v. Sickles*, 19 Wall. (U. S.) 611.

That rule (infringers' profits as criterion of damages) applies universally and mainly to cases in equity, and is based on the idea that the plaintiff shall be converted into a trustee as to those profits for the owner of the patent which he infringes; a principle which it is very difficult to apply before a jury but quite appropriate on a reference to a master, who can examine defendant's books and papers and examine him on oath, as well as his clerks and employees. *Burdell v. Denig*, 92 U. S. 716.

2. The general rule of computing the infringer's profits has been sometimes said to be upon the theory that the infringer is converted into a trustee for the owner of the patent as regards the profits made by the use of his invention, but it is more strictly accurate to say that a court of equity which has acquired upon some equitable ground jurisdiction of a suit for infringement of a patent, will not send the plaintiff to a court of law to recover damages, but will itself administer relief by awarding, as an equivalent or substitute for legal damages, a compensation computed and measured by the same rule that courts of equity apply to the case of a trustee who has wrongfully used the trust property to his own advantage. *Tilghman v. Proctor*, 125 U. S. 136; *Root v. R. R. Co.*, 105 U. S. 184.

Reasons for Adoption of This Rule.—

The reasons which have led to the adoption of this rule are: that it comes nearer than any other to doing complete justice between the parties; that in equity the profits made by an infringer of a patent belong to the patentee, and not to the infringer, and that it is inconsistent with the ordinary principle, and practice of the courts of chancery either to let the wrong doer profit by his own wrong, and on the other hand to make no allowance for the cost and expense of conducting his business, or to undertake to punish him by obliging him to pay more than a fair compensation to the person wronged. *Tilghman v. Proctor*, 125 U. S. 136.

Upon a bill in equity by the owner against infringers of a patent, the plaintiff is entitled to recover the amount of gains and profits the defendants have made by the use of his invention. *Liv- ington v. Woodworth*, 15 How. (U. S.) 546.

3. *Rubber Co. v. Goodyear*, 9 Wall. (U. S.) 788.

The rule of damages is the profits which have been derived by the defendant by means of the invention over any other mode which the defendant had a right to adopt. *Serrill v. Collins*, 1 Fish. Pat. Cas. 289.

The profit which the infringer makes or ought to make, not what profit the plaintiff shows he might have made, governs the measure of damages. *Burdell v. Denig*, 92 U. S. 716. Infringer is liable for actual, not for possible, gains. *Tilghman v. Proctor*, 125 U. S. 136.

Profits are to be computed and ascertained by finding the difference between cost and yield. The calculation is to be made as a manufacturer calculates the profits of his business. *Rubber Co. v. Goodyear*, 2 Fish. Pat. Cas. 499; *Brown v. Piper*, 1 Holmes (U. S.) 196; s. c., 6 Fish. Pat. Cas. 240.

Actual Profit, Not What Could Have

(3) *Profits Where Complainant's Device Is Used with Other Device or Is Merely an Improvement.*—If any portion of the profits arose from an improvement made by the defendant,¹ or if the patent covers only some features of a machine,² or the patent is for an improvement on an old machine,³ the complainant is entitled only to the profits arising from his own invention.

Been Made.—An allowance of profits which the defendant could have made with reasonable diligence is erroneous. *Dean v. Mason*, 20 How. (U. S.) 108; *Livingstone v. Woodworth*, 15 How. (U. S.) 546; *Munson v. New York*, 16 Fed. Rep. 560.

The estimate of profits must be based, not upon the capacity for production, but upon the actual production. *Webster v. Carpet Co.*, 2 Bann. & Ard. Pat. Cas. 67; *Burdett v. Estey*, 5 Bann. & Ard. Pat. Cas. 308.

1. Where Portion of Profits Arose from Improvements of Defendant.—If any portion of the profits arose from an improvement made by defendant, they do not belong to the patentee. *Carter v. Baker*, 4 Fish. Pat. Cas. 404; s. c., 1 Sawy. (U. S.) 512. If defendant has cheapened the cost of producing the infringing device by an improvement of his own, he is entitled to a corresponding credit in the ascertainment of the profits which the complainants are entitled to recover. *Mason v. Graham*, 23 Wall. (U. S.) 261. See further, *infra*, this title, DEDUCTIONS TO BE ALLOWED INFRINGERS.

How Burden of Proof Rests Where Defendant Has Made Improvements.—If a portion of the profits are to be accredited to an improvement of the defendant, the burden rests upon him to show it and the amount affirmatively. *Carter v. Baker*, 4 Fish. Pat. Cas. 404; s. c., 1 Sawy. (U. S.) 512.

Plaintiffs had made a device which was unmarketable. Defendants had made improvement on it which rendered it marketable. Complainants failed to show what profits arose from the original invention, apart from the improvement; *held*, only entitled to nominal damages. *Bostock v. Goodrich*, 34 Pat. Office Gaz. 1047; *Garretson v. Clark*, 111 U. S. 120; *Dobson v. Carpet Co.*, 114 U. S. 439.

2. The patentee had invented a cover and hinge for an inkstand. The defendants used the hinge. The court *held* that where the infringement is confined to a part of the thing sold, the

recovery must be limited accordingly. *Philip v. Nock*, 17 Wall. (U. S.) 460.

The defendant used the patented device along with other devices. *Held*, the enquiry in the accounting should be limited to an account of the profits received by defendants as a direct result of the improper use of the improvements patented. *Littlefield v. Perry*, 21 Wall. (U. S.) 205.

If a patent covers only one of many features of a machine, the patentee is not entitled to the profits arising from the whole machine, but merely to the gains arising from the special feature. *Calkins v. Bertrand*, 10 Biss. (U. S.) 445.

Inventions covered by patents other than the complainant's were embraced in the machine of defendant; it was not shown how much of the profit was due to other patents. *Held*, complainant only entitled to nominal damages. *Blake v. Robertson*, 94 U. S. 728.

3. Plaintiff must show the particular profits which accrued to the defendant from using his improvement. *Black v. Munson*, 2 Bann. & Ard. Pat. Cas. 623; *Calkins v. Bertrand*, 10 Biss. (U. S.) 445; s. c., 8 Fed. Rep. 755.

Where patent is for improvement and not for entire machine, plaintiff must give evidence tending to separate or apportion the defendant's profits and the patentee's between the patented features and the unpatented features, and such evidence must be reliable or tangible, and not speculative or conjectural. *Garretson v. Clark*, 111 U. S. 120.

Design Patent.—Plaintiff must show what profits or damages are attributable to use of infringing design. *Dobson v. Dornan*, 118 U. S. 10.

If an invention consists merely of an improvement on an old machine, the patentee is entitled only to the profit of the improvement, even though he had exclusive control of the market when the infringement began. *Garretson v. Clark*, 3 Bann. & Ard. Pat. Cas. 352; s. c., 15 Blatchf. (U. S.) 70.

Evidence Must Not be Conjectural.—

Exception.—Where the invention, though an improvement, adapts the machine to a particular use, and there is no way open to the public to supply that use, the patentee is entitled to the entire profits.¹

(4) *Measure of Profits—Construction.*—Where the profit is derived from the *construction* of the thing patented, the infringer must account for the whole profit arising from the construction.²

(5) *Measure of Profits—Use.*—The profits of an infringer are the worth of the advantage he obtained by his illegal use of patentee's invention,³ where the gain is directly traceable to the use of the invention;⁴ they are the saving arising directly from

Where the patentee of an improvement fails to show that the use of his machinery, in connection with other machinery, produced a definite part of the whole profits, his recovery of profits must be nominal only. *Kirby v. Armstrong*, 10 Biss. (U. S.) 135; s. c., 19 Pat. Office Gaz. 661.

If the estimate of profits is a mere conjecture without any reliable basis, it cannot be the basis of a decree. *Locomotive Safety Truck Co. v. Penn. R. R. Co.*, 5 Bann. & Ard. Pat. Cas. 514.

1. Where Patentee Entitled to Entire Profits.—Although a patented invention is only an improvement, yet if the improvement is required to adapt the machine to a particular use, and there is no other way open to the public to supply the demand for that use, the patentee is entitled to the entire profits. *Goulds Mfg. Co. v. Cowing*, 105 U. S. 253.

Although the patent is for an improvement, yet if the improved article is a new and different species, a specific article having a peculiar value because of the patentee's discovery or invention, the account will be taken for the profits on the whole article, and not merely on the improvement. *Livingston v. Jones*, 3 Wall. Jr. (U. S.) 330; s. c., 2 Fish. Pat. Cas. 207.

2. If the profit is derived from the construction of the thing patented as an entirety, the infringer must account for whole profit, and not merely for the difference between the profit on that and on some other thing. *Elizabeth v. Pavement Co.*, 97 U. S. 126.

The defendants used the patentee's invention of a partial set of organ reeds placed in a certain position in the organ; a partial set placed in another position horizontally would have produced the same effect and not have infringed the

patent. *Held*, the profits to be recovered were the difference between what it cost the defendants to make and sell the partial set, and what it brought them, notwithstanding they might have employed the horizontal set. *Burdett v. Estey*, 5 Bann. & Ard. Pat. Cas. 308.

3. The profits of an infringer are not all he made in the business in which he used the invention, but they are the worth of the advantage he obtained by such use—or, in other words, the fruits of that advantage. *News v. Conover*, 11 Pat. Office Gaz. IIII.

The advantage the defendant obtained, or might by skill have obtained, by using the patented device over the use of the old device, and the value of this advantage in money. *Campbell v. Barclay*, 5 Biss. (U. S.) 179.

Exception.—The defendant's gain was directly traceable to the use of the invention. *Held*, the proper inquiry was not what saving he had made by using the patented device over using other devices, but what saving he had made directly by using the patented device. *Herring v. Gage*, 15 Blatchf. (U. S.) 124; s. c., 3 Bann. & Ard. Pat. Cas. 396.

Where the invention is used in connection with a machine, the profits on the whole are not to be apportioned according to the cost of each part respectively, or to be divided according to the cost of the machine and improvement respectively, but are to be computed according to the profit on the improvement when sold separately. *Graham v. Mason*, 23 Wall. (U. S.) 261.

4. Improvement.—Where the complainant's invention is an improvement upon an existing machine by which its productive capacity is increased, the measure of complainant's profits is to

the use of it;¹ in other cases the advantage obtained by using the infringed invention over other modes open to the public for accomplishing the same end.²

be ascertained from the consideration of the advantage which resulted to the defendant by his unauthorized use of the complainant's invention, and would be the amount produced over and above what would have been produced by the machines if the complainant's improvement had not been used. *Webster v. Carpet Co.*, 2 Bann. & Ard. Pat. Cas. 67. The difference in profit arising from the shape of a square dish over a round one would be the measure of profit. *Tomkinson v. Willets Mfg. Co.*, 34 Fed. Rep. 536.

1. Process—General Doctrine.—It is as true of a process invented as an improvement in a machine, that an infringer is not liable to the extent of his entire profits in the manufacture. The question is what advantage did the defendant derive from using the complainant's invention over what he had in using other processes then open to the public and adequate to enable him to obtain an equally beneficial result. *Mowry v. Whitney*, 14 Wall. (U. S.) 620.

Where the infringed patent is for an art, a fair measure of the infringer's actual profits is the saving in cost of production by the use of the appropriated invention over the cost of production by the use of cognate means, used and available. *Wetherill v. N. J. Zinc Co.*, 1 Bann. & Ard. Pat. Cas. 105.

2. Machine—With What Machines Should be Compared.—Profits are to be computed from the advantages derived by the infringer by the use of the invention over what he would have derived by the use of other machines then known and open to the public, and adequate to produce an equally beneficial result. The machine with which the comparison of the invention should be made with others in existence, or known, or open to public use at the time of the infringement complained of, not with machines subsequently invented, or for the first time constructed or known, or machines not open to public use. *Knox v. Great West. etc. Co.*, 14 Pat. Office Gaz. 862; s. c., 6 Sawy. (U. S.) 430; s. c., 4 Bann. & Ard. Pat. Cas. 25.

The patentee is entitled to the amount saved, as compared with the articles known to the defendant, al-

though defendant might have used better article. *Campbell v. James*, 5 Bann. & Ard. Pat. Cas. 630; s. c., 18 Blatchf. (U. S.) 92.

Considering the number of feet of rails mended by respondent in the use of machines covered by letters patent, of those which infringe them, the gain in mending, compared with the cost in mending on common anvil and the saving in fuel and labor. *Cawood Patent*, 94 U. S. 695.

The difference in selling value of a patent pavement over one in common use, made of same materials. *Shannon v. Bruner*, 33 Fed. Rep. 289, 871.

Decrease in Expenses as Profits.—The decrease of expenses by the infringer are proper subjects for consideration in determining the patentee's damages. *Ransom v. New York*, 1 Fish. Pat. Cas. 252; *Williams v. Rome etc. R. Co.*, 5 Bann. & Ard. Pat. Cas. 423; s. c., 18 Blatchf. (U. S.) 181.

Profits to be Given Although Loss on Business.—If defendant saved money by use of the patented machine as compared with other means of doing the same work, the complainant is entitled to the profit, although there was a loss in the particular business. *Ill. Cent. R. Co. v. Turrill*, 94 U. S. 695; *Tilghman v. Proctor*, 125 U. S. 136.

Defendants made no profit by using infringing machine, yet as the loss was less than it would have been with the infringed device omitted, this benefit is equivalent to an equal gain and is rightly estimated as a part of the profits for which the infringer is responsible. *News v. Conover*, 11 Pat. Office Gaz. III; *Knox v. Great West. etc. Co.*, 14 Pat. Office Gaz. 897; s. c., 4 Bann. & Ard. Pat. Cas. 45; s. c., 6 Sawy. (U. S.) 430.

Profits Must be Immediate.—The profits allowed are only those which result directly and immediately from the wrongful acts of the infringer. Profits which are remote and contingent are not recoverable. *Piper v. Brown*, 1 Holmes (U. S.) 20; s. c., 3 Pat. Office Gaz. 97.

Where an infringer of a patent has realized no profit from the use of an invention he cannot be called upon for profits. The patentee in such case is left to his remedy for damages. *Elizabeth v. Pavement Co.*, 97 U. S. 126.

(6) *Licence Fees as Measure of Profits.*—Licence fees, in the absence of other evidence, may be taken as measure of profits.¹

(7) *Time to be Included in Accounting.*—The account should extend over the time of infringement only,² down to the time of the hearing before the master.

(8) *Deductions to be Allowed Infringer.*—It is inconsistent with the principles of a court of equity to make no allowance to an infringer for the costs and expenses of conducting his business.³ These *disbursements* are therefore allowed in making up the account.⁴

Worth of Advantage Must be Shown.—

In order to recover the profits made by a defendant the proof must show not merely that he obtained an advantage from the use of the invention, but the worth of the advantage. *Blake v. Greenwood Cemetery*, 16 Fed. Rep. 676.

1. Licence fees are the criterion of damages at law, but in the absence of satisfactory evidence of profits they may be resorted to as a measure of profits in equity. *Burdell v. Denig*, 92 U. S. 716.

The difficulties of proving the exact money value of the advantage arising to defendant by use of complainant's device were exceptionally embarrassing. *Held*, a licence fee may be used as the measure of profits. *Emigh v. Balt. etc. R. Co.*, 4 Hughes (U. S.) 271; s. c., 19 Pat. Office Gaz. 935; s. c., 6 Fed. Rep. 283.

Interest.—When a licence fee is taken as measure of profits, interest is not allowed. *Emigh v. Balt. etc. R. Co.*, 4 Hughes (U. S.) 271.

2. The defendants held responsible for actual gains and profits during the time machine was in operation, and during no other period. *Livingston v. Woodworth*, 15 How. (U. S.) 546. An accounting for profits can only be had where the infringement began prior to the suit and continued afterward. *Marsh v. Nichols*, 128 U. S. 605.

Where the complainant's patent had been adjudged invalid by supreme court in a suit against another defendant, and had subsequently adjudged it valid, defendant must account for infringements committed after first and prior to second adjudication. *Tilghman v. Proctor*, 125 U. S. 136.

But defendant, who knew at the time he made and sold the infringing machines, that the plaintiff was the inventor, is not thereby rendered liable in damages for sales made before plaintiff had made application for a patent. *Lyon v. Donaldson*, 34 Fed. Rep. 789.

The practice is to take the account of profits down to the time of hearing before the master, if the infringement continues to that time. *Tatham v. Lowber*, 4 Blatchf. (U. S.) 86.

What Account Should and Should Not

Include.—The account should include the profit on all machines, whether bought before or after the commencement of the suit. *Knox v. Great West. etc. Co.*, 14 Pat. Office Gaz. 897; s. c., 6 Sawy. (U. S.) 430; s. c., 4 Bann. & Ard. Pat. Cas. 25.

Limitation of Time of Accounting by Act of Plaintiff.—

Where defendant has limited the period within which he claims infringements were made, the accounting must not include a later time. *Creamer v. Bowers*, 35 Fed. Rep. 206.

If the patentee did not introduce his patent into general use, and the defendant was not conscious of an infringement, no profits will be allowed before notice to defendant of plaintiff's claim, but they may be allowed afterwards. *Merriam v. Smith*, 11 Fed. Rep. 588.

The patentee is entitled to recover profits, although he exercised his invention not by using the thing patented, but by making and selling it. *Williams v. Rome etc. R. Co.*, 5 Bann. & Ard. Pat. Cas. 423; s. c., 18 Blatchf. (U. S.) 181.

3. *Tilghman v. Proctor*, 125 U. S. 136.

4. What Expenses May be Allowed

the Defendant.—Disbursements which enable the defendant to offer the thing patented to the public in a salable form, and to keep it on the market before the eye and within the reach of customers, and generally to properly conduct the business of selling and to keep a due account thereof, clerk hire or rent. *Hitchcock v. Tremaine*, 5 Fish. Pat. Cas. 537; s. c., 9 Blatchf. (U. S.) 550.

Property Used on Which to Carry on

(9) *Interest on Profits.*—Profits are to be regarded in the light of liquidated damages which usually do not draw interest without

Business.—Allowance for use of property owned by defendant, on which business was conducted. *Steam S. C. Co. v. Windsor Mfg. Co.*, 4 Bann. & Ard. Pat. Cas. (C. C.) 445; s. c., 17 Blatchf. (U. S.) 24.

Shop Room.—Use of shop room and tools, being a necessary ingredient in the manufacture of most articles. *Troy etc. Factory v. Corning*, 6 Blatchf. (U. S.) 328; s. c., 3 Fish. Pat. Cas. 497.

Materials Used.—Price of materials. *Rubber Co. v. Goodyear*, 9 Wall. (U. S.) 788.

Where defendant manufactures the material out of which patented thing is made, the quantity, if large, may be a ground for reducing the allowance for the price below ordinary market value. *Troy etc. Factory v. Corning*, 3 Fish. Pat. Cas. 497; s. c., 1 Blatchf. (U. S.) 467. Also bad debts. *Rubber Co. v. Goodyear*, 9 Wall. (U. S.) 788; *American etc. Co. v. Elizabeth*, 1 Bann. & Ard. Pat. Cas. 463; s. c., 6 Pat. Office Gaz. 772.

Interest.—*Rubber Co. v. Goodyear*, 9 Wall. (U. S.) 788. Interest paid on invested capital or to be paid on borrowed capital, but interest on the cost of a device only when it is shown to have been paid or incurred as debts. *Herring v. Gage*, 3 Bann. & Ard. Pat. Cas. 396; s. c., 15 Blatchf. (U. S.) 124.

Expenses of Manufacture and Sale.—*Rubber Co. v. Goodyear*, 9 Wall. (U. S.) 788; *Zane v. Peck*, 23 Pat. Office Gaz. 191.

Clerk Hire.—*Zane v. Peck*, 23 Pat. Office Gaz. 191; s. c., 13 Fed. Rep. 475; *Hitchcock v. Tremaine*, 5 Fish. Pat. Cas. (U. S.) 531; s. c., 9 Blatchf. (U. S.) 550.

Storage.—*Zane v. Peck*, 23 Pat. Office Gaz. 191; s. c., 13 Fed. Rep. 475.

Freight.—*Zane v. Peck*, 23 Pat. Office Gaz. 191; s. c., 13 Fed. Rep. 475.

Apportionment of Expenses.—If defendant sells other articles besides the patented invention, a ratable portion of his general expenses from the profits arising from the sale of the patented invention. *Tremaine v. Hitchcock*, 23 Wall. (U. S.) 518.

This apportionment must be according to the gross sales, and not according

to the profits received from each kind. *Hitchcock v. Tremaine*, 9 Blatchf. (U. S.) 550.

If the business as to patented articles is so intermingled and confused that approximate results only are possible, these may be ascertained by taking the proportion of the gross amount of sales of each kind to the profit on both. *Rubber Co. v. Goodyear*, 2 Fish. Pat. Cas. 499.

Wages and Salaries.—If defendant is a corporation and employs its stockholders in the manufacture of machines, the salaries paid them. *Steam S. C. Co. v. Windsor Mfg. Co.*, 17 Blatchf. (U. S.) 24; s. c., 4 Bann. & Ard. Pat. Cas. 445.

Licence Fees.—The licence fees which a party operating in good faith under another patent has agreed to pay therefor. *La Baw v. Hawkins*, 2 Bann. & Ard. Pat. Cas. 561; s. c., 6 Pat. Office Gaz. 724.

The royalty paid another patentee for the privilege of using his invention, which was novel and which made the infringing device an improvement on the plaintiffs. *American etc. Co. v. Elizabeth*, 1 Bann. & Ard. Pat. Cas. 463.

What Cannot be Deducted—Taxes and Insurance.—Taxes and insurance, even when property on which device is manufactured is owned by defendant. *Steam S. C. Co. v. Windsor Co.*, 17 Blatchf. (U. S.) 24; s. c., 4 Bann. & Ard. Pat. Cas. 445.

Profits Derivable from Defendant's Own Improvement.—*Hitchcock v. Tremaine*, 9 Blatchf. (U. S.) 550.

Where defendant paid a certain sum to complainant to prevent him from suing those who had purchased machines from him, but with the express understanding that such payment should not affect the right to recover damages from defendant, he is not entitled to deduction on that account. *Mason v. Graham*, 23 Wall. (U. S.) 261.

Losses.—Losses on some machines cannot be set off against profits on others. *Steam S. C. Co. v. Windsor Mfg. Co.*, 17 Blatchf. (U. S.) 24; s. c., 4 Bann. & Ard. Pat. Cas. 445; *Mason v. Graham*, 23 Wall. (U. S.) 261. Nor losses on whole machine against profits on a patented device forming a part. *Mason v. Graham*, 23 Wall. (U. S.) 261.

order of the court,¹ and this rule is not changed by the provisions of the Act of 1870, § 4921.²

3. Damages in Suits in Equity.—Under section 4921, damages of a compensatory character may also be allowed to a complainant suing in equity where the gains and profits are clearly not enough to compensate the complainant for the injury sustained by the infringement.³

Salaries—Salary Paid Defendant.—

Williams v. Leonard, 9 Blatchf. (U. S.) 476; *Piper v. Brown*, 1 Holmes (U. S.) 20; s. c., 3 Pat. Office Gaz. 97.

Compare American etc. Co. v. Elizabeth, 1 Bann. & Ard. Pat. Cas. 463.

Extraordinary salaries paid, the master being satisfied that they were dividends under another name. *Rubber Co. v. Goodyear*, 9 Wall. (U. S.) 788.

Interest.—Interest on cost of device and cost of power, unless it can be shown that the cost was paid or incurred. *Herring v. Gage*, 15 Blatchf. (U. S.) 124; s. c., 3 Bann. & Ard. Pat. Cas. 396.

1. *Silsby v. Foote*, 20 How. (U. S.) 378; *Tilghman v. Proctor*, 125 U. S. 136; *Parks v. Booth*, 102 U. S. 96; *Turrill v. Ill. Cent. R. Co.*, 110 U. S. 301.

"Defendants should not have been charged with interest before the final decree. The profits which are recoverable against an infringer of a patent are in fact a compensation for the injury the patentee has sustained from the invasion of his right. They are the measure of his damages. Though called profits, they are really damages, and unliquidated until the decree is made. Interest is not generally allowable upon unliquidated damages. We will not say in no possible case can interest be allowed. It is enough that the case in hand does not justify such an allowance. The defendant manufactured the wheels of which the complaint is made under a patent granted to him. His infringement of the patent was not wanton. He had before him the judgment of the patent office that his process was not an invasion of the patent granted to the complainant; and though this does not protect him against responsibility for damages, it ought to relieve him from liability for interest on the profits. *Mowry v. Whitney*, 14 Wall. (U. S.) 620.

Defendants Charged.—Defendant had knowledge, while making and selling the infringing machines, of the orator's claims, and had a patent on an improve-

ment, but not on the machine itself, covered by the plaintiff's patent. *Held*, interest should be allowed from the entering of the interlocutory decree. *Steam S. C. Co. v. Windsor Mfg. Co.*, 4 Bann. & Ard. Pat. Cas. 449; s. c., 18 Blatchf. (U. S.) 47.

Where a case was sent back from the supreme court to ascertain how much should be deducted from decree for errors in the accounting as then stated, it seems not at all inequitable to allow interest on the corrected reports from the date of the master's report. *Ill. Cent. R. Co. v. Turrill*, 110 U. S. 301.

Mowry v. Whitney, 14 Wall. (U. S.) 20; s. c., 1 Pat. Office Gaz. 492, hold that interest is not allowable on profits except under peculiar circumstances. . . "Circumstances, however, may arise which would justify the addition of interest in order to give a complete indemnity for losses sustained by wilful infringement." *Littlefield v. Perry*, 21 Wall. (U. S.) 205; *Holbrook v. Small*, 3 Bann. & Ard. Pat. Cas. 625; *Tilghman v. Proctor*, 125 U. S. 136.

Profits are to be regarded in the light of unliquidated damages, which usually do not draw interest without order of the court. *Silsby v. Foote*, 20 How. (U. S.) 378; *Parks v. Booth*, 102 U. S. 96; *Tilghman v. Proctor*, 125 U. S. 136. *Ill. Cent. R. Co. v. Turrill*, 110 U. S. 301.

The defendants took the patented combination and used it with a patented addition. *Held*, profits should bear interest only from final decree. *American etc. Co. v. Elizabeth*, 1 Bann. & Ard. Pat. Cas. 439. Plaintiff, claiming to be assignee, sued patentee as infringer. *Held*, profits should not bear interest. *Littlefield v. Perry*, 21 Wall. (U. S.) 205; *Webster v. Carpet Co.*, 2 Bann. & Ard. Pat. Cas. 67; *Brady v. Atlantic Works*, 3 Bann. & Ard. Pat. Cas. 577.

2. The provisions introduced into the patent act of 1870, regulating the subject of profits and damages, did not affect the former rule concerning interest. *Tilghman v. Proctor*, 125 U. S. 136.

3. *Birdsall v. Coolidge*, 93 U. S. 64.

INGRESS.—See note 1.

INHABITANT—(See CITIZENSHIP; DIVORCE; DOMICILE; RESIDENT).—This is a word of great variation of meaning. The necessary element in its signification is "locality of existence." The permanency of the residence indicated, however, depends in a great degree upon the context. The word has been variously construed to mean an occupier of lands, a resident, a permanent resident, one having a domicile, a citizen, a qualified voter. The construction is generally governed by the connection in which the word is used.²

Gains and profits are still the proper measure of damages in equity suits, except in cases where the injury sustained by the plaintiff is plainly greater than the aggregate of what was made by the respondent. *Birdsall v. Coolidge*, 93 U. S. 64; *Wooster v. Taylor*, 14 Blatchf. (U. S.) 403; s. c., 3 Bann. & Ard. Pat. Cas. 241.

Where Articles Were Sold Below Their True Value.—Damages may be given where patented improvements were sold greatly below their just and market value in order to compel the owner of the patent, his assignees and licences, to abandon the manufacture of the patented article. *Birdsall v. Coolidge*, 93 U. S. 64.

Damages of a compensatory character may be allowed to a complainant in an equity suit when it appears that the business of the infringer was so improvidently conducted that it did not yield any substantial profits. *Marsh v. Seymour*, 97 U. S. 346; *Birdsall v. Coolidge*, 93 U. S. 64.

Object of This Provision.—The sole object of this provision was to enable the patentee to recover, by bringing suit in equity, not only the profits made by the defendant by means of such infringement, but also damages sustained by the patentee thereby. *Bancroft v. Atton*, 7 Blatchf. (U. S.) 505.

If no profits be made, the patentee may be allowed his usual royalty as damages. *Goodyear D. V. Co. v. Van Antwerp*, 2 Bann. & Ard. Pat. Cas. 252.

Authorities on Infringement of Patent Rights.—The chapters on Infringement, Damages and Profits, in Walker on Patents, are properly the best authority. Curtis on Patents is an authority formerly much, and still occasionally, quoted by the bench. Of the digests which cover the whole subject of patents, the latest is Simond's "Digest of Patent Cases," which is brought down

to Jan. 1st, 1888; the others are that compiled by Mr. Baldwin, of Washington, for Myer's Fed. Decisions, which is brought down to Jan. 1st, 1885, and "Preble's Pat. Cas. Index," which is brought down to May 1st, 1884. None of these are exhaustive; that of Bump (Patents, Trade Marks and Copy Rights, 2nd ed.) includes decisions to Oct. 1st, 1883, and is thoroughly exhaustive. The "United States Digest," "the American Digest," the "Complete Digest," and the "Annual Digest" are useful to bring information up to date, and the cases decided after the digest will all be found either in the U. S. Reports, the Fed. Rep., or the Pat. Office Gaz.

1. A deed from a railway company giving the grantee a right of free "ingress, egress and regress" to and from certain private roads which bounded the close and led to a station and to the highway, entitles the grantee to pass from the close to the private roads and thence to the public highways, or in the reverse direction. "Now what is the meaning of 'ingress to and from the road,' that is to say, the private road? I read it to mean the right of going from the close onto the road, or the right of going from the road onto the close. . . . What is the meaning of 'egress from the road'? It is plainly going out from the road—going forth from the road. Going forth whither? It is not suggested that it must be confined to going to the close. It is said, I really hardly understand why, that the grantee may go to the station, but, according to my view, egress from the road may be to any point to which the person going may lawfully go." *FRY, J. Somerset v. G. W. Ry. Co.*, 46 L. T., N. S. 883.

2. **In Attachment Laws.**—"The word 'inhabitant' has a plain meaning. A person coming hither occasionally, as a captain of a ship in the course of trade, cannot be called an inhabitant; nor does

a person going from his settled habitation here, on occasional business to Boston or any other place, cease to be an inhabitant. But a man who comes from another place to reside among us, introduces his family here, takes a house, engages in trade, contracts debts, and after some time runs away with design to defraud his creditors, ought surely to be considered such an inhabitant as not to be an object of the foreign attachment, but of a domestic one, and as a person whose effects should be seized for the benefit of all his creditors." *Barnet's Case*, 1 Dal. (Pa.) 152. "While a man remained in the state, though avowing an intention to withdraw from it, he must be considered an inhabitant." "The having once been an inhabitant will not, however, protect a man from a foreign attachment, where he has notoriously emigrated from the state and settled elsewhere." *Lyle v. Foreman*, 1 Dal. (Pa.) 480.

An unmarried man who took lodgings in a place, rented a store and declared his intention of taking up a permanent residence there, and after six months absconded, is an inhabitant within a domestic attachment law. *Kennedy v. Baillie*, 3 Yeates (Pa.) 55. But one who sails as a supercargo, taking with him the bulk of his property, making a partial assignment of the rest for the benefit of his creditors, and leaving his wife and child behind, who is absent nine months and is silent as to his return, is not an inhabitant within a foreign attachment act. The court, in this case, refused to lay down a general rule to govern this class of cases. *Nailor v. French*, 4 Yeates (Pa.) 241.

Attainder.—A man born in Pennsylvania, who on December 26th, 1776, departed and joined the enemy, and was subsequently brought back into the state as a prisoner of war, was upon his return an inhabitant, but not a subject of the state within the meaning of an act of attainder. *Republica v. Chapman*, 1 Dal. (Pa.) 53.

In Criminal Statutes.—Persons residing in houses abutting on a street are inhabitants of the street, within an act making it penal to disturb the same by loud, indecent and profane language. *Keller v. State* (Tex.), 8 S. W. Rep. 275.

An act providing that an entry into a house for the purpose of committing theft is not burglary when made by a domestic servant or other inhabitant of such house, does not cover the

case of a boarder in a boarding house entering the room of another boarder. The act applies only to those who have a recognized right of entry, which one guest has not into the room of another. *Ullman v. State*, 1 Tex. App. 221.

In Laws Prescribing Qualifications of Electors and of Office.—Here the word "inhabitant" is generally construed to be equivalent to "citizen." "The words 'inhabitant,' 'citizen,' and 'resident,' as employed in different constitutions to define the qualifications of electors, mean substantially the same thing; and one is an inhabitant, resident or citizen at the place where he has his domicile or home." *Cooley, Const. Lims.* (5th ed.) 754; *Thorndike v. Boston*, 1 Metc. (Mass.) 242.

"The words 'inhabitants' and 'residents' may comprehend aliens; or they may be restrained to such inhabitants or residents who are citizens, according to the subject matter to which they are applied. The latter construction comports with the general design of the constitution." *Opinion of the Justices*, 7 Mass. 523.

Under an act providing that no school district shall be abolished without the consent of a majority of the "taxable inhabitants"; aliens cannot vote, but only those qualified to vote for officers. "The words 'taxable inhabitants,' it is clear, cannot have their full, unrestrained meaning, so as to include every resident liable to be taxed, or they must be held to include not only females but infants of the most tender age. Some restriction must therefore be put upon them. What it shall be must depend upon the connection in which they are used and the constitution and statutes relating to the same subject." *State v. Deshler*, 1 Dutch. (N. J.) 177.

"Inhabitants" includes qualified voters of a town, and is frequently used to mean such. *Baldwin v. Town of N. Branford*, 32 Conn. 47. "Our constitution and statutes, with great uniformity, use the word citizen to designate one who is a citizen of the state and of the United States, and the term *inhabitant* to designate the domiciled residence of a town, and such is the general acceptance of the terms." *Bull v. Town of Warren*, 36 Conn. 85. Where an act of congress vested the title to certain lands in the inhabitants of a township, and a subsequent act authorized their sale with the consent of the inhabitants, which was to

be ascertained by a vote of the qualified electors, a sale under the latter act is binding on the inhabitants. *Long v. Brown*, 4 Ala. 622.

In *Massachusetts*, it is provided by law that every person shall be considered an inhabitant for the purpose of electing and being elected into any office, in the town, district or plantation where he dwells or has his home. This makes the question one of domicile. Opinion of the Justices, 5 Metc. (Mass.) 588.

In an act authorizing municipal corporations to subscribe to railway stock, upon approval by the inhabitants of the city, "inhabitants" means "legal voters." "In its broadest sense this would include all sexes, ages and conditions. To require the approval by a vote of the 'inhabitants' in this sense would be an absurdity. The act itself is its own interpreter, and shows that this is not its meaning. . . . The act, though carelessly drawn, clearly meant to restrict the election to the voters, and the approval of the inhabitants was to be indicated by the vote of a majority of the legal voters." *Walnut v. Wade*, 103 U. S. 683.

A much less restricted meaning was put upon the word in *Spragins v. Houghton*, 2 Scam. (Ill.) 577, where it was decided that under a constitutional provision that every white male inhabitant of the age of twenty-one years, who has resided in the state six months immediately preceding any general election, is entitled to vote at such election. An unnaturalized Irishman is qualified to vote. "The term 'inhabitant' is derived from the Latin *habito*, and signifies to live in, to dwell in; and is applied exclusively to one who lives in a place and has a fixed and legal settlement. It embraces locality of existence. It refers to the place of a person's actual residence, and excludes the idea of an occasional or temporary residence; and as used in the section referred to, the place where the elector dwells at the time of his voting.

"The term is conceived to be entirely free from technicality, and has a known and universally accepted meaning, all agreeing in considering inhabitant as directly connected with habitation and abode. It is supposed that a term of no technicality, so simple and expressive in itself, and so clear and definite in its character, is susceptible of but one meaning. This residence is, however, to be *bona fide*, and not casual or temporary. To determine, then, the qualifications of

an elector in this state, it would seem to be wholly unnecessary to enquire whether the elector was a citizen of the United States. . . . To show, however, that the position assumed which asserts the terms 'inhabitant' and 'citizen' to be synonymous and correlative is not maintainable, even in a political sense the following extract is transcribed from the report of the committee of elections, in the congress of the United States, in the case of John Bailey, which transpired in 1824. The report was approved by congress and Mr. Bailey ejected from his seat by a large majority of the house, without distinction of party. On enquiring into the meaning of the word 'inhabitant' in the constitution of the United States, in reference to the qualification of a representative in the congress of the United States, the committee remark: 'Having examined the case in connection with the probable reasons which influenced the minds of the members of the convention, and led to the use of the word "inhabitant" in the constitution, in relation to senators and representatives in congress, it may not be improper, before an attempt is made at a further definition of the word, a little to consider that of citizen, with the view of showing that meaning of the misconceptions in respect to the former have arisen from confounding it with the latter. The word "inhabitant" comprehends a single fact, locality of existence, that of citizen, a combination of civil privileges, some of which may be enjoyed in any state of the Union. The word "citizen" may properly be construed a member of a political society; and although he might be absent for years and cease to be an inhabitant of its territory, the right of citizenship may not thereby be forfeited, but may be resumed whenever he may choose to return.'

"From what has already been said, it must appear that the words 'citizen' and 'inhabitant' cannot be considered synonymous.

"In the third section of the second article of the state constitution, the words 'individual' and 'citizen' are used in juxtaposition. The representative is to be not only a citizen of the United States, but an inhabitant also of the state.

"Another authority may be found in Vattel, supporting very clearly this distinction. In bk. 1, ch. 19, § 213, he says: 'The inhabitants, as distinguished from citizens, are strangers who are

permitted to settle and stay in the country. Bound by their residence to the society, they are subject to the laws of the state, while they reside there, and they are bound to defend it while it grants them protection, though they do not participate in all the rights of citizens."

"This author shows very plainly the distinction between the citizen and the inhabitant; and that the latter application is derived from abode and habitation, and not from political privileges." And see Opinion of Justices, 122 Mass. 594; The Federalist No. 42.

Militiamen absent on duty are inhabitants of the place where they have dwelling houses and their families reside, within the meaning of a local election act. *Rex v. Mitchell*, 10 East 511.

A curate absent on licence, and whose cure is filled by another who occupies the glebe house, does not occupy the latter as an inhabitant so as to be qualified to vote as such. *Durant v. Carter*, L. R., 9 C. P. 261.

In an act requiring the appointment of substantial inhabitants to collect the rate on real estate, this word means residents. "The word inhabitant may mean either occupier or resident. The latter is the proper sense when it is used to denote persons on whom a personal and not a pecuniary charge is to be imposed. *Rex v. Adlard*, 4 B. & C. 772. Here a personal service is imposed." *Donne v. Martyr*, 8 B. & C. 62.

Insolvent Laws.—A plea of discharge under an insolvent act, which states that the defendant was a resident of the county in which the application was made is a sufficient averment that he was an inhabitant. "The words signify the same thing; a person resident is defined to be one 'dwelling or having his place of abode in any place,' an inhabitant, 'one that resides in a place.'" *Rosevelt v. Kellogg*, 20 Johns. (N. Y.) 208.

A foreigner who resided and transacted business in New York for seven years, and then left without intention of returning, taking his property with him, and at the end of a few weeks returns merely for a temporary purpose, is not an inhabitant within the meaning of an insolvent act. "An *inhabitant* is defined by Jacobs to be a dweller or householder. The word *inhabitants* includes tenants in fee simple, for life, for years, at will, and he who has no interest, but only his habitation and dwelling. (Jacobs' Law Dict.) *Inhabitants*, says Vattel, p. 162, as distinguished from

citizens, are strangers who are permitted to settle and stay in the country; bound by their residence to the society, they are subject to the laws of the state while they reside there. Webster, in his dictionary, defines an *inhabitant* to be a dweller, one who dwells or resides permanently in a place, or who had a fixed residence as distinguished from an occasional lodger or visitor." *In re Wrigley*, 4 Wend. (N. Y.) 602, affirmed in s. c., 8 Wend. (N. Y.) 134, where CHANCELLOR WALWORTH says: "Inhabitaney and residence do not mean precisely the same thing as domicile, when the latter term is applied to successions to personal estate, but they mean a fixed and permanent abode or dwelling place for the time being, as contradistinguished from a mere temporary locality of existence."

It unquestionably means *in coloe* or sojourners, as distinguished from *advenae*, transient persons or strangers. Although the plaintiff in error was an inhabitant of New York while he was actually located there and doing business as a commercial merchant, yet the moment he broke up his residence and sailed for his native land, *sine animo revertendi*, he was no longer an inhabitant of New York, but he resumed his domicile of origin."

In Municipal Charter.—"All the inhabitants" living within certain limits, in an act of incorporation intends "those who were inhabitants of the several towns from which the new town was taken, who were of full age and *sui juris*." The expression does not include an infant whose father has a settlement elsewhere, but whose mother, who is also his guardian, is divorced from his father, and is settled in the town. *Marlborough v. Hebron*, 2 Conn. 22.

In Poor Law.—One who came into a parish with one load, intending to return with another, did not come to inhabit. *Rex v. Inhabs. of St. James*, 10 East 25.

In an act authorizing guardians of the poor to apprentice poor children to any inhabitant or occupier of lands in the parish, *inhabitant* and *occupier* are synonymous. The idea of residence is not necessarily included. *Rex v. Guardians of Poor of Tunstead*, 3 T. R. 523.

In Acts Providing for the Place of Probate of Wills.—The term is not construed as having reference to domicile here. "A habitation is a place of abode, a place to dwell in; and an inhabitant of a place is one who has an actual resi-

dence there. But a person's domicile is a place where he may reside in fact, or for many purposes may be deemed to reside. . . . A man's domicile, as the word implies, is his house, his home; and it may continue such for years, without being actually inhabited by him. But an inhabitant of a place is one who ordinarily is personally present there, not merely *in itinere*, but as a resident and dweller therein. . . . A person who, in contemplation of law, has a domicile, may, nevertheless, as a matter of fact, be a mere wanderer, and not an inhabitant of any place." Holmes v. Cal. Ry. Co., 5 Fed. Rep. 523; s. c., 9 Fed. Rep. 229.

One who having lived at B., his birthplace, many years, and subsequently at W., having broken up his establishment at B., purchased a house at B., where he spent his winters, and died there, is an inhabitant of W. Whether he might also be considered an inhabitant of B. was not decided. "We think it pretty obvious that the words *inhabitant* and *resident* were used in the statute *diverso intuito*, and not synonymously, not merely because they are used disjunctively, but because they are words of different capacities and meaning. . . . Many aliens reside for years within the commonwealth without becoming inhabitants of any town or county, for the term inhabitant imports many privileges and duties which aliens cannot enjoy or be subject to, and yet such persons often make wills which are proved and allowed here, and lawfully, because they are residents in some particular county. It may well be supposed that the legislature intended to embrace such cases in the statute, and that they had respect in providing for the probate of wills to two classes of persons—citizens, who are necessarily inhabitants of some town or county, and strangers who can be residents only in some town or county." Howard College v. Gore, 5 Pick. (Mass.) 570.

Under an act regulating the probate of wills, one is an inhabitant of place of domicile. Isham v. Gibbons, 1 Bradf. Sur. (N. Y.) 70.

In the Law of Procedure.—The judiciary act of 1789 provides that "no civil action shall be brought before either of said courts against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." In construing

this act, STORY, J., said: "I lay no particular stress upon the word 'inhabitant,' and deem it a mere equivalent description of 'citizen' and 'alien' in the general clause conferring jurisdiction over parties. A person might be an inhabitant without being a citizen; and a citizen might not be an inhabitant, though he retained his citizenship. Alienage or citizenship is one thing, and inhabitancy, by which I understand local residence *animo manendi*, quite another. I read, then, this clause, thus: 'No civil suit shall be brought before either of said courts against an alien or a citizen by any original process, in any other district than that whereof he is an inhabitant or in which he shall be found at the time of serving the writ.'" Picquet v. Swan, 5 Mason (U. S.) 35; Toland v. Sprague, 12 Pet. (U. S.) 328.

In a statute providing that "in actions on joint contracts, if all the defendants are not inhabitants of this state, service upon such as are inhabitants shall be sufficient notice to maintain the suit against all the defendants;" an inhabitant is any one in the state, whether for a long or a short period, without reference to permanency of residence. Bishop v. Vose, 27 Conn. 1.

Objection being taken to process of outlawry, because it described the defendant as an inhabitant of W., whereas he worked there but resided elsewhere, the court said: "It is necessary to state the township; but if the defendant is shown to have been there, then it is enough to satisfy the designation. The first day a man comes into a place he is a stranger; the second day he is considered as a guest, and the third day he becomes an inhabitant. But if anyone comes from New Jersey and stays only an hour in Pennsylvania, during which he commits an offence, he must be charged as of the township in which he was at the time, for he cannot be called in New Jersey." Respublica v. Steele, 2 Dal. (Pa.) 92.

In School Law.—A minor child of a pauper supported at a poor farm, is an inhabitant of a school district within an act prescribing who may attend public schools.

"It is not the ordinary law of domicile, as affected by the *animus manendi* or the *animus revestendi*, which is to govern this case.

"Who then is an inhabitant of a school district, in the legal sense?

"He need not be a *resident* of the district. The word inhabitant is derived from the Latin verb *habito*, which

is defined 'to dwell, to abide, to inhabit or live in.' *Reside* is from *re* and *side*, 'to sit down,' and dwell, from the Danish *dwelger*, 'to abide.'

"All these terms are usually classed as synonyms, but not in strictness properly so; for the word inhabit does not convey the idea of permanent residence. To dwell or to abide does not indicate permanency of location or time. . . . *Inhabit* conveys the idea of a home, but not necessarily of a full and fixed settlement, such as is conveyed by the term residence; for Dr. Johnson tells us that 'being obliged to remove my *habitation*, I was led by my evil genius to a convenient house in the street where the nobility *reside*'—precisely the condition it would seem of these unfortunate children of the public." School Dist. v. Pollard, 55 N. H. 503. But a person temporarily and fraudulently located in a district for the sole purpose of acquiring an education is not an inhabitant. School Dist. v. Bragdon, 53 N. H. 507.

In Tax Laws.—Under statute 22, H. 8, ch. 5, providing that bridges and roads should be repaired by the inhabitants of the city, town, etc., the term was construed to mean those who held lands and to include corporations. 2 Inst. 702; Rex v. Hall, 1 B. & C. 136; Bank v. Deveaux, 5 Cranch (U. S.) 88. The same construction was put upon 43 Eliz., ch. 2, in Rex v. Gardner, 1 Cowp. 79.

In this country corporations have been considered inhabitants of the place where their property or principal office is situated, for purposes of taxation. A mutual insurance company has been held to be such. Tripp v. Merchants' M. F. Ins. Co., 12 R. I. 435. A bank. Ontario Bank v. Bunnell, 10 Wend. (N. Y.) 186. A church charity, local in its nature. Trustees of Greene Foundation v. Boston, 12 Cush. (Mass.) 54; Inhab. of Baldwin v. Trustees of Ministerial Fund, 37 Me. 369. But in Hartford F. I. Co. v. Hartford, 3 Conn. 15, it was said: "This word has a technical sense which has no bearing on this enquiry. The popular sense of the term is the same as *resident*, or one who *lives* in a place. An inhabitant necessarily implies an *inhabitation*, an abode, a place of dwelling. It requires no reflection to determine that in this sense a corporation resides nowhere. It is an artificial person, a creature of the imagination, subsisting only in intendment and consideration of law. Undoubtedly in a *figurative* sense it may be said to

inhabit where the members of it reside, and in a *legal* sense it may be denominated an occupier of land which is in possession of its bailiff, when usage has sanctioned this application of the term. In the latter import of the expression persons corporate in England have been deemed inhabitants of a city, a town, a shire. 2 Inst. 700. . . . Even this construction has been a subject of discussion and doubt, during the administration of Lord Mansfield, and the ratifiability of corporations was put by him on the footing of *usage*. Except in the instances of land occupied by the servants of corporations, I have not been able to find residence ascribed to them, and there by an easy figure, with the aid of usage, they have been denominated inhabitants.

"We have before us a corporation which has no local limits, the members and officers of which are scattered abroad and may reside anywhere, and which has no land which it occupies by its servants or bailiffs. In Hartford this corporation has an office for the transaction of business, and this is the only circumstance on which it is contended to be an inhabitant. . . . Now I am at a loss to conceive by what analogy or figure of speech, in the absence of all usage, an invisible, incorporeal entity may be said to reside in a place on the slight ground contended for. I am clear that the Hartford Fire Insurance Company is not the inhabitant of any town." This reasoning was followed in Bank v. City Council, 3 Rich. (S. Car.) 348, where it was said: "Is a bank an *inhabitant* of Charleston? Surely not! It is a body in law, but not in fact; it exists altogether in paper—its charter—and cannot be an inhabitant living and dwelling in the city."

A banking corporation is not an inhabitant of a county for the purpose of taxation of its capital stock, though it may be for some purposes. Cherokee Ins. & Bkg. Co. v. Justices of Whitfield Co., 28 Ga. 121.

In the early English rate acts, inhabitant was interpreted to mean occupier, land holder. 2 Inst. 702; Rex v. Hall, B. & C. 136; Rex v. Gardner, 1 Cowp. 79; Rex v. Guardians of Poor of Tunstead, 3 T. R. 523; but see Rex v. Liverpool, 8 East 456 n.; or resident, Rex v. Nicholson, 12 East 330; Rex v. Bishop of Rochester, 12 East 353.

"The term 'inhabitant,' as used in the act and in the popular acceptance of the phrase means something more than a

INHALE.—See note 1.

person having a mere temporary residence. It imports citizenship and municipal relations; and if the term were less unequivocal than it is, it could never be presumed, in the absence of the most explicit enactment, that the legislature designed to impose a poll tax upon the citizens of another State." Inhabitancy and residence are synonymous with domicile, and a citizen of Georgia having a house and establishment in New Jersey, where he spent five or six months of the year, is not an inhabitant within a poll tax act. *State v. Ross*, 3 Zab. (N. J.) 517. But under an act for the taxation of personal property, one is an inhabitant of a town which is in the State of which he is a citizen and in which he has a summer residence, if he is dwelling there at the time of assessment. *Bell v. Pierce*, 48 Barb. (N. Y.) 51.

In *Massachusetts*, the question is treated as one of domicile. By a departure from the State, going to Europe, leasing his house at home and hiring another in Paris where he remained sixteen months, one does not cease to be an inhabitant for the purpose of taxation of his personalty. "If the departure from one's fixed and settled abode is for a purpose in its nature temporary, whether it be business or pleasure, accompanied with an intent of returning and resuming the former place of abode as soon as such purpose is accomplished; in general such a person continues to be an inhabitant at such place of abode, for all purposes of enjoying civil and political privileges, and of being subject to civil duties." *Sears v. Boston*, 1 Metc. (Mass.) 250. But if the removal is permanent the inhabitancy terminates. *Thayer v. Boston*, 124 Mass. 132.

"Inhabitant" does not include non-resident property owners under an act exempting the inhabitants of a city "from working upon any road beyond the limits of the city, and from paying any tax to procure laborers to work upon the same." *Fletcher v. Oliver*, 25 Ark. 289.

In a Will.—A legacy to the poor inhabitants of the parish was held good, but confined to those poor who did not receive alms. "The word *inhabitants* bears a very general use, and may extend to everybody living in the parish." *Atty. Gen. v. Clarke*, Amb. 422.

In General.—"No word is capable of

a larger or more limited interpretation." Lord Eldon in *Atty. Gen. v. Foster*, 10 Ves. 339.

"It is clear that it is a word of such uncertain legal meaning that the party relying upon it ought to have a construction of his own to put upon it and should be prepared to sustain that construction, and to show that according to it he has a rightful claim. That has not been done here, and therefore the question is not properly before us. It is contended that the word 'inhabitants' has, of itself, a definite legal meaning; but the authorities cited do not show this" *DENMAN, C. J.*, in *Rex v. Mashiter*, 6 A. & E. 153.

The word implies a more fixed and permanent abode than *resident* and frequently imports many privileges and duties which a mere resident could not claim or be subject to. *Board of Supervisors v. Davenport*, 40 Ill. 206.

An inhabitant is "one who has his domicile or fixed residence, in opposition to one who is a mere sojourner or temporary resident in a place. *State v. Primrose*, 3 Ala. 546. Legal residence or inhabitancy is the same as domicile. *Crawford v. Wilson*, 4 Barb. (N. Y.) 422.

"The popular meaning of the term *inhabitant* is a resident or dweller in a place, in opposition to a mere sojourner or transient person." *Long v. Brown*, 4 Ala. 622.

"It is difficult to give an exact definition of habitancy. In general terms one may be designated as an inhabitant of that place which constitutes the principal seat of his residence, of his business, pursuits, connections, attachments, and of his political and municipal relations. It is manifest, therefore, that it embraces the fact of residence at a place, with the intent to regard it and make it his home. The act and intent must concur, and the intent may be inferred from declarations and conduct. It is often a question of great difficulty, depending on minute and complicated circumstances, leaving the question in so much doubt that a slight circumstance may turn the balance. . . . But it is a question of fact for the jury, to be determined from all the circumstances of the case." *Lyman v. Fiske*, 17 Pick. (Mass.) 231; s. c., 28 Am. Dec. 293.

1. An exception in insurance policy that the "insurance shall not extend to any bodily injury . . . by the tak-

INHERITANCE—INHALE—INJUNCTIONS.

INHERITANCE.¹—An estate which descends, or may descend, to the heir upon the death of the ancestor;² also, the fact of receiving an estate as heir.

INITIALS.—See ABBREVIATIONS; ELECTIONS; NAME.

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ing of poison, contact with poisonous substances, or inhaling of gas, or by any surgical operation or medical treatment" does not cover a case of death caused by breathing illuminating gas, which in some way escaped in the room of the insured while he slept. "Inhaling of gas" is here used to designate its use in dentistry, surgery, etc. "It contemplated a voluntary and intelligent act by the assured, not an involuntary and unconscious act." *Paul v. Travelers' Ins. Co.*, 45 Hun (N. Y.) 513; s. c., 10 N. Y. St. Rep. 306.

1. From Anderson's Law Dict.

2. Estates of freehold are estates of

inheritance, absolute or limited; and estates not of inheritance, or for life only. 2 Bl. Com. 104, 120.

In its popular acceptation, "inheritance" includes all the methods by which a child or relative takes property from another at his death, except by devise, and includes as well succession as descent. As applied to personalty, signifies succession. *Horner v. Webster*, 33 N. J. L. 413.

An estate acquired by inheritance is one that has descended to the heir, and been cast upon him by the single operation of law. *Estate of Donahue*, 36 Cal. 332.

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1. Definition.—An injunction is an order or judgment of a court or judge commanding the defendant to do or refrain from doing a particular thing.¹

1. Story defines an injunction as "a judicial process whereby a party is required to do a particular thing or to refrain from doing a particular thing according to the exigency of the writ." 2 Story's Eq. Juris., § 861.

Mr. Jeremy's definition is: "A writ framed according to the circumstances of the case, commanding an act which the court regards as essential to justice or restraining an act which it esteems contrary to equity and good conscience." Jeremy Eq. Juris., ch. 2, § 1.

Origin of the Writ.—The remedy by injunction seems to have been derived from the interdicts of the civil law, the

granting of which belonged wholly to the equitable jurisdiction of the magistrate. Sanders Justinian, p. 58, §§ 570, 580. Interdicts were divided into three principal classes, viz: prohibitory, restitutory and exhibitory, the first class being issued to restrain the commission or continuance of a particular act, the second to compel restitution or "putting things back into the state they were before," and the third as the preliminary of vindication, as to require one having a freeman in his custody to produce him. Sanders Justinian, pp. 570, 573.

Grounds for.—The case must be one

The process of injunction should be applied with the utmost caution. The interference rests on the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right which, on just and equivalent

of strong and imperious necessity or the right must have been previously established at law. *Parker v. Winnipeseogee etc. Co.*, 2 Black (U. S.) 545; *Olmsted v. Loomis*, 6 Barb. (N. Y.) 160; *Fisk v. Wilber*, 7 Barb. (N. Y.) 400; *Gardner v. Newburgh*, 2 Johns. Ch. (N. Y.) 164; *Ogden v. Kip*, 6 Johns. Ch. (N. Y.) 160; *Jerome v. Ross*, 7 Johns. Ch. (N. Y.) 315; s. c., 11 Am. Dec. 485; *Coe v. Lake Co.*, 37 N. H. 254. *Burston v. Augusta*, 17 Me. 202. *Goodrich v. Moore*, 2 Minn. 61; s. c., 72 Am. Dec. 74; *Hart v. Marshall*, 4 Minn. 296; *Montgomery v. McEwen*, 9 Minn. 108.

Bad faith on the part of a party applying for an injunction is good ground for refusing the same or for dissolving it after it has been obtained. *Haight v. Lucia*, 36 Wis. 355, 362.

Davis v. Morgain, 2 Barn. & C. 8.

In *Glascott v. Lang*, 3 Myl. & Cr., 455, LORD COTTENHAM says: "In looking through the pleadings and evidence for the purpose of an injunction, it is not necessary that the court should find a case which would entitle the plaintiff to relief at all events. It is quite sufficient if the court finds, upon the pleadings and upon the evidence, a case which makes the transaction a proper subject of investigation in a court of equity."

In the *Great Western R. Co. v. Birmingham etc. R. Co.*, 2 Ph. 602, the same learned Judge says: "It is certain that the court will, in many cases, interfere and preserve property *in statu quo* during the pendency of a suit in which the rights to it are to be decided, and *that* without expressing, and often without means of forming, any opinion as to such rights, . . . seeing that there is a substantial question to be decided, it will preserve the property until such question can be regularly disposed of. In order to support an injunction for such purpose, it is not necessary for the court to decide upon the merits in favor of plaintiff."

In *Shrewsbury v. Shrewsbury & B. R. Co.*, 1 Sim., N. S. 410-426, the VICE CHANCELLOR says: "That there are two points on which the court must satisfy itself: First, it must satisfy itself, not that

the plaintiff has certainly a right, but that he has a fair question to raise as to the existence of such a right. The other is whether *interim* interference on a balance of convenience or inconvenience to the one party and to the other is or is not expedient."

Discretion of the Court.—The application is addressed to the sound conscience of the court acting upon all the circumstances belonging to each particular case. *Reddall v. Bryan*, 14 Md. 444; s. c., 74 Am. Dec. 550; *Allen v. Hawley*, 6 Fla. 142; *Sullivan v. Moreno*, 19 Fla. 222. *Robert v. Anderson*, 2 John. Ch. (N. Y.) 202; *Middletown v. Roundout etc. R. Co.*, 43 How. (N. Y.) 488. See 2 Story's Eq. Jur., § 863; 1 Madd. Ch. Pr. 125.

Maddocks in his work says: "All injunctions are discretionary and are granted upon the circumstances of the case." *Potter v. Chapman*, Amb. 99; *Roberts v. Anderson*, 2 Johns. Ch. (N. Y.) 202; *Hanson v. Gardiner*, 7 Ves. Jr. 366.

In *Roberts v. Anderson*, 2 Johns. Ch. (N. Y.) 202; *Middletown v. Roundout etc. R. Co.*, 43 How. Pr. (N. Y.) 488. See 2 Story's Eq., CHANCELLOR KENT says: "The granting and continuing of the process [injunction] must always rest in sound discretion, to be governed by the nature of the case." In *Potter v. Chapman*, Amb. 99, CHANCELLOR HARDWICKE says: "There cannot be a stronger instance that such injunctions are not of course than the case of waste. After answer comes in and affidavits read, the court will, according to their discretion, continue the injunction till hearing or not, and yet the plaintiff may go on with the cause and finally have a decree to stay waste." *Sheldon v. Rockwell*, 9 Wis. 167; *Pettibone v. La Crosse etc. R. Co.*, 14 Wis. 443; *Cobb v. Smith*, 16 Wis. 661; *Atty. Gen. v. Railroad Cas.*, 35 Wis. 425; *Tucker v. Carpenter*, Hempst. 440; *Hine v. Stephens*, 33 Conn. 497; *State v. Judge*, 16 La. 233; *Reddall v. Bryan*, 14 Md. 444.

The discretion of a chancellor in granting or refusing injunction will not be controlled unless abused, or some well recognized principle of law or equity is

violated. *Nisbet v. Sawyer*, 66 Ga. 256; *Carroway v. Lockett*, 66 Ga. 256; *Anraria etc. Co. v. Wahl*, 66 Ga. 256; *Carter v. Monroe*, 66 Ga. 755.

Instances.—An injunction will not be granted when it will operate inequitably or contrary to the real justice of the case; equity interferes in this manner to prevent irreparable mischief or to suppress a multiplicity of suits and vexatious litigations. *Troy etc. R. Co. v. Boston etc. R. Co.*, 86 N. Y. 107.

So an injunction ought not to be granted unless the injury is pressing and the delay dangerous, and there is no adequate remedy at law. *Goodrich v. Moore*, 2 Minn. 61; s. c., 72 Am. Dec. 74.

An injunction will not be granted to prevent the use of a portion of the water of a reservoir, when there will be no need of numerous suits at law, and where defendants are not insolvent and business will not be deranged.

An injunction will not be granted unless the anticipated injury is not reparable by recovery of damages in an action at law, whether from need of numerous or successive suits, or from insolvency of defendants, or from derangement of business. *Haskell v. Thurston (Me.)*, 13 Atl. Rep. 273.

Where all that can be inferred from what the complainant states in his bill is, that when a heavy freshet may happen, the stream will, if the embankment complained of remains, overflow a portion of his land, and thereby destroy the crops, if any there be growing thereon at the time of such freshet, such a case is not made out as will warrant an injunction to restrain the defendant from maintaining the embankment. Such an occasional overflow of a few acres of land, part of a farm of more than a hundred acres, does not work a destruction of the inheritance, nor justify the granting of an injunction in order to prevent irreparable mischief. *Blaine v. Brady*, 64 Md. 373.

But where a town is made a part of a city by an unconstitutional act, a court of equity may restrain the city from exercising municipal jurisdiction over it, and interfering with its property in a manner calculated to inflict on the community irreparable injury. *Hyle Park v. Chicago (Ill.)*, 18 N. E. Rep. 222. *Reid v. Moulton*, 51 Ala. 271; *Barnard v. Davis*, 54 Ala. 574; *Moore v. Hylton*, 1 Dev. Eq. (N. Car.) 435; *State v. Wilson*, 49 Mo. 150; *Nelson v. Robinson*, Hemp. (U. S.) 465.

It is not essential to the granting of equitable relief that irreparable injury shall already have resulted from the acts complained of, it is only required that the damage is threatened or impending, and that a clear necessity be shown for affording immediate protection to some right or interest which would otherwise be seriously injured or impaired. The mere allegation that irreparable injury will result unless protection is extended is not sufficient, but facts must be stated, that the court may see how and why it would result, and that the apprehension of irreparable mischief is well founded. *Crisman v. Heiderer*, 5 Colo. 589.

The solvency of a person who is about to construct a tunnel through the land of another does not affect the right of the latter to an injunction. The injury would be irreparable in its nature. *Richards v. Dower*, 64 Cal. 62.

A court of equity will not interfere by injunction with a plan of improvement adopted in good faith by municipal authorities, and within the scope of their authority, where injury therefrom is doubtful, eventual or contingent. To justify such an interference it must be shown that injury material and actual is the necessary or probable result. *Morgan v. Binghamton*, 32 Hun (N. Y.) 602, reversed so far as appealed from *Morgan v. Binghamton*, 102 N. Y. 500.

In an action brought to restrain the sale of certain teas, it appeared, and the court found, that the teas were adulterated to some extent with offensive and noxious substances, and their possession for the purpose of sale was a nuisance; but the court found that there was no sufficient evidence to prove that the use of the teas was "dangerous to human life, or detrimental to health, or unwholesome," or that the injunction was needed to prevent serious danger to human life, or detriment to health. *Held*, that there was no irreconcilable repugnancy in the findings, and that the relief sought was properly denied. *N. Y. Health Department v. Purdon*, 99 N. Y. 237; s. c., 59 N. Y. Super. Ct. 109; s. c., 52 Am. Rep. 22.

An injunction will not be granted to restrain the erection of a planing mill and cotton gin (in process of construction) upon an allegation by plaintiff that the same, when completed, will expose his premises to increased perils of fire, and that the noise, etc., will render his dwelling unfit for a residence. *Dor-*

grounds, ought to be prevented.¹ And the writ ought, as a general rule, to contain a concise and unequivocal description of the particular acts or things in respect to which the party is enjoined.²

An injunction, unless issued after the decree, when it becomes a judicial process, can only be used for the purpose of prevention and protection, and not for the purpose of commanding the defendant to undo anything he had previously done.³ It may compel parties to do certain acts as well as restrain them from acting.⁴

1. When Granted.—An injunction will be granted to prevent irreparable injury to public property,⁵ and to secure to a party the enjoyment of a statute privilege of which he is in actual

possession. *See v. Allen*, 85 N. Car. 358; s. c., 39 Am. Rep. 704; *Barnes v. Calhoun*, 2 Ired. (N. Car.) Eq. 199; *Ellison v. Comrs.*, 5 Jones (N. Car.) Eq. 57; *Hyatt v. Myers*, 73 N. Car. 232; *Simpson v. Justice*, 8 Ired. (N. Car.) Eq. 115; *Eason v. Perkins*, 2 Dev. (N. Car.) Eq. 38; *Wilder v. Strickland*, 2 Jones (N. Car.) Eq. 386.

So an injunction will not lie to prevent the wrongful collection of tolls by a turnpike company which merely demands the tolls without hindering the passage of those who do not pay. *Sidney v. Haw Creek Turnpike Co.*, 91 Ind. 186.

1. S. P. Md. Savings Institution v. Schroeder, 8 Gill & J. (Md.) 93; *Morse v. Machias Water Power Co.*, 42 Me. 119; *Snowden v. Noah, Hopk.* (N. Y.) Ch. 347; *Hoyt v. Albany*, 3 Paige (N. Y.) 213; s. c., 9 Wend. (N. Y.) 571; *North River Steam Boat Co. v. Livingston*, 3 Cow. (N. Y.) 713; *Harrison v. Newton*, 9 N. Y. Leg. Obs. 311, 347; s. c., 1 Code R. (N. Y.) N. S. 207; *Power v. Alger*, 13 Abb. (N. Y.) Pr. 284; *Gould v. Thompson*, 39 How. Pr. (N. Y.) 5; *Steinberg v. O'Conner*, 42 How. (N. Y.) Pr. 52; *Dubois v. Budlong*, 15 Abb. (N. Y.) Pr. 445; *Swift v. Jenks*, 19 Fed. Rep. 641.

2. *Whipple v. Hutchinson*, 4 Blatchf. (U. S.) 190.

3. *Washington University v. Green*, 1 Md. Ch. 97.

4. *Pierce v. New Orleans*, 18 La. 242.

5. *Putnam v. Valentine*, 5 Ohio 187; *Waldron v. Marsh*, 5 Cal. 119; *Centerville etc. Co. v. Barnett*, 2 Ind. 537; *Daubenspeck v. Gear*, 18 Cal. 444; *Bolton v. Catterlin*, 10 Ind. 117; *White v. Flanigan*, 1 Md. 525; *Green v. Keen*, 4 Md. 98; *Herr v. Bierbower*, 3

Md. Ch. 456; *James v. Dixon*, 20 Mo. 79; *Bell v. Chadwick*, 71 N. Car. 329; *Wilson v. Mineral Point*, 39 Wis. 160; *German v. Clark*, 71 N. Car. 417; *Burgess v. Kattleman*, 41 Mo. 480; *Scudder v. Trenton etc. Co.*, 1 N. J. Eq. 694; *Weigel v. Walsh*, 45 Mo. 560; *De Veney v. Gallagher*, 20 N. J. Eq. 33; *Southmayd v. McLaughlin*, 24 N. J. Eq. 181; *Johnston v. Hyde*, 25 N. J. Eq. 454; *West Point Iron Co. v. Reymert*, 45 N. Y. 703; *Bonlo v. New Orleans R. Co.*, 55 Ala. 480; *Shanbut v. St. Paul etc. R. Co.*, 21 Minn. 502; *Van Wert v. Webster*, 31 Ohio St. 420; *Howell v. Howell*, 5 Ired. (N. Car.) Eq. 258; *Whitfield v. Rogers*, 26 Miss. 84; *Taylor v. Brookman*, 45 Barb. (N. Y.) 106; s. c., 1 Abb. (N. Y.) Pr., N. S. 169; *Blake v. Brooklyn*, 26 Barb. (N. Y.) 301; *Marshall v. Peters*, 12 How. Pr. (N. Y.) 218; *Balcom v. Julien*, 22 How. Pr. (N. Y.) 349; *Brown v. Metropolitan Gas Light Co.*, 38 How. (N. Y.) Pr. 133; *Ward v. Kelsey*, 14 Abb. Pr. (N. Y.) 106; *Sternman v. Kennedy*, 15 Abb. Pr. (N. Y.) 201; *Park v. Musgrove*, 2 Thomp. & C. (N. Y.) 571; *Golusha v. Flour City National Bank*, 1 Hun (N. Y.) 523; s. c., 4 S. Car. 68; *Bolton v. McShane*, 67 Iowa 207; *District Tp. v. District Tp.*, 54 Iowa 115.

Equity will not interfere by injunction where the injury is not irreparable and destructive to the plaintiff's estate, but is susceptible of perfect pecuniary compensation, and for which the party may obtain adequate satisfaction in the ordinary course of law. *Cockey v. Carroll*, 4 Md. Ch. 344; *Hart v. Marshall*, 4 Minn. 294; *Morris etc. Co. v. Central R. Co.*, 16 N. J. Eq. 419.

The mere allegation that irreparable injury will result unless protection is

possession when the legal title is settled.¹ It may be granted where the defendant, against whom there is otherwise a good remedy at common law, is insolvent or about to abscond.²

Mere apprehension of a threatened wrong is not enough.³ A party seeking an injunction must show a particular injury, distinct from that which he suffers in common with the public.⁴

A court of equity will not interfere by injunction to prevent an injury merely nominal or theoretical in its nature, although an action at law might be maintained for it.⁵ Nor can equity be invoked to restrain a consequential injury necessarily resulting from the lawful exercise of a right granted by the sovereign power of the State, or authorized by competent municipal authority.⁶

Where the evidence presents a probability that more wrong will be done than prevented by the injunction prayed for, it will not be granted.⁷ So where a defendant asserts positively that it is not his intention to do a certain act, or to violate any particular right asserted by the plaintiff, and there be no evidence to show to the contrary, the court will not interfere by injunction. It will neither grant nor continue an injunction in the face of such disclaimer.⁸

An application for an injunction will be denied when it appears that the act sought to be enjoined has already been committed.⁹

Where an injunction might cause irreparable damage to the defendant in the event of the plaintiff's not being exclusively entitled to relief, the injunction will be refused.¹⁰ So where a stat-

extended, is not sufficient, but facts must be stated that the court may see how and why it would result, and that the apprehensions of irreparable mischief are well founded. *Carlisle v. Stevenson*, 3 Md. Ch. 505; *Waldron v. Marsh*, 5 Cal. 119.

1. *Croton Turnp. Co. v. Ryder*, 1 Johns. (N. Y.) Ch. 611.

2. *Ponder v. Cox*, 28 Ga. 305; *Council Bluffs v. Stewart*, 51 Iowa 385; *Gibbs v. McFadden*, 39 Iowa 371; *Burroughs v. Saterlee*, 67 Iowa 396; *West v. Smith*, 52 Cal. 322.

3. *Lutheran Church v. Maschop*, 10 N. J. Eq. (2 Stock.) 57; *Jenny v. Crase*, 1 Cranch (U. S.) C. C. 443; *Mariposa Co. v. Garrison*, 26 How. (N. Y.) Pr. 448; *Watrous v. Rodgers*, 16 Tex. 410.

4. *Falls Village etc. Co. v. Tibbetts*, 31 Conn. 165; *Hovelman v. Kansas City Horse R. Co.*, 79 Mo. 632.

5. *Bassett v. Salisbury etc. Co.*, 47 N. H. 426.

6. *Williams v. New York Central R. Co.*, 18 Barb. (N. Y.) 222. See *Ottaquehee Woolen Co. v. Newton*, 75 Vt. 451.

7. *North v. Kershaw*, 4 Blatchf. (U. S.) 70.

An injunction which would work great harm to one party without corresponding benefit to the other should be refused. *Swift v. Jenks*, 19 Fed. Rep. 641.

8. *Whalen v. Dalashmutt*, 59 Md. 250; *West Jersey R. Co. v. Cape May etc. R. Co.*, 34 N. J. Eq. 164.

9. *Cole v. Duke*, 79 Ind. 107.

Past injuries are not in themselves ground for granting an injunction; but when there is a continuance of an injury, and a right to continue it is claimed, an injunction may, in a proper case, be issued to restrain. *Society etc. v. Morris Canal*, 1 N. J. Eq. (Sax.) 157; *Cobb v. Smith*, 16 Wis. 661. Compare *Corning v. Troy etc. Factory*, 40 N. Y. 191; *People v. Vanderbilt*, 26 N. Y. 287; *Durrell v. Pritchard, L. J.*, 1 Ch. App. 224; *Broome v. New York etc. Co. (N. J.)*, 5 Cent. Rep. 816; *Ewing v. Rourke*, 14 Oregon 514.

10. *Hartridge v. Rockwell, R. M. Charl. (Ga.)* 260; *Jones v. Newark*, 11

ute has made provision for all the circumstances of a particular case, no relief in equity can be afforded by injunction.¹

An injunction will be refused when the complainant has an adequate remedy at law.² Though the remedy at law seems adequate, yet if a judge enjoins a common law case, pending in his own court, and there is not a manifest abuse of his discretion, the supreme court will not interfere.³

An injunction will not be granted where the right is doubtful.⁴ Nor against a person who is not a party to the suit.⁵ An injunction will not be granted for every wrongful or unconstitutional act of individuals or corporations.⁶ Nor will a court enjoin its own proceedings, though it may suspend its own order.⁷ So an injunction will not be granted where the effect would be practically to permit an appeal where the statute refuses it.⁸

An injunction may be the final relief sought in an action, as where suit is brought to set aside a deed or other instrument and enjoin the defendant from claiming rights thereunder; or preliminary, as where during the pendency of the action it is necessary to restrain the defendant from doing some act the doing of which would, in whole or in part, render the judgment ineffectual. In either form the injunction is protective and preventive, and depends upon substantially the same principles. In cases of nuisance, interference with easements, etc., mandatory injunctions are issued to compel the defendant to remove his erections or destructions, and abate the wrong to which the plaintiff had been subjected.⁹

3. Perpetual Injunction.—To entitle the plaintiff to a final or perpetual injunction against the defendant he must allege in his bill

N. J. Eq. (3 Stock.) 452; *Torrey v. Camden etc. R. Co.*, 18 N. J. Eq. 293.

1. *Glenn v. Fowler*, 8 Gill & J. (Md.) 340.

2. *Finley v. Thayer*, 42 Ill. 350; *Whittlesey v. Hartford etc. R. Co.*, 23 Conn. 421; *Thibodaux v. Wright*, 3 La. Ann. 130; *Laughlin v. Lamas Co.*, 6 Ind. 223; *Camp v. Matheson*, 30 Ga. 170; *Arnold v. Klipper*, 24 Mo. 273; *Winnipiseogee Lake Co. v. Worster*, 29 N. H. (9 Frost) 433; *Warne v. Morris etc. Co.*, 5 N. J. Eq. (1 Hals.) 410; *Balcom v. Julien*, 22 How. (N. Y.) Pr. 349; *Rogers v. Michigan etc. R. Co.*, 28 Barb. (N. Y.) 539; *Stevenson v. Fayerweather*, 21 How. (N. Y.) Pr. 449; *McCoy v. United States Bank*, 5 Ohio 548; *Wilkins v. Hogue*, 2 Jones (N. Car.) Eq. 479; *Nicolson v. Hancock*, 4 Hen. & M. (Va.) 491; *Borland v. Thornton*, 12 Cal. 440; *Hulse v. Wright*, *Wright* (Ohio) 61.

3. *Webb v. Wynn*, 35 Ga. 216.

4. *Cooper v. Passenger R. Co.*, 3 Phila. (Pa.) 262; *Water Co. v. McCallum*, 5 Phila. (Pa.) 93; *Steamboat Co. v. Livingston*, 3 Cow. (N. Y.) 713; *Manhattan Gas Light Co. v. Barker*, 36 How. (N. Y.) Pr. 233.

5. *Fellows v. Fellows*, 4 Johns. (N. Y.), Ch. 25.

6. *Blake v. Brooklyn*, 26 Barb. (N. Y.) 301.

7. *Medlock v. Cogburn*, 1 Rich. (S. Car.) Eq. 477.

8. *Odom v. McMahan*, 67 Tex. 292.

9. *Lane v. Newdigate*, 10 Ves. 192. In this case an injunction was granted to restrain the defendant "from impeding plaintiff from navigating (a canal) by continuing to keep the canal banks and works out of repair by diverting the water or by continuing the removal of the stop-gate." See also *Robinson v. Byron*, 1 Bro. Ch. 588. These appear to be the leading cases on the allowance of mandatory injunctions.

of complaint facts showing his right to the relief prayed for against the defendant. It is not sufficient that the defendant is in the wrong or is about to commit an injury if it does not affect the plaintiff. He must show, both by his pleadings and proof, the necessity for the interference of the court to protect his rights, and if he fails to do this, he will be defeated. In other words, he must show a clear right to a perpetual injunction. Thus, suppose a mortgagor should file a complaint asking for an injunction to restrain a sale of real estate under a power in the mortgage, and should admit that a certain sum was due to the mortgagee thereon, he must allege an offer to pay such sum to entitle him to enjoin the sale.¹

The burden of establishing a right to a perpetual injunction, claimed by a party to an action, is upon such party. A court will grant a perpetual injunction only when a party shows a clear right thereto.²

So an injunction will not be perpetuated against a party without having him before the court.³

1. *Stringham v. Brown*, 7 Iowa 33; *Sloan v. Boolbaugh*, 10 Iowa 31; *Waffenden v. Waffenden*, 1 Ariz. 328. See *Broadbent v. Imperial Gas Co.*, 7 De G. M. & G. 436; s. c., 3 Jur. U. S. 221; 26 L. J., Ch. 276; *Hunt v. Peake*, 1 Johns. 705.

If the purchaser of lands at a sale made by the sheriff for delinquent taxes fraudulently represents to the owner of the land that the land so bought was a different tract of land, and one in which the owner has no interest, with a view of preventing such owner from redeeming the land within a year of such sale, and it is for that reason not redeemed by the owner, such fraudulent purchaser may be perpetually enjoined from obtaining a deed for such land. *Koon v. Snodgrass*, 18 W. Va. 320.

The temporary interruption of the business of a city horse railway company, for only three or four days, by moving a large house along the street lengthwise with the company's track, even granting that the company has the exclusive right of way in the street for its cars, is not a case of irreparable damage, or such an injury but that an adequate remedy exists at law. And the further fact that the defendant proposes to move other houses over the same and other streets, when employed to do so, in view of the fact that such removals are of rare occurrence, and not likely to occur again on the same street for many years, and because it would be but a temporary interruption

of the company's franchise, was held not to furnish sufficient equitable grounds for decreeing a perpetual injunction. *Fort Clark Horse R. Co. v. Anderson*, 108 Ill. 64; s. c., 48 Am. Rep. 545.

"While, on the trial of an equity case, by special verdict upon written questions, the chancellor may decree a perpetual injunction, if the facts specially found demand it, without the finding by the jury, in express words, that a perpetual injunction be granted, yet we think that the pleadings should show a prayer for injunction before the same should enter into a decree." *SPEER, J.*, in *Jefferson v. Hamilton*, 69 Ga. 463.

2. *Spangler v. Cleveland*, 43 Ohio St. 526; *Bonaparte v. Camden etc. R. Co.*, 6 Baldw. (U. S.) 218; *Whalen v. Dalashmutt*, 59 Md. 250.

"Courts will not exercise this necessary authority when the right is doubtful or the facts not definitely ascertained." *Burnham v. Kempton*, 44 N. H. 78.

3. *Chapman v. Harrison*, 4 Rand. (Va.) 336.

When Denied.—A complainant in a bill filed to impeach a decree of divorce for fraud, on failure to make out a case of fraud, is not entitled to a perpetual injunction restraining the divorced wife from maintaining her suit in ejectment for dower. *Orth v. Orth* (Mich.), 37 N. W. Rep. 67. It is error for an inferior court to award a perpetual injunction upon the same facts upon

4. Preliminary or Interlocutory.—When it appears by the bill of complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce great injury to the plaintiff, and tending to render the final judgment ineffectual, a preliminary or interlocutory injunction may be granted. Where the facts necessary to entitle the plaintiff to a preliminary injunction do not exist at the time of filing the bill, but occur afterwards, during the pendency of the action, they may be brought to the attention of the court by supplemented bill and a temporary order obtained.¹ A defendant also, on filing

which the court of last resort of the State has already reversed an interlocutory injunction in the cause. *Thorne v. Sweeney*, 13 Nev. 415.

When a bill is filed restraining county commissioners from opening a road on the ground that they have not assessed the damages and provided for the payment thereof, it is error to grant a perpetual injunction. The commissioners should only be restrained until they have complied with the preliminary requirements of the statute. *Champion v. Sessions*, 2 Nev. 271. And in a decree for alimony on a bill for a divorce, it is erroneous to perpetually enjoin the defendant from selling his property and order his imprisonment until he gives bond with personal security for the payment of the sum allowed. *Errissman v. Errissman*, 25 Ill. 119; *Hornesby v. Burdell*, 9 S. Car. 303.

Extracting Minerals.—The complaint charged that defendants had wrongly entered upon a tract of mining ground (described by metes and bounds) owned by the plaintiff, and had extracted therefrom gold-bearing earth of the value of \$1,000, and that they threatened to continue their wrongful acts, and prayed for damages in the sum of \$1,000 and for a perpetual injunction. The answer set up title in defendants to a specific portion of the tract claimed by plaintiff, and denied that they had worked upon any other portion than that to which they thus asserted title. The jury, under a general submission, found "a verdict in favor of plaintiff with one dollar damages." *Held*, that the verdict decided the question of title in favor of plaintiffs, and that upon it they were entitled to a decree perpetually enjoining defendants from working upon the ground claimed in the complaint, and this equitable relief was a matter

of right, the denial of which, by the district court, was error. *McLaughlin v. Kelly*, 22 Cal. 212.

Motion to Dissolve.—Upon a motion to dissolve, the court will not usually make the injunction perpetual, since the defendant still has a right to be heard upon the merits, and a decree making an injunction perpetual can only be rendered upon a bill *pro confesso* upon overruling a demurrer to the bill, or upon a hearing on the bill, answer, exhibits and proofs. *Ottawa v. Walker*, 21 Ill. 610. But in Texas it is *held* that when the court overrules a motion to dissolve upon hearing and argument, and the allegations of the bill are not denied in any matter material to the rights of the parties, and defendants do not demand a jury trial, but give notice of an appeal, it is not error to make the injunction perpetual. *Alsup v. Allen*, 43 Tex. 598.

1. *Blakemore v. Glamorganshire*, 1 Nye & K. 154; *Wallace v. McVey*, 6 Ind. 300; *S. P. Real Del Monte etc. Co. v. Pond etc. Co.*, 23 Cal. 82; *Flagg v. Sloan*, 16 Ind. 432; *Hicks v. Micheal*, 15 Cal. 107; *Atty. Gen. v. Paterson*, 9 N. J. Eq. (1 Stock.) 624; *Ward v. Dewey*, 7 How. Pr. (N. Y.) 17; *Corning v. Troy etc. Factory*, 6 How. (N. Y.) Pr. 89; *Zinsser v. Cooledge*, 17 Fed. Rep. 538. See *Hamilton v. Eden Gold Mining Co.*, 75 Ga. 447; *International Tooth Crown Co. v. Mills*, 22 Fed. Rep. 659; *McHenry v. Jewett*, 90 N. Y. 58.

Where the complaint shows no cause of action, then a preliminary injunction is unauthorized, and the granting of it is error of law, which may be reviewed by the court on appeal. Code, § 190, sub. 2; *Allen v. Meyer*, 73 N. Y. 1; *Wright v. Brown*, 67 N. Y. 1; *Collins v. Collins*, 71 N.

Y. 270; Paul v. Munger, 47 N. Y. 469.

When Granted.—A preliminary injunction may be granted under N. Y. Code, § 219, if it is necessary to protect the plaintiff from injury; and if the nature and extent of the injury is such as to entitle the plaintiff to a final, perpetual injunction. Both these grounds must be shown to exist before the injunction can be allowed. *Corning v. Troy etc. Factory*, 6 How. (N. Y.) Pr. 89; *Ward v. Dewey*, 7 How. (N. Y.) Pr. 17.

If a plaintiff wish to obtain a preliminary injunction, he should insert a formal prayer for such process in his bill. *Walker v. Devereaux*, 4 Paige (N. Y.) 229.

A temporary injunction should not be granted without the usual notice, unless a pressing necessity be shown. *Androvette v. Bowne*, 15 How. (N. Y.) Pr. 75; s. c., 4 Abb. (N. Y.) Pr. 440.

Nor should it be allowed, except upon a case clearly made, showing an equitable right to the interference of the court, and good ground to apprehend such loss or damage as cannot be compensated for, and then not until the adverse party has had notice. *Wallace v. McVey*, 6 Ind. 300; *S. P. Real Del Monte etc. Co. v. Pond etc. Co.*, 23 Cal. 82; *Flagg v. Sloan*, 16 Ind. 432. See *Androvette v. Bowne*, 4 Abb. (N. Y.) Pr. 440; s. c., 15 How. (N. Y.) Pr. 75.

A preliminary injunction is generally granted upon such terms appropriate to the case as the court may, either on application of council or at its own suggestion, think proper to impose. *Ewing v. Filley*, 43 Pa. St. 384.

Where the complainant, in an action by a wife for a limited divorce and for support, alleges that the defendant threatened to dispose of his property and remove from the State, without an order for restraining him from so doing, a temporary injunction is allowable. *Vermilyea v. Vermilyea*, 14 How. (N. Y.) Pr. 470.

A preliminary injunction can issue to maintain a party in possession, but not to oust one in possession. *New Orleans etc. R. Co. v. Mississippi etc. R. Co.*, 36 La. Ann. 561.

When Denied.—A wrong which is a mere technical invasion of complainant's rights, and does not threaten serious injury, will not lay a ground for a preliminary injunction. *Wakeman v. New York etc. R. Co.*, 35 N. J. Eq. 496.

A complainant is not entitled to a preliminary injunction to protect a right which depends on a disputed question of law. *Jersey City Gaslight Co. v. Consumers' Gas Co.*, 40 N. J. Eq. 427.

A preliminary injunction to stay the progress of a public work will not be allowed unless the act threatened to be done will cause irreparable injury. *Booraem v. North Hudson Co. R. Co.*, 40 N. J. Eq. 557.

So where complainant's right, as an abutting lot owner, to prevent the defendant from stretching its wires over the land in the street in front of his lot, defendant claiming to act under statutory and municipal authority, is debatable, a preliminary injunction to restrain defendant's proceeding will not be allowed. *Roake v. American Telephone etc. Co.*, 41 N. J. Eq. 35.

Where the plaintiff's right is doubtful a preliminary injunction will not be granted. *Biddle v. Ash*, 2 Ash. (Pa.) 211; *Brown's Appeal*, 62 Pa. St. 17; *Harkinson's Appeal*, 78 Pa. St. 196; *Waring v. Cram*, 1 Pars. (Pa.) 516; *Baxter v. Buchanan*, 3 Brewst. (Pa.) 435; s. c., 7 Phila. (Pa.) 315; *Moore v. Passenger R. Co.*, 3 Phila. (Pa.) 210; *Cooper v. Passenger R. Co.*, 3 Phila. (Pa.) 262; *Windrim v. Philadelphia*, 8 Phila. (Pa.) 361; *Germantown Water Co. v. McCallum*, 5 Phila. (Pa.) 93; *McDonald v. Bromley*, 6 Phila. (Pa.) 302; *Volmer v. Greer*, 7 Phila. (Pa.) 453; *Kelly v. Long*, 7 Phila. (Pa.) 455; *Wetham v. Clyde*, 1 Leg. Gaz. (Pa.) 53; *Johnson v. Kier*, 3 Pitts. (Pa.) 204.

A preliminary injunction will not be granted where the material facts are averred merely on information and belief. *Waddell v. Bruen*, 4 Edw. (N. Y.) Ch. 671; *Williams v. Lockwood, Clarke* (N. Y.) Ch. 172. Unless such information be derived from defendant. *Cole v. Savage, Clarke* (N. Y.) Ch. 361. Nor where the answer denies all the equity of the bill. *Crandall v. Woods*, 6 Cal. 449.

A preliminary injunction should not be granted when the right on which the complainant founds his claim is, as a matter of law, unsettled. *Reversing Central R. Co. v. Pennsylvania R. Co.*, 31 N. J. Eq., 475; *National Dock R. Co. v. Central R. Co.*, 32 N. J. Eq. 755.

When Continued.—When a preliminary injunction has been granted upon a bill in equity, and in the answer the facts set forth in the bill are admitted or not denied, or new matter is set up

a cross-bill, or in the States having a code an answer, stating facts sufficient to entitle him to the relief, may have an injunction against the plaintiff. The sole purpose of granting a preliminary injunction pending the action is to stop the mischief complained of. Where it is to stop a further injury, to keep things as they are for the present, the granting of the preliminary order does not require the court, on the final hearing, to make the injunction perpetual.¹

Preliminary injunctions are classified as *special* and *common*, the latter being granted without notice in aid of certain equities in favor of the plaintiff.² The former are granted to stay waste or prevent great or irreparable injury.³ Under the statute all in-

in avoidance, the injunction will be continued. *State v. Northern etc. R. Co.*, 18 Md. 193; *Clark v. Martin*, 4 Edw. (N. Y.) Ch. 424; *Kerns v. Chambers*, 3 Ired. (N. Car.) Eq. 576; *Reynolds v. McKenzie*, Phill. (N. Car.) Eq. 50; *Chase v. Manhardt*, 1 Bland (Md.) 333; *McNamara v. Irwin*, 2 Dev. & B. (N. Car.) Eq. 13; *Randell v. Morrell*, 17 N. J. Eq. 343.

The defendant must answer upon his own knowledge and not upon information; otherwise the injunction will be retained until the final hearing. *Everly v. Rice*, 4 N. J. Eq. (3 Green) 553.

An injunction to stay waste pending an ejectment suit will not be continued where the defendant is in possession claiming adversely, especially if there has been needless delay in the prosecution of the ejectment. *Higgins v. Woodward*, Hopk. (N. Y.) 342.

1. *Parker v. Winnipiseogee etc. Co.*, 2 Black (U. S.) 545; *Irwin v. Dixon*, 9 How. (U. S.) 28; *Great W. R. Co. v. Birmingham etc. R. Co.*, 2 Ph. 602. The CHANCELLOR says: "It is certain that the court will in many cases interfere and preserve property *in statu quo* during the pendency of the suit in which the rights are to be decided, and that without expressing and often without having the means of forming any opinion as to such rights . . . It is true the court will not so interfere if it thinks that there is no real question between the parties; but seeing that there is a substantial question to be decided, it will preserve the property until such question can be regularly disposed of." And the same chancellor in *Glasscott v. Lang*, 3 Myl. & C. 455, said: "It is quite sufficient if the court finds upon the pleadings and upon the evidence a

case which makes the transaction a proper subject of investigation in a court of equity." *Andre v. Redfield*, 12 Blatchf. (U. S.) 408; *Atty. Gen. v. Paterson*, 1 Stock. (N. J.) 624.

2. *Martin v. Cook*, 6 Jones (N. Car.) Eq. 199; *Murray v. Knapp*, 62 Barb. (N. Y.) 566. See, as to distinction between common and special injunctions, *Woodworth v. Rogers*, 3 Woodb. & M. (U. S.) 135; *Purnell v. Daniel*, 8 Ired. (N. Car.) Eq. 9; *Troy v. Norment*, 2 Jones (N. Car.) Eq. 318; *Peterson v. Matthis*, 3 Jones (N. Car.) Eq. 31; *Chadwell v. Jordan*, 2 Tenn. Ch. 635; *Patterson v. Gordon*, 3 Tenn. Ch. 18. But see *Anderson v. Noble*, 1 Drew 143; *Magnay v. Mines Royal Co.*, 3 Drew 130.

3. *Purnell v. Daniel*, 8 Ired. Eq. (N. Car.) 9; *Bradford v. Peckham*, 9 R. I. 250. In this case it was *held* that an order of injunction until a certain day does not expire on that day, but continues in force until dissolved. *Woodworth v. Rogers*, 3 Woodb. & M. (U. S.) 135.

Motion to Dissolve.—It is *held*, in cases of special injunctions for the prevention of irreparable injuries, that on a motion to dissolve, the bill may be read in contradiction to the answer, and if the equity appears in doubt, the motion will be refused and the injunction will be continued to the hearing. *Purnell v. Daniel*, 8 Ired. (N. Car.) Eq. 9; *Lloyd v. Heath*, Busb. (N. Car.) Eq. 39; *Troy v. Norment*, 2 Jones (N. Car.) Eq. 318. And it has even been *held*, in cases of special injunctions for the prevention of irreparable injury, that the denial in the answer of the complainant's equity will not suffice to warrant a dissolution. *Peterson v. Matthis*, 3 Jones (N. Car.) Eq. 31.

junctions issued by the courts of the United States are special, and are issued after notice.¹

5. A mandatory injunction is granted with extrême caution, and ordinarily is restricted to cases where a court of law cannot grant adequate relief, or where full compensation cannot be made in damages.² As a general rule, it will not be granted until the

1. Rev. Stat. U. S., § 718; Perry v. Parker, 1 Woodb. & M. (U. S.) 280.

2. Deer v. Guest, 1 Myl. & C. 516; Isenberg v. East Ind. etc., 33 L. J. Ch. 392. Ryder v. Bentham, 1 Ves. 543; Sparling v. Clarson, 17 W. R. 518; Smith v. Smith, 23 W. R. 771; 32 L. T., N. S. 787; 44 L. J., Ch. 630; 20 L. R., Eq. 500. People v. Vanderbilt, 24 How. Pr. (N. Y.) 301.

A mandatory injunction commanding an act to be done, will not ordinarily be granted as a provisional remedy pending the suit. Ward v. Kelsey, 14 Abb. Pr. (N. Y.) 106; Akrill v. Selden, 1 Barb. (N. Y.) 316.

In Isenberg v. East India Estate Co., 33 L. J., Ch., 392, CHANCELLOR WESBURY refused to issue the writ prayed for, and said: "The exercise of granting that power [of granting mandatory injunctions] is one that must be attended with the greatest possible caution. I think, without intending to lay down any rule, that it is confined to cases where the injury done to the plaintiff cannot be estimated and sufficiently compensated by a pecuniary sum."

When Granted.—Mandatory injunctions are granted in cases of nuisances and trespasses of an irreparable nature. Robinson v. Lord Byron, 1 Bro. C. C. 588; Cole etc. Co. v. Virginia etc. Co., 1 Sawy. (U. S.) 685.

In Manchester etc. R. Co. v. Workshop Board etc., 23 Beav. 198, an injunction was allowed against permitting a side sewer to remain open, whereby the main sewer was discharged into the plaintiff's canal. So in the case of a nuisance occasioned by the making of a certain excavation, a mandatory injunction negative in form was issued at the final hearing to prevent the continuance of such excavation. Spencer v. London etc. R. Co., 8 Sim. 193. Where the defendant maliciously erected a structure on his own land for the purpose of shutting off the plaintiff's light and air, and there was a statute providing that an injunction might be issued to prevent the erection of such a structure, a mandatory writ prohibiting the con-

tinuance of the structure was granted. Harbison v. White (Conn.), 8 Rep. (U. S.) 586. In Webb v. Portland Mfg. Co., 3 Sumn. (U. S.) 189, a mandatory injunction was granted to prevent the diversion of a stream to the injury of the plaintiff's mill, where the defendant had already done the act which caused the diversion. So in Corning v. Troy etc. Factory, 40 N. Y. 191, a similar writ was granted to compel the restoration of a stream of water to the channel from which the defendants had diverted it, on the ground that there was no adequate legal remedy, and to prevent a multiplicity of actions.

A continuing trespass also, which inflicts an injury incapable of measurement in damages, may be restrained by a mandatory injunction, which will have the effect to compel the undoing of some substantive act. Kerr on Inj. 330; High on Inj., § 478.

A mandatory injunction may issue from the United States circuit court sitting in equity in a proper case, whenever it might issue under the general chancery practice. Norfolk Trust Co. v. Marye, 25 Fed. Rep. 654.

Mandatory injunctions are granted to enforce a delivery of possession of real property under a decree for possession to be followed, if not obeyed, by a writ of *habere facias* possession. Garretson v. Cole, 1 Harr. & J. (Md.) 373; Lutheran Evangelical Church v. Gristgan, 34 Wis. 328; Wangelin v. Goe, 50 Ill. 459.

The mandatory writ is available to compel a yielding up, or to quit, or continue a possession of lands. Dove v. Dove, 2 Dick 617; s. c., 1 Bro. C. C. 375, 1 Cox 101; Stribley v. Hawkie, 3 Atk. 275; Hugonin v. Bazeley, Shelton v. Shelton, Foth. 115; Denio v. Carew, Foth. 75; Lane v. Howard, Cary 148; Ludlow v. Lansing, Hopk. (N. Y.) 231; Wood v. Mason, 3 Sumn. (U. S.) 318; Kershaw v. Thompson, 4 Johns. (N. Y.) Ch. 609; Roberdeau v. Rous, 1 Atk.; Gates v. Hemblly, 2 Atk. 360; Penn v. Lord Baltimore, 1 Ves. 444.

A railway company may be com-

pelled by mandatory injunction to perform their obligations to the public. *Vincent v. Chicago & Alton R. Co.*, 49 Ill. 33. See *Barrett v. G. N. & M. R. Co.*, 1 Nev. & Mac. 38; *Victoria C. Co. v. N. & B. M. R. Cos.*, 3 Nev. & Mac. 35; *James v. Taff Co.*, L. R., 9 Ch. App. 331.

Where a railway company had made arrangements with one W to carry passengers from its station to the town of K, and admitted his omnibus within its station grounds for that purpose, it was *held* that it could be compelled to admit M's omnibus also, who was engaged in carrying passengers to the town, no special circumstances being shown why the latter should be excluded. *Marriot v. L. & S. W. R. Co.*, 1 Nev. & Mac. 47. But where it was not shown that public convenience required the admission to the station grounds of a rival cab line, an order to compel its admission was denied. *Bladell v. Eastern R. Co.*, 1 Nev. & Mac. 56; *Painter v. L. B. & S. C. R. Co.*, 1 Nev. & Mac. 58.

A railway company may be prevented by mandatory injunction from entering into an agreement not to transport goods at the rates fixed by law. *Rogers Locomotive etc. Works v. Erie R. Co.*, 20 N. J. Eq. 379; *Andenried v. Philadelphia etc. R. Co.*, 68 Pa. St. 370; *American Coal Co. v. Consolidation Coal Co.*, 46 Md. 15. A railway company may be compelled to make a road it had agreed to make, the order being to prevent it from allowing the work to remain unperformed. *Stores v. Great Western R. Co.*, 2 Younge & Coll. Ch. 48. And where a railway company had agreed to make a road at a certain level, the order was issued to prevent it from making one at a lower level than that agreed upon. *Foster v. Birmingham etc. R. Co.*, 2 W. R. 378.

The alteration of the elevation or form of a building not in conformity with the terms of a contract, or even with an act of the legislature (*Warden of Dover Harbor v. Southeastern R. W. Co.*, 9 Hare 493; *Franklyn v. Tuton*, 5 Madd. 46), or to tear down a building contrary to a contract, not to erect it. *Schwoerer v. Boylston*, 99 Mass. 285; *Lord Manners v. Johnson*, 1 Ch. Div. 673; *North of England R. Co. v. Clarence R. Co.*, 1 Coll. 507. But in *Jacombs v. Knight*, 32 L. J. Ch. 601, the court refused to grant an injunction that would compel the defendant to pull

down buildings which it was claimed obstructed the plaintiff's light, because the hardship to the defendants would be greater than the benefit to the plaintiff; it appearing that he was only a tenant from year to year.

Where a trespass is entirely completed, so that its effect may be measured in damages, an injunction will not be granted. *Gort v. Clark*, 18 L. T. (N. S.) 343; s. c., 16 W. R. 569; *Kerr on Inj.* 330; 1 *Joyce on Inj.* 101; *Doran v. Carroll*, 11 Irish Ch. 379; *Atty. Gen. v. New Jersey R. Co.*, 3 N. J. Eq. (2 Green) 141; *Lexington etc. Bank v. Gwynn*, 6 Bush (Ky.) 486. In *Fisher v. Board of Trade*, 80 Ill. 85, it was *held* that a party could not be compelled by a mandatory injunction to undo what had already been done.

The injury complained of in *Doran v. Carroll*, 11 Irish Ch. 379, was that the defendant had committed waste consisting partly of throwing down a stone wall, but it did not appear that he intended or claimed the right to commit any further waste. The chancellor refused to grant an injunction to compel the rebuilding of the wall, saying: "The wall is prostrate, and there is an end of it;" and that therefore it was a case for a court of law.

After a bridge has been completed, it is too late to obtain an injunction to prevent its completion; and it is not within the power of a chancellor at chambers to grant a mandatory order requiring a municipal corporation to remodel or remove any part of a bridge forming a part of one of its streets. *Georgia Pac. R. Co. v. Douglassville*, 75 Ga. 828. See *Thomas v. Hawkins*, 20 Ga. 126, 134 (2); Code, § 3002.

A mandatory writ will not enforce acts that are continuance. *Marble Co. v. Ripley*, 10 Wall. (U. S.) 339; *Wheatley v. Westminster etc. Coal Co.*, L. R., 9 Eq. 538; *Starnes v. Newsom*, 1 Tenn. Ch. 239; *Blanchard v. Detroit R. Co.*, 31 Mich. 44; *Atlantic etc. R. Co. v. Spear*, 32 Ga. 550; *Fothergill v. Rowland*, L. R., 17 Eq. 132; *Buck v. Smith*, 29 Mich. 166; *Powell etc. Coal Co. v. Taff Vale R. Co.*, L. R., 9 Ch. App. 331; *Port Clinton R. Co. v. Cleveland etc. R. Co.*, 13 Ohio St. 544; *Blackett v. Bates*, L. R., 1 Ch. App. 117; *People v. Albany etc. R. Co.*, 24 N. Y. 267; *Union Pac. R. Co. v. Hall*, 91 U. S. 343; *McCann v. South Nashville St. R. Co.*, 2 Tenn. Ch. 773.

A contract to deliver marble of certain kinds, being for a perpetual supply

final hearing.¹ Although when necessary to protect the rights of the parties or some of them, it may be granted as interlocutory.² This remedy is applied when the injury is pressing and irreparable, the right to the same clear, and the wrong not acquiesced in by the plaintiff. The power of the court in such cases is undoubted, although the remedy has been more freely applied by the English courts than those of this country.³

of marble, will not be enforced by injunction. *Rutland Marble Co. v. Ripley*, 10 Wall. (U. S.) 339.

The court will not enforce by mandatory injunctions a duty imposed upon a company by its charter to build a railroad. *People v. Albany etc. R. Co.*, 24 N. Y. 267; *Union Pac. R. Co. v. Hall*, 91 U. S. 343. Nor to enforce an agreement for the use of the defendant's railway by the complainant. *Blackett v. Bates*, L. R., 1 Ch. App. 117. Nor an agreement to build a railroad, or an agreement to build a house. *Ross v. Union Pac. R. Co.*, *Woolm.* (U. S.) 26; *Fallon v. Railroad Co.*, 1 Dill. (U. S.) 121; *South Wales R. W. Co. v. Wythes*, 5 De. G. M. L. 880; *Heathcote v. North Stafford R. Co.*, 20 L. J. (N. S.) 82. See *Danforth v. Philadelphia etc. R. Co.*, 30 N. J. (Stew.) Eq. 12; *Wilkerson v. Clements*, L. R., 8 Ch. App. 96; *Beck v. Allison*, 56 N. Y. 367; *Justices v. Croft*, 18 Ga. 473; *Eringston v. Aynesley*, 2 Bro. C. C. 341; *Lucas v. Comerford*, 3 Bro. C. C. 166; *Mastin v. Halley*, 61 Mo. 196. Or even to repair. *Rayner v. Stone*, 2 Eden 128; *Sanderson v. Cockermouth R. W. Co.*, 11 Beav. 497; *Soames v. Edge*, John. 669; *Flint v. Brandon*, 8 Ves. 159; *Brace v. Wehnert*, 25 Beav. 348; *Lytton v. Great Northern R. Co.*, 2 K. & J. 394; *Norris v. Jackson*, 1 J. & H. 319; *Samuda v. Lawford*, 4 Giff. 42; *Taylor v. Partington*, 7 De G. M. & G. 328.

On Motion.—MR. JUSTICE FIELD examined the question very elaborately in *Cole etc. Co. v. Virginia etc. Co.*, 1 Sawy. (U. S.) 470, and granted the order, although it required the expenditure of much labor and money to comply with it. The conclusion he arrived at, and which is fully supported by the best considered cases, was, that a mandatory injunction will not be granted upon motion, except where irreparable injury will result before a final decree can be entered; and where such a showing is made, the court has ample power to do justice between the

parties without any further delay.

1. *Gale v. Abbott*, 8 Jur. N. S. 987; *Blakemore v. Glamorganshire Canal Co.*, 1 Myl. & K. 154; *Durell v. Pritchard*, L. R., 1 Ch. App. 244; *Great West. R. Co. v. Birmingham etc. R. Co.*, 2 Ph. 597; *Shrewsbury R. Co. v. Shrewsbury etc. R. Co.*, 1 Sim. (N. S.) 410. *Gale v. Abbott*, 8 Jur. N. S. 987; *Washington University v. Green*, 1 Md. Ch. 97; *Rogers etc. Works v. Erie R. Co.*, 5 C. E. Green (N. J.) 379; *Andenreid v. Phil. etc. R. Co.*, 68 Pa. St. 370. Compare *Beadel v. Perry*, L. R., 3 Eq. 456; *Durrell v. Pritchard*, 1 Ch. App. 244; *Cole etc. Co. v. Virginia etc. Co.*, 1 Sawy. (U. S.) 470; *Baptist Congregation v. Scannell*, 3 Grant's Cas. (Pa.) 48; *Frear v. Sasterlin*, 6 Luz. L. Reg. (Pa.) 111; *Farmers' R. Co. v. Reno etc. R. Co.*, 53 Pa. St. 224.

It is a preventive remedy only. *Mammoth Vein etc. Appeal*, 54 Pa. St. 183; *Brown's Appeal*, 62 Pa. St. 17; *Andenreid v. Phil. etc. R. Co.*, 68 Pa. St. 370; reversing s. c., 27 Leg. Int. (Pa.) 149; *Lehigh Coal & Nav. Co. v. Beaver Meadow R. Co.*, 7 Leg. & Ins. (Pa.) 325; *Mocanaqua Coal Co. v. Northern Cent. R. Co.*, 4 Brewst. (Pa.) 158; s. c., 9 Phila. (Pa.) 250.

2. *Robinson v. Byron*, 1 Bro. (C. C.) 588; *Hervey v. Smith*, 1 Kay & J. 392; *Joyce on Inj.* 433; *Kerr on Inj.* 232; *Drewry on Inj.* 260; *Bispham's Prin. of Eq.*, § 400.

3. *Blakemore v. Glamorganshire Canal etc.*, 1 Myl. & K. 154; *Spencer v. Birm. Ry. Co.*, 8 Sim. 193; *Great North etc. Ry. v. Clarence Ry.*, 11 Coll. 507. The VICE CHANCELLOR says (pp. 521-2): "That injunctions in substance mandatory, though in form merely prohibitory, have been and may be granted by the court, is clear. This branch of its jurisdiction may be one not fit to be exercised without particular caution, but certain it is one fit and necessary under certain circumstances to be exercised. Under what circumstances it may be exercised must be a matter for judicial discretion in each several case."

6. Jurisdiction.—If in an action at law the plaintiff can obtain full and adequate relief, a suit in equity for an injunction cannot be maintained by him. Nor can a defendant invoke the aid of a court of equity upon mere *legal grounds*, because in such case his defence is available at law.¹ To entitle the defendant to relief he must have an equitable defence which is not available at law, or a good defence at law which, by reason of fraud or accident without any negligence on his part, he was prevented from

Green v. Green, 5 Hare 400; Atty. Gen. *v. Met. B. of W.*, 1 Hen. & M. (Va.) 298; *Hepburn v. Lordan*, 2 Hen. & M. (Va.) 345; *Mexborough v. Bower*, 7 Beav. 127; *Greatrex v. Greatrex*, 1 De G. & Sm. 692; *Hervey v. Smith*, 1 K. & J. 389; *Rankin v. Huskisson*, 4 Dim. 13; *Cole etc. Co. v. Virginia etc. Co.*, 1 Sawy. (U. S.) 470, 685; *Rogers etc. Works v. Erie R. Co.*, 20 N. J. Eq. 379; *Longwood R. Co. v. Baker*, 27 N. J. Eq. 166; *Corning v. Troy etc. Factory*, 40 N. Y. 191; *Guskin v. Balls*, L. R., 13 Ch. Div. 324; *Cooke v. Chilcott*, L. R., 3 Ch. Div. 694; *Krehl v. Burrell*, L. R., 7 Ch. Div. 551; *Manners v. Johnson*, L. R., 1 Ch. Div. 673; *London etc. Co. v. Tennant*, L. R., 9 Ch. App. 212; *Goodson v. Richardson*, L. R., 9 Ch. App. 221; *Auburn etc. Co. v. Douglass*, 12 Barb. (N. Y.) 553; *Penniman v. N. Y. etc. Co.*, 13 How. Pr. (N. Y.) 40.

1. *Whalen v. Dalashmutt*, 59 Md. 250; *Hayes v. Hayes*, 2 Del. Ch. 191; *Olmsted's App.*, 86 Pa. St. 284; *Hewett v. Kuhl*, 10 C. E. Green (N. J.) 24; *Powell v. Chamberlain*, 22 Ga. 123; *Carr v. Lee*, 44 Ga. 376; *Beauchamp v. Putnam*, 34 Ill. 378; *Yates v. Batavia*, 79 Ill. 500; *Hartman v. Heady*, 57 Ind. 545; *Smith v. Short*, 11 Iowa 523; *Gibson v. Moore*, 22 Tex. 611; *People v. Wasson*, 64 N. Y. 167; *N. Y. etc. Co. v. Amer. etc. Co.*, 11 Paige (N. Y.) 384; *Jerome v. Ross*, 7 Johns. Ch. (N. Y.) 315; *De Witt v. Hays*, 2 Cal. 463; *Pico v. Sunol*, 6 Cal. 294; *Smith v. Sparrow*, 13 Cal. 597; *Imlay v. Carpenter*, 14 Cal. 173; *Logan v. Hillegass*, 16 Cal. 201; *Green v. Thomas*, 17 Cal. 86; *Comstock v. Clemens*, 19 Cal. 78; *Leach v. Day*, 27 Cal. 643; *Rahm v. Minis*, 40 Cal. 421; *Mayo v. Brytle*, 47 Cal. 626; *Hausmeister v. Porter*, 21 Fed. Rep. 355; *Torpedo Co. v. Clevendon*, 19 Fed. Rep. 231; *Wilson v. Hughell*, Mor. (Iowa) 461; *Cowles v. Shaw*, 2 Iowa 406; *Snyder v. Marks*, 109 U. S. 189; *Legg v. Horn*, 45 Conn. 409; *Grant v. Moore*, 88 N. Car. 77; *Finegan v. Fernandina*, 18 Fla. 127; *State v. Civil*

District Judge, 34 La. An. 741; *La Mothe v. Fink*, 8 Bliss (U. S.) 493; *Gore v. Brubaker*, 55 Md. 87; *Jacks v. Bigham*, 36 Ark. 481; *Jersey City v. Gardner*, 33 N. J. Eq. 622; *Gutierrez v. Pino*, 1 New Mex. 392; *Frazier v. White*, 49 Md. 1; *Edwards v. Allonez*, Min. Co., 38 Mich. 46; *Palmer v. Logansport etc. Co.*, 108 Ind. 137; *Kennedy v. Consumers' Gas Co.*, 142 Mass. 417; *Cummings v. Barrett*, 10 Cush. (Mass.) 196; *Washburn v. Miller*, 117 Mass. 376; *Parker v. Winnipiseogee Cotton Co.*, 2 Black (U. S.) 545; 2 Story Eq. Jur., § 925; 3 Pom. Eq., § 1350; *Sickles v. New Rochelle*, 41 Hun (N. Y.) 408; *Goldfrank v. Young*, 64 Tex. 432; *Overruling Blackwell v. Barnett*, 52 Tex. 326; *Laughlin v. Lamasco*, 6 Ind. 223; *Finley v. Thayer*, 42 Ill. 350; *Whittlesey v. Hartford etc. R. Co.*, 23 Conn. 421; *Camp v. Matheson*, 30 Ga. 170; *Thiboduax v. Wright*, 3 La. An. 130; *Arnold v. Klepper*, 24 Mo. 273; *Winnipiseogee Lake Co. v. Worster*, 29 N. H. (9 Frost) 433; *Warne v. Morris etc. Co.*, 5 N. J. Eq. (1 Halst.) 410; *Rogers v. Michigan etc. R. Co.*, 28 Barb. (N. Y.) 539; *Balcom v. Julien*, 22 How. (N. Y.) Pr. 349; *Willis v. Stapels*, 30 Hun (N. Y.) 644; *Fincke v. N. Y. Police Comrs.*, 66 How. (N. Y.) Pr. 318; *Stevenson v. Fayerweather*, 21 How. (N. Y.) 449; *Wilkins v. Hogue*, 2 Jones (N. Car.) Eq. 479; *McCoy v. U. S. Bank*, 5 Ohio 548; *Nicolson v. Hancock*, 4 Hen. & M. (Va.) 491; *Borland v. Thorton*, 12 Cal. 440; *Hulse v. Wright*, Wright (Ohio) 61; *Amelung v. Seekamp*, 9 Gill & J. (Md.) 468; *Hamilton v. Ely*, 4 Gill (Md.) 34; *White v. Flannigan*, 1 Md. 525; *Lanahan v. Gahan*, 37 Md. 105; *George's Creek etc. Co. v. Detmold*, 1 Md. Ch. 371; *Jerome v. Ross*, 7 Johns. Ch. 315; *Goodell v. Lassen*, 69 Ill. 145; *Dunham v. Miller*, 75 Ill. 379; *Kilpatrick v. Smith*, 77 Va. 347; *Kendall v. Missisquoi etc. R. Co.*, 55 Vt. 438. *Pullman Palace Car Co. v. Central Trans. Co.*, 34 Fed. Rep. 357; *Richards v.*

Kirkpatrick, 53 Cal. 433; Coe v. Columbus etc. R. Co., 10 Ohio St. 372; Coughron v. Swift, 18 Ill. 414; Poage v. Bell, 3 Rand. (Va.) 586; Winkler v. Winkler, 40 Ill. 179; Webster v. Couch, 6 Rand. (Va.) 519; Sherman v. Clark, 4 Nev. 138; Arkhill v. Selden, 1 Barb. (N. Y.) 316; Mullen v. Jennings, 1 Stock. (N. J.) 192; Frazier v. White, 49 Md. 19; Wood v. Wooden, 2 Green (N. J.) Ch. 429; Lovette v. Longmire, 14 Ark. 339; Sanders v. Sanders, 20 Ark. 610; Murphy v. Harrison, 29 Ark. 340; Oliver v. Memphis etc. Co., 38 Ark. 128; Bennett v. Nichols, 12 Mich. 22; Teft v. Stewart, 31 Mich. 367; Mears v. Howarth, 34 Mich. 19; Bay City Bridge Co. v. Van Etten, 36 Mich. 210.

A bill in equity praying an injunction, will not lie to determine which of two parties is entitled to the office of school director. There is an adequate and exclusive remedy at law in such case by a writ of *quo warranto*. Gilroy's Appeal, 100 Pa. St. 5.

In Hagner v. Heyberger, 7 W. & S. Pa. 104, it was *held* that an injunction will not be granted to restrain an individual from exercising the office of school director, who has accepted the office of commissioner of an incorporated district; the question of his right to exercise the duties of the office must be tried by proceedings on a writ of *quo warranto*, which affords an ample legal remedy.

In Updegraff v. Crans, 47 Pa. St. 103, it was *held* that a bill in equity for an injunction to restrain borough officers from entering upon official duties under an alleged illegal appointment of town council, will not lie, though they had not exercised, or attempted to exercise the duties of their offices; the remedy is at law, by *quo warranto*, and to be invoked after entry into or exercise of authority under their appointment.

A bill in equity will not lie to restrain one from interfering with complainant's possession as owner of premises when defendant's claim is that of a riparian owner; the remedy is at law. And the dismissal of such bill will not prejudice complainant as to any rights that have not been put in issue and adjudicated. Peters v. Hansen etc. R. Co., 55 Mich. 276.

The giving of a delivery bond by an execution debtor, does not prevent or estop him from scheduling the property and suspending the sale; but equity will not enjoin the sale of it under an execution on the delivery bond, because

the owner may have an adequate remedy at law for the injury done him by the sale. Where the remedy at law is adequate, equity will not interfere to enjoin the sale of personal property. Jacks v. Bigham, 36 Ark. 48.

Removing Fences from an Alleged Highway.—Where a party, claiming to act as a road commissioner, had removed complainant's fences a considerable number of times, claiming they were obstructions to a public road, and had said he would remove them as often as replaced, and he had no property subject to execution, and the proofs failed to show the road was in fact located over the place in dispute, it was *held* that the case fell within the exception to the general rule, and that a court of equity had jurisdiction to enjoin the defendant from again removing such fences, for the reason that there was no adequate remedy at law, and to prevent multiplicity of suits. Owens et al. v. Crossett, 105 Ill. 354.

Use of Street for a Railroad Switch.—A court of chancery has no jurisdiction to enjoin a railway company from the use of a public street of a city for a switch, under a permit from the city council, when the fee of the street is in such city, on the ground of injury to private property situate on such street. The party complaining, if he has any remedy, must seek it in a court of law. Mills v. Parlin, 106 Ill. 60.

Injunction Against Ejectment Suit.—One who claims the legal title to land under a will has no reason for resorting to equity to restrain an action of ejectment against him, except when the common law is inadequate to give full relief. Shaw v. Chambers, 48 Mich. 355. Injunction may sometimes be sought to restrain a suit at law where the latter only involves a portion of the controversy, or is likely to leave an apparent record title clouding the legal title in issue. Eaton v. Trowbridge, 38 Mich. 454. A mere equitable estoppel is not needed to aid a legal title; proof of equities becomes important when the legal title is defective, or where it is proposed to assail it. Shaw v. Chambers, 48 Mich. 355.

Injunction Against Officer.—Plaintiff, claiming to be the duly elected, qualified and acting county attorney of Saline county, brings his suit in this court, against the defendant, to obtain a judgment prohibiting him from exercising or attempting to exercise any power or duty of the office of such county at-

using.¹ To authorize the interposition of a court of equity, the controversy must involve some equitable right, interest or estate, so that a full and complete determination of the matters in issue cannot be had at law. *Where, however, the subject-matter is*

torney, and asks for a restraining order pending the suit. On motion of the defendant to dismiss the action, *held* that this court has no jurisdiction of the subject matter, or power to grant the relief demanded, and that such action cannot be maintained in this court. *Foster v. Moore*, 32 Kan. 483.

Quo Warranto.—Where title to office is the point in controversy, the remedy is not by injunction, but at law, by information in the nature of *quo warranto*. *Kilpatrick v. Smith*, 77 Va. 347.

Illustrations.—A bill in equity which alleges that complainant, a citizen of Florida, is part owner with other parties named, citizens of Louisiana, of a steam pilot boat, on which are employed branch pilots duly licenced; that respondents had confederated together to destroy said business and property by publications in newspapers, by instituting suits, by seeking injunctions, and in divers other ways; and that they had agreed together not to do business as branch pilots with any persons other than those included in the "confederation—and which prays for a perpetual injunction to restrain the defendant from interfering with the rights of the complainant, his pilot boat and his business—furnishes no ground for the interposition of a court of equity, as complainant has adequate remedies at law for each and all the acts complained of. *Francis v. Flinn*, 118 U. S. 385.

And in *Karrer v. Berry*, 44 Mich. 391, an injunction bill was filed to restrain certain defendants from closing up premises which complainants claimed the right to use as a street.

The bill alleged, in substance, that in September, 1859, one R, who is also made defendant, being the owner and actual possessor of certain land, conveyed it to complainant, bounding it as on the south side of G street, which did not reach the land conveyed, but which R expressed the intention of opening through the premises afterwards obstructed by defendants; that complainants had bought relying on such extension, and said R had aided in preparing the premises for a highway: that defendants hold land on

the north side of these premises under a mortgage from R, dated in December, 1859, and recognizing the proposed extension of G street; and that they had erected a small brick office which stands partly on the premises, and for the removal of which complainants ask. *Held*, that the bill sufficiently alleges the ownership of R and the source of the other defendants' title to be sustained at least, unless specially demurred to; and that a court of equity could require the destruction or removal of the building under the circumstances, there being no adequate remedy at law.

But in Missouri an injunction may be resorted to under Revised Statutes 1879, § 2722, notwithstanding there may be an adequate remedy at law for the injury, in all cases where such adequate remedy cannot be afforded by an action for damages as such. *Towne v. Bowers*, 81 Mo. 491. Compare *Bullitt v. Songster*, 3 Munf. (Va.) 55.

The mere existence, however, of a remedy at law is not in itself sufficient ground for refusing relief in equity by injunction, nor does the existence or nonexistence of a remedy at law afford a test as to the right to relief in equity. To deprive a plaintiff of the aid of equity by injunction it must also appear that the remedy at law is plain and adequate: in other words, that it is as practical and efficient to secure the ends of justice and its proper and prompt administration as is the remedy in equity. And unless this is shown, a court of equity may lend its extraordinary aid by injunction notwithstanding the existence of a remedy at law. *Watson v. Sutherland*, 5 Wall. (U. S.) 74; *Irwin v. Lewis*, 50 Miss. 363; *La Mothe v. Fink*, 12 Chicago Leg. N. 152; *Boyce's Exrs. v. Grundy*, 3 Pet. (U. S.) 210.

Statutory Remedy.—Where statutory remedy exists for the redress of particular grievances, a court of equity will not interfere by injunction and assume jurisdiction of the question. *Brown's Appeal*, 66 Pa. St. 155; *Hornesby v. Burdell*, 9 S. Car. 303.

1. *Hendrickson v. Hinckley*, 17 How. (U. S.) 443; *Walker v. Robbins*,

within the jurisdiction of the court, objections to the jurisdiction must be made at the earliest opportunity, otherwise they will be waived.¹

7. Concurrent Jurisdiction.—In cases of concurrent jurisdiction, proceedings at law will not be interfered with by a court of chancery, unless that court can give a more perfect remedy, or the case can be better tried by the procedure of that court.²

8. Causes Retained for Full Relief.—Where a court of equity has

14 How. (U. S.) 584; *Johnson v. Lyon*, 14 Iowa 431; *Holmes v. Strateler*, 57 Ill. 209; *Vennum v. Davis*, 35 Ill. 568; *Hinrichsen v. Van Winkle*, 27 Ill. 334; *M. E. Church v. Baltimore*, 6 Gill (Md.) 391; *Brandon v. Green*, 7 Humph. (Tenn.) 130; *Gibson v. Moore*, 22 Tex. 611; *Chadoin v. Magee*, 20 Tex. 476; *Powell v. Chamberlain*, 22 Ga. 123; *Glendenning v. Ansley*, 52 Ga. 347; *Wright v. Fleming*, 12 Hun (N. Y.) 469; s. c., 76 N. Y. 517; *Bell v. Romaine*, 30 N. J. Eq. 24; *New York etc. Telephone Co. v. East Orange*, 42 N. J. Eq. 490; *Kemp v. Tucker*, L. R., 8 Ch. App. 369; *Neville v. Wilkinson*, 1 Bro. C. C. 543; *Gray v. Mathias*, 5 Ves. 286; *Money v. Jordan*, 2 De G. M. & G. 318; *Duckworth v. Duckworth*, 35 Ala. 70; *Windwart v. Allen*, 13 Md. 196; *Lyday v. Double*, 17 Md. 188; *Katz v. Moore*, 13 Md. 566; *Creath v. Sims*, 5 How. (U. S.) 192; *Marine Ins. Co. v. Hodgson*, 7 Cranch (U. S.) 332. In the latter case it was held that a legal defence actually made at law was not ground for an injunction, although the court may be of the opinion that the defence should have prevailed; the remedy in such case evidently is by review in an appellate court. *Barker v. Elkins*, 1 Johns. Ch. (N. Y.) 465. In this case the defendant had not used due diligence in making his defence at law, or applying to the court for a discovery.

A party cannot be enjoined from prosecuting suits for claims, whether well founded or not. The intimation that a party fears that he may not obtain justice before a particular judicial officer, or that he should be sued in a court of higher jurisdiction, is no ground for an injunction. *Butcher's etc. Assoc. v. Cutler*, 26 La. An. 500.

1. *Nicholson v. Pim*, 5 Ohio St. 25; *Ludlow v. Simond*, 2 Cal. Cas. (N. Y.) 1; *Burden v. Stein*, 27 Ala. 104; *Sedam v. Williams*, 4 McLean (U. S.) 51; *Russ v. Wilson*, 22 Me. 207; *New York*

v. Mapes, 6 Johns. Ch. (N. Y.) 46; *Waterbury v. Dry Dock etc. R. Co.*, 54 Barb. (N. Y.) 388; s. c., 32 How. (N. Y.) Pr. 193; *People v. Harlem Bridge Co.*, 1 Abb. (N. Y.) Pr. N. S. 169; *Gransend v. Hoffman*, 1 Abb. L. J. 99; *Muir v. Howell*, 37 N. J. Eq. 39. Compare *Water Lot Co. v. Bucks*, 5 Ga. 315; *Grey v. Ohio etc. R. Co.*, 1 Grant (Pa.) Cas. 412; *Fuller v. Melrose*, 1 Allen (Mass.) 166; *Pillow v. Thompson*, 20 Tex. 206; *Callaway v. Alexander*, 8 Leigh (Va.) 114.

Where land has been "let on shares," and the landlord has duly demanded of the renter or cropper the delivery of his share of the crops, which has been refused, and such cropper threatens to, and is about to, appropriate the whole crop to his own use, and sell and dispose of the same, held sufficient to entitle the landlord to equitable relief by injunction restraining the renter from disposing of the former's share of the crops, and by the appointment of a receiver to take possession of the crops and divide them between the parties; at least, where the renter is insolvent, or has no tangible property out of which a judgment could be collected. *Schmitt v. Cossilius*, 31 Minn. 7.

Persons Beyond Jurisdiction.—The jurisdiction of State courts is only coextensive with the limits of the State, and they cannot send their process for service into other States and jurisdictions for any purposes whatsoever. *Western Union T. Co. v. Pacific & A. T. Co.*, 49 Ill. 90. Nor will equity attempt by injunction to restrain defendant who has not been served with process, and who is not subject to the jurisdiction of the court, from performing some act beyond the State, even though there has been constructive service by publication as to such defendant. *Hazlehurst v. Savannah G. & N. A. R. Co.*, 43 Ga. 13.

2. *Ochsenbein v. Papelier*, L. R., 8 Ch. App. 695; *Hoare v. Bremridge*, L. R., 14 Eq. 522; s. c., L. R., 8 Ch. App.

gained jurisdiction for one purpose it may retain the cause and administer full relief.¹ And the defendant has a right in such case, upon filing a cross-bill for that purpose, to ask the court for full relief.²

While the general rule is that the court of equity will not grant an injunction in any case where relief can be obtained by an ordinary action, yet where the remedy at law is not efficient and complete, the aid of equity in a proper case may be invoked to enjoin the proceedings.³

9. Parties.—An injunction is never granted against one not a party to the suit.⁴

Where the bill is multifarious because of joining plaintiffs whose title and right to relief are wholly distinct and disconnected, the injunction may be properly refused on that ground alone.⁵ So where the parties interested are numerous, and it is impracticable to bring them all before the court, and they have a common interest in the subject of the litigation, one of them may prosecute an action for the benefit of all, to enjoin the consummation of the fraud.⁶ The fact that a necessary party defendant has been

22; *Hayes v. Hayes*, 2 Del. Ch. 191.

1. *Oliver v. Pray*, 4 Ohio 175.

2. *Fithian v. Corwin*, 17 Ohio St. 118.

3. *West Point Iron Co. v. Reymert*, 45 N. Y. 703; *Crane v. McCoy*, 1 Bond (U. S.) 422.

4. *Fellows v. Fellows*, 4 Johns. (N. Y.) Ch. 25. "I find," said LORD ELDON, "the court has adhered very closely to the principle that you cannot have an injunction except against a party to the suit." *Iveson v. Harris*, 7 Ves. 257; *State v. Anderson*, 5 Kan. 90; *Schalk v. Schmidt*, 1 McCart. (N. J.) 268. There are some exceptions to this rule, as where the act sought to be enjoined affects the public at large. *Atty. Gen. v. Compton*, 1 Y. & C. Ch. 417; *Atty. Gen. v. Lea*, 3 Ired. Eq. (N. Car.) 302; *Solton v. De Held*, 2 Sim., N. S. 150. Or where a purchaser under a decree in equity is acting contrary to the decree. *Cassamajor v. Strod*, 1 Sim. & St. 381. Or while the suit in equity is pending certain parties seek to proceed at law upon the same subject matter. *Harrison v. Gurney*, 2 Jac. & W. 563; *Wedderburn v. Wedderburn*, 2 Beav. 208; *Hartlepool Co. v. West Hartlepool*, 12 L. T., N. S. 366. The court may proceed against such defendants as have been served with process, although others are not yet served. *Brown v. Pac. etc. Co.*, 5 Blatchf. (U. S.) 525.

5. *Moore v. Hill*, 59 Ga. 760.

A court of equity has no jurisdiction to enjoin proceedings on a *mandamus*, where the parties seeking redress by such proceedings are not the plaintiffs in equity. *Finegan v. Ferdinandina*, 18 Fla. 127.

If there is a misjoinder of parties plaintiff, it is competent for one to dismiss the action as to himself, and such dismissal would not dissolve the injunction or render the filing of an amended petition necessary. *Hanks v. North*, 58 Iowa 396.

6. *Palo Alto Banking etc. Co. v. Mahar*, 65 Iowa 74, following *Brankirff v. Harrison Co.*, 50 Iowa 164; *Fleming v. Mereshon*, 36 Iowa 413, distinguished. In *Brankirff v. Harrison County*, 50 Iowa 164, in an opinion concurred in by all the justices, the court announced the doctrine, holding that an action to restrain the collection of a tax could be jointly prosecuted by several tax payers. It cannot be denied that in a case wherein parties may jointly sue, one may prosecute an action for the benefit of others having a common interest. One property holder may maintain a suit on behalf of himself and others similarly situated to restrain the execution of an ordinance illegally passed for the improvement of a street at the expense of said property holders. *Dennison v. Kansas (Mo.)*, 8 S. W. Rep. 429; *Mozley v. Alston*, 1 Ph. 790.

omitted from a bill for an injunction will not of itself justify the court in granting a dissolution.¹

Separate trespassers may be enjoined in one ejectment suit from committing waste.² But cotenants need not join in a suit to enjoin the diversion of water.³ Nor a mere agent should not be made a party.⁴

In a bill to enjoin issuance of municipal bonds, persons to whom bonds are to be issued are necessary parties defendant.⁵ In suit to enjoin supervisors, a majority of members must be made parties.⁶ And joint participants in fraudulent acts may be joined as defendants.⁷ If a defendant is not liable to be enjoined, he cannot be made liable by joining him as a defendant.⁸

(a) *Judgments at Law*.—Where an injunction is asked against a judgment at law, all the plaintiffs who have obtained the judgment must be made defendants in the injunction suit.⁹

(b) *Officers of Court*.—It is incorrect practice to make a sheriff or other officer, who has an execution in his hands for collection, defendant in a bill to enjoin a judgment upon which the execution issued.¹⁰

1. *Morgan v. Rose*, 7 C. E. Green (N. J.) 583.

Sale of Real Estate.—In a bill by an administrator to enjoin a sale of real estate by a trustee on the ground that the debt has been paid by the debtor in his lifetime, the heirs of the grantor are necessary parties. *Stewart v. Jackson*, 8 W. Va. 29.

Parties Not Served with Notice.—As to defendants to a bill who have not been served with notice, and who have not appeared, a mandatory injunction will not issue on motion, but "if there appears to be danger of irreparable injury from delay," within the meaning of Rev. St. U. S., § 718, a restraining order, to be served on said defendants, with notice of the time and place of hearing, will be granted. *Chicago etc. R. Co. v. Burlington etc. R. Co.*, 34 Fed. Rep. 481.

Fraudulent Conspiracy.—One who is about to receive a conveyance of land, in consummation of a conspiracy to defraud the true owner thereof, is a proper party defendant to an injunction suit to defeat the conspiracy. *Palo Alto Banking etc. Co. v. Mahar*, 65 Iowa 74.

2. *Curtis v. Sutter*, 15 Cal. 260.

3. *Lytle Creek W. Co. v. Perdew*, 65 Cal. 447.

4. *Buffandeau v. Edmondson*, 17 Cal. 437.

5. *Hutchinson v. Burr*, 12 Cal. 103.

6. *Trinity County v. McCammon*, 25

Cal. 117; *Andrews v. Pratt*, 44 Cal. 309.

7. *Crane v. Hirshfelder*, 17 Cal. 467; *Andrews v. Pratt*, 44 Cal. 309.

8. *Keyes v. Little York etc. Co.*, 53 Cal. 724.

9. *Berry v. Berry's Heirs*, 3 Mont. 263. See *Webster v. Skipwith*, 26 Miss. 341; *Dunn v. Clarke*, 8 Pet. (U. S.) 1. See *New York v. Connecticut*, 4 Dall. (U. S.) 1; *Chamblin v. Schlichler*, 12 Minn. 276; *Pentney v. Lynn*, *Paving Comrs.*, 13 W. R. 983.

Where proceedings under a judgment are enjoined, it is highly improper to make the sheriff and constable defendants. *Olin v. Hungerford*, 10 Ohio 268; *Edney v. King*, 4 Ired. (N. Car.) Eq. 465; *Lackay v. Curtis*, 6 Ired. (N. Car.) Eq. 19. But see, *contra*, *Burke v. Smith*, *Walk.* (Mich.) 327.

But if there be fraudulent combination between the sheriff and judgment creditor, it may be proper to make the sheriff a party. *Olin v. Hungerford*, 10 Ohio 269. But owners of several judgments cannot be joined as defendants to restrain sale under each. *Gates v. Lane*, 44 Cal. 382.

10. *Buffandeau v. Edmondson*, 17 Cal. 437; *Allen v. Medill*, 14 Ohio 445; *Edney v. King*, 4 Ired. Eq. (N. Car.) 465; *Lackay v. Curtis*, 6 Ired. (N. Car.) 199; *Olin v. Hungerford*, 10 Ohio 268; *contra*, *Burke v. Smith*, *Walk.* (Mich.) 327.

Where there is a fraudulent combina-

Violation of Public Duty by Officers.—Where a public duty about to be violated by public officers is public in its nature and effects, one not suffering any special injury cannot maintain a bill to enjoin the violation, but the remedy must be sought by the public through its proper officer.¹

(c) *Easements.*—Suit to enjoin the doing of acts from which irreparable damage may be done to an easement must be brought by persons injured in their individual rights.²

(d) *Public Nuisances.*—A public nuisance may be enjoined by the corporate authorities of a town.³ A bill in equity by a private individual for an injunction will not be sustained unless it shows a particular injury, distinct from that which he suffers in common with the rest of the public.⁴

tion between the officer barring the execution in his possession and the judgment creditor, or where the officer is charged with being an active agent in the commission of the fraud, on account of which the judgment is impeached, such officer should be joined as a proper party to the action. *Allen v. Medill*, 14 Ohio 445.

Suits Against the State.—Gantt's Digest does not prohibit chancery courts from enjoining individuals assuming to act in behalf of the State and as State officers, from acts not authorized by law, and which are productive of irreparable mischief. *Crawford v. Carson*, 35 Ark. 565.

1. *Seager v. Kankakee Co.*, 102 Ill. 669.

A board of supervisors will not be enjoined from issuing a licence to keep a dram shop in violation of law, on a bill by a private citizen, who will sustain no greater injury than the public generally by the act sought to be prevented. The only remedy in such case is on the application of the proper public officers of the State on behalf of the public. *Seager v. Kankakee Co.*, 102 Ill. 669.

2. *Smith v. Heuston*, 6 Ohio 101; *Brown v. Manning*, 6 Ohio 298.

Surveyors of a public road cannot have an injunction to prevent obstructing a public road. *Putnam v. Valentine*, 5 Ohio 187.

Individual holders of lots around a square conveyed to the county for the use of public buildings and a court house, have not such individual interest in the ground as will authorize chancery on their application to enjoin county commissioners from leasing portions of the ground to individuals reserving rent to the county. Such persons have no

right to proceed in chancery to enforce the public right to such ground. *Smith v. Heuston*, 6 Ohio 101. But individual owners of adjacent lots may proceed in equity to enjoin proprietors from making private appropriations of a square dedicated for public purposes. *Brown v. Manning*, 6 Ohio 298.

When the right involved is purely of a public nature the proceeding for injunction is usually instituted by the attorney general. *Atty. Gen. v. Compton*, 1 Y. & C. Ch. 417; *Atty. Gen. v. Lea's Heirs*, 3 Ired. (N. Car.) Eq. 302; *Eason v. Perkins*, 2 Dev. (N. Car.) Eq. 38.

A bill to enjoin an alleged obstruction of a township public road may, however, be maintained in the name of the township, and it is not necessary that the commonwealth, at the instance of the attorney general, should be made a party to the suit. *Appeal of Township of North Manheim (Pa.)*, 14 Atl. Rep. 137; *People v. Vanderbilt*, 28 N. Y. 396; *Atty. Gen. v. Richards*, 2 Anst. 602.

3. *Watertown v. Cowen*, 4 Paige (N. Y.) 510; *Mayor v. Bolt*, 5 Ves. 129. Where lands are dedicated to the use of the inhabitants of an incorporated village or city for a public square, a bill might be filed in the name of the corporation to restrain the erection of a nuisance thereon or to protect the equitable right of the corporators to the use of the public square as such, and the owner of a lot adjoining the square, who was specially injured by the nuisance might unite in the action. *Williams v. Smith*, 22 Wis. 600.

4. *O'Brien v. Norwich etc. R. Co.*, 17 Conn. 371; *Biglow v. Hartford Bridge Co.*, 14 Conn. 565; *Frink v. Lawrence*, 20 Conn. 117; *Corning v. Lowerre*, 6

10. Where Legal Rights of Parties in Dispute.—Where the object of the suit is a perpetual injunction, and there is a controversy as to the legal rights of the parties, the relief will be denied until the right is established at law. In other words, where equitable relief by way of injunction is sought in aid of a legal right, the court, unless such right is clear, will not, except with the consent of both parties, declare the legal right and grant a perpetual injunction founded on such declaration, but will require the question to be tried at law.¹

Johns. (N. Y.) Ch. 439; Doolittle v. Broome Co., 18 N. Y. 160; Allen v. Board, 1 Beas. (N. J.) 68; Hinchman v. Paterson H. R. Co., 2 C. E. Green (N. J.) 75; Mechling v. Kittanning Bridge Co., 1 Grant's Cas. (Pa.) 416; Beveridge v. Lacey, 3 Rand. (Va.) 63; Walker v. Shepardson, 2 Wis. 384; Barnes v. Racine, 4 Wis. 454. See Andrews v. Pratt, 44 Cal. 309.

A and B were owners of contiguous lots of land, bounded on the easterly side by a harbor; A's lot lying south of B's. A owned a wharf extending from his land into the harbor, at the farther end of which was a short wharf at right angles with the principal one the whole being in the form of a \perp . This wharf on the north side of it, where vessels principally lay, was a safe and convenient one and much resorted to. B was about driving a connected row of piles from the southeast corner of his land to the northeast end of A's wharf, in such a manner as to entirely obstruct the passage of vessels from the waters of the harbor to the north side of A's wharf, which would greatly impair the value of his property. This obstruction was not contemplated by B as part of a wharf which he intended to construct adjoining his land. On a bill in equity, brought by A against B to restrain him from making such obstruction, it was held that A was entitled to the relief sought. Frink v. Lawrence, 20 Conn. 117.

1. Council v. Rivers, 65 N. Car. 54; Faison v. McIlwaine, 75 N. Car. 312; Chambers v. Penland, 78 N. Car. 53; Lord v. Beard, 79 N. Car. 55; Murrill v. Murrill, 84 N. Car. 182; Parker v. Bledsoe, 87 N. Car. 221; Mammoth Vein Coal Co.'s Appeal, 54 Pa. St. 183; Perry v. Parker, 1 Woodb. & M. (U. S.) 280; Mayor v. Cardiff Water Works Co., 4 De Gex & J. 596; New York v. Mapes, 6 Johns. (N. Y.) Ch. 46; Bruce v. Delaware etc. Canal Co., 19 Barb. (N. Y.) 371; Gravesend v. Hoff-

man, 1 Alb. L. J. 99; New York Printing and Dying Establishment v. Fitch, 1 Paige (N. Y.) 97; People v. Harlem Bridge Co., 1 Abb. (N. Y.) Pr., N. S. 169 n.; Dry Dock East Broadway etc. R. Co. v. N. Y. etc. R. Co., 54 Barb. (N. Y.) 388; s. c., 32 How. (N. Y.) Pr. 193. In Roath v. Driscoll, 20 Conn. 539, the court say: "Whenever the right is doubtful, or needs the investigation of a jury upon facts in dispute, a court of equity is always reluctant to interpose its summary authority; for it is rather the duty of the court to protect *acknowledged rights*, than to establish new and doubtful ones." See also Cheever v. Rutland etc. R. Co., 39 Vt. 653; Murdock's Case, 2 Bland (Md.) 461; Burnham v. Kempton, 44 N. H. 78; Cummings v. Barrett, 10 Cush. (Mass.) 186; Eastman v. Manfg. Co., 47 N. H. 71. In Roskell v. Whitworth, L. R., 5 Ch. App. 459, it is said: "Where the defendant makes the application for a trial at law by an independent motion, after the disclosure of the plaintiff's evidence, the court will require strong proof that the case is one which the court itself cannot satisfactorily try."

To entitle the plaintiff to an injunction protecting his property, while the decision of his legal title is pending, he must state facts showing a strong *prima facie* case in his favor, that he has not been guilty of great delay in applying for the relief sought. Del. & Rar. Canal and C. & A. R. T. Co. v. Rar. & Del. Bay R. Co., 1 C. E. Green 380; Russ v. Wilson, 22 Me. 211; Pillow v. Thompson, 20 Tex. 206; Tash v. Adams, 10 Cush. (Mass.) 252; Fuller v. Melrose, 1 Allen (Mass.) 166; Grey v. Ohio etc. R. Co., 1 Grant Cas. (Pa.) 416; Briggs v. Smith, 5 R. I. 213; Phelps v. Peabody, 7 Cal. 50; Little v. Price, 1 Md. Ch. 135; Sheldon v. Rockwell, 9 Wis. 167; Peabody v. Flint, 6 Allen (Mass.) 52; Senior v. Pawson, L. R., 3 Eq. 330. In Atty.

Gen. v. Eastlake, 11 Hare 205, the vice chancellor *held* that in cases of waste, and the like, mere delay in applying for relief would not preclude the parties aggrieved from obtaining an injunction. In granting an injunction to protect property of a party pending the decision of his legal title, the court will consider the inconvenience to which the defendant will be subjected, and also the expense in case he is found to be in the right. So, the inconvenience, loss or injury to which the plaintiff would be subjected in case the injunction was refused, should be considered. *Wason v. Sanborn*, 45 N. H. 169; *Wilcox v. Wheeler*, 47 N. H. 488; *Bassett v. Manfg. Co.*, 47 N. H. 426; *Ingraham v. Dunnell*, 5 Met. (Mass.) 126; *Hart-ridge v. Rockwell*, R. M. Charlt. (Ga.) 260; *Read v. Dews*, R. M. Charlt. (Ga.) 358; *Atty. Gen. v. Ely*, H. & S. R. Co., B. L. R., 6 Eq. 106.

In *Thornton v. Grant*, 10 R. I. 477, it was *held* that an injunction will not be granted to prevent the erection of a wharf in tide-waters, unless it appears that the party petitioning will be materially and substantially injured by such erection.

In *Torrey v. Camden etc. R. Co.*, 18 N. J. Eq. 293, the court said that an injunction will not be granted where it would cause great injury to the defendant, and might be a serious detriment to the public, without corresponding benefit to the complainant. See also *Mayne v. Fairhaven*, 8 Cush. (Mass.) 653; *Atty. Gen. v. Lunatic Asylum*, L. R., 4 Ch. App. 146; *Salem v. Eastern R. Co.*, 98 Mass. 431; *Hart v. Albany*, 3 Paige (N. Y.) 213; *Chesapeake etc. Co. v. Young*, 3 Md. 480.

An injunction will not be granted where the matter is involved in another pending suit between the same parties, in which relief can be there had. A party in such case is not allowed to seek redress from the action of one court through the conflicting action of another court, or in a different and distinct proceeding in the same court. *Grant v. Moore*, 88 N. Car. 77; *Murrill v. Murrill*, 84 N. Car. 182; *Chambers v. Penland*, 78 N. Car. 53; *Parker v. Bledsoe*, 87 N. Car. 221.

Where the marshal of a city had been directed by the city government to remove, as unlawful obstructions in a highway, a fence and a storm door in front of plaintiff's dwelling house in said city; *held*, that equity would not interfere by perpetual injunction before

plaintiff's right was established at law, the case not being one in which he would suffer any irreparable or very considerable injury, or one which could not be readily and speedily repaired, and compensated by damages. *Wilson v. Mineral Point*, 39 Wis. 160, distinguished; *Smith v. Oconomowoc*, 49 Wis. 694; *Sheboygan v. Sheboygan etc. R. Co.*, 21 Wis. 667. See also *Judd v. Town of Fox Lake*, 28 Wis. 583.

But an injunction will be granted until the hearing, where the plaintiff alleges irreparable injury and makes out an apparent case. *Marshall v. Commrs. of Stanley Co.*, 89 N. Car. 103; *Newall v. Staffordville Gravel Co. (N. J.)* 11 Cent. R. 606.

In the words of LORD CRANWORTH, in *Shrewsbury etc. R. Co. v. Shrewsbury etc. R. Co.*, 1 Sim. (N. S.) 410: "Where the alternative is interference or probable destruction of the property, there, of course, the court will be ready to lend its immediate assistance, even at considerable risk that it may be encroaching on what may eventually turn out to be a legal right of the defendant." But the court will not interfere where the only injury likely to result to the complainant, if it refuses to act, is that he may be retarded or embarrassed in the litigation.

A defendant claimed that a condition in a deed, which authorized his grantors to enter on complainant's lands and avoid a grant of a right to use certain water in case of the non-payment of the water rent, had been broken, and all of complainant's claim or right to the water thereby forfeited, and that therefore he was justified in cutting off or diverting the water from complainant's mill. The complainant claimed that, although the question whether it had been forfeited or not had not been settled at law, yet the defendant's deed contained a reference to the prior grant of the water under which complainant claimed, and therefore defendant had actual notice thereof; and further, that even if there might have been a forfeiture for want of prompt payment of the water rent, the defendant or his grantors had waived that forfeiture by accepting such rent afterwards, and further, that the injury to the mill by the diversion or deprivation of the water would be irreparable. *Held*, that complainant was entitled to an injunction to prevent the threatened injury. *Fulton v. Greacen*, 36 N. J. Eq. 216.

11. Equitable Interests.—Where the matter in controversy, although of a legal character, involves an equitable interest, right or estate, a complete determination of which cannot be had in a court of law, the party in whom the equitable right or estate is vested may invoke the aid of a court of equity to decide the whole controversy, and if need be, enjoin an action at law.¹

The complainant claimed the franklinite ore in certain land known as the northerly half of Mine Hill, under deeds made, one in 1848 and the other about a year afterwards. The defendant, Trotter, also claims that ore as lessee of a person who claims under a deed of the same grantor made in 1848. The complainant's deeds did not include the land in question in the description, though it says it was intended that the description should embrace those premises, and the bill is filed for rectification of the description so as to include the premises in dispute. The complainant, and those under whom it claims, had possession of the land from 1848 up to September, 1882, when Trotter took possession and fenced it out. In 1881 he recovered damages against the complainant's grantor in a federal court, in trespass, for taking franklinite from the property, and shortly afterward the complainant's grantor filed a bill in a federal court for rectification of the description, and applied for an injunction to restrain Trotter from mining the franklinite, which was denied. On motion for injunction in this suit to restrain Trotter from mining, *held* that an injunction should be allowed to preserve the property in question *pendente lite*. New Jersey etc. Co. v. Trotter, 38 N. J. Eq. 3.

1. In order to invoke this relief the equitable defence must apply to the entire cause of action. The doctrine of the text is ably discussed by CHANCELLOR KENT in *Fanning v. Dunham*, 5 Johns. (N. Y.) Ch. 122. See also *Skinner v. White*, 17 Johns. (N. Y.) 357; *Varick v. Edwards*, Hoff. (N. Y.) Ch. 382; *Hibbard v. Eastman*, 47 N. H. 507; *Ross v. Harper*, 99 Mass. 175; *Armstrong Co. v. Brinton*, 47 Pa. St. 367; *White v. Crew*, 16 Ga. 416; *Pollock v. Gilbert*, 16 Ga. 398; *Frith v. Roe*, 23 Ga. 139; *Haescig v. Brown*, 34 Mich. 503; *Detroit etc. R. Co. v. Brown*, 37 Mich. 533; *Scriven v. Hursh*, 39 Mich. 98; *Wyckoff v. Victor*, 43 Mich. 309; *Greenlee v. Gaines*, 13 Ala. 198; *Jones v. Slubey*, 5 Har. & J. (Md.) 372; *Hill v. Billingsly*, 53 Miss. 111; Texas

L. Co. v. Turman, 53 Tex. 619; *Franks v. Morris*, 9 W. Va. 664; *Aylesford v. Morris*, L. R., 8 Ch. App. 484; *Tredegar v. Wondus*, L. R., 19 Eq. 607; *Crofts v. Middleton*, 8 De G. M. & G. 192; *Scott v. Burton*, 2 Ashm. (Pa.) 312; *Kean v. Colt*, 1 Hals. (N. J.) Ch. 365; *Commonwealth v. Pittsburgh etc. R. Co.* 24 Pa. St. 159; *Erwin v. Fulk*, 94 Ind. 235; *Kyle v. Koscius Co.*, 94 Ind. 115; *New Albany v. White*, 100 Ind. 206.

Where there has been an attempted illegal annexation of territory to a city, and an attempt on the part of the city to interfere with property rights under such color of legal authority, injunction is the appropriate remedy. *Delphi v. Startzman*, 104 Ind. 343.

A bill which shows, however imperfectly, that complainant has had turned out to him a quantity of No. 1 iron ore, and that an assignee of the debtor has possession of it, and is mixing it with ore of inferior quality and shipping it, makes out an equitable case to which a general demurrer will not lie. A party in such a case cannot be turned over to a suit at law to recover damages from the wrong-doer, even though he may be solvent. *Glidden v. Norvill*, 44 Mich. 202.

Plaintiff alleged that he was surety on a note to defendant for the price of a horse; that defendant aided the principal to trade the horse for a mare, against plaintiff's objection; that plaintiff notified defendant to sue said note, both before and after maturity, and make his money out of the property, as the principal was insolvent; that afterwards the note was sued on and declaration served on plaintiff by leaving a copy at his residence during his absence, plaintiff having no notice of suit until after judgment; that defendant knew of plaintiff's absence, and designedly took advantage thereof; that execution had been issued and levied on plaintiff's property. *Held*, that plaintiff was not entitled to an injunction to restrain the enforcement of the judgment. *Hamer v. Sears* (Ga.). 6 S. E. Rep. 810.

12. Laches.—A court of equity requires reasonable diligence on the part of those seeking its aid, and discourages laches by making it a bar to relief, therefore a plaintiff on filing his bill for an injunction must make it appear that he has used reasonable diligence in invoking the aid of the court, otherwise the relief will be denied.¹

And in *Hawley v. Beardsley*, 47 Conn. 571, an injunction was sought against the filling in by the respondents, who were adjoining owners to the petitioner, against the piles of the petitioner's wharf. The filling in was of much importance to the respondents, the sole injury was in the pressure against and partial displacement of the piles, the damage would not exceed \$300, which the respondents were of abundant ability to pay, and the injury could be prevented by the petitioner by an inconsiderable outlay. *Held*, that the injunction ought not to be granted.

1. Atty. Gen. *v. Sheffield*, 3 De G. M. & G. 304; *Dulin v. Caldwell*, 28 Ga. 117; *Griffin v. Augusta etc. R. Co.*, 70 Ga. 164; *Morris v. Edwards*, 62 Tex. 205; *Dana v. Valentine*, 5 Met. (Mass.) 8; *Central R. Co. v. Standard Oil Co.*, 33 N. J. Eq. 127; *United Co. v. Standard Oil Co.*, 33 N. J. Eq. 123; Atty. Gen. *v. Utica Ins. Co.*, 2 Johns. Ch. (N. Y.) 379; *Van Bergen v. Van Bergen*, 3 Johns. Ch. (N. Y.) 282; *Reid v. Gifford*, 6 Johns. Ch. (N. Y.) 19; *Bradfield v. Dewell*, 48 Mich. 9; *Hill v. Harris*, 51 Ga. 628; *Parker v. Winnispeogee etc. Co.*, 2 Black (U. S.) 545; *Burden v. Stein*, 27 Ala. 104; *Dibble v. Trueluck*, 12 Fla. 185; *Tarver v. McKay*, 15 Ga. 550; *Water Co. v. Bucks*, 5 Ga. 315; *Rogers v. Kingsbury*, 22 Ga. 60; *Vaughn v. Fuller*, 23 Ga. 366; *Cleckley v. Beall*, 37 Ga. 583; *Ramsey v. Perley*, 34 Ill. 504; *Titcomb v. Potter*, 11 Me. (2 Fairb.) 218; *Faulkner v. Campbell*, Morr. (Iowa) 148; *Miller v. McGuire*, Morr. (Iowa) 150; *Kriechbaum v. Bridges*, 1 Iowa 14; *Paynter v. Evans*, 7 B. Mon. (Ky.) 420; *Todd v. Fisk*, 14 La. An. 13; *Williams v. Jones*, 18 Miss. (10 Smed. & M.) 108; *Semple v. McGatagan*, 18 Miss. 98; *Bruner v. Planters' Bank*, 23 Miss. 514; *Shipp v. Wheelless*, 33 Miss. 646; *Jordan v. Thomas*, 34 Miss. 72; *Brandon v. Green*, 7 Humph. (Tenn.) 130; *Champion v. Miller*, 2 Jones (N. Car.) Eq. 194; *Vaughn v. Johnson*, 9 N. J. Eq. (1 Stock.) 173; *Schroeppel v. Shaw*, 3 N. Y. 446; *Sample v. Barnes*, 14 How.

(U. S.) 70; *Wynn v. Wilson*, Hempst. (U. S.) 698; *Gibson v. Moore*, 22 Tex. 611; *Fitzhugh v. Orton*, 12 Tex. 41; *Musgrove v. Chambers*, 12 Tex. 32; *Crawford v. Winfield*, 25 Tex. 414; *Kidwell v. Masterson*, 3 Cranch (U. S.) C. C. 52; *Wells v. Wall*, 1 Oreg. 295; *Grey v. Ohio etc. R. Co.*, 1 Grant Cas. (Pa.) 412; *Pensacola etc. R. Co. v. Jackson*, 21 Fla. 146; *Logansport v. La Rose*, 99 Ind. 117; *Brown v. Merrick Co. Commrs.*, 18 Neb. 355; *Dierks v. Martin*, 16 Neb. 120; *Fuller v. Melrose*, 1 Allen (Mass.) 166; *Russ v. Wilson*, 22 Me. 207; *Binney's Case*, 2 Bland (Md.) 99; *Sedam v. Williams*, 4 McLean (U. S.) 51; *Pillow v. Thompson*, 20 Tex. 206; *Callaway v. Alexander*, 8 Leigh (Va.) 114; *Northern Pac. R. Co. v. St. Paul etc. R. Co.*, 2 McCrary (U. S.) 260; *Jones v. Cameron*, 81 N. Car. 154; *American Dock and Imp. Co. v. School Trustees*, 35 N. J. Eq. 181; *Parker v. Spillin*, 10 Phila. (Pa.) 8.

This rule would be applicable in all cases where the plaintiff knowingly prevented the defendant to expend considerable sums of money in making the improvements or erections complained of. In *Smith v. Clay*, Ambli. 645, it is said: "A court of equity which is never active in relief against conscience or public convenience has always refused its aid to stale demands, where the party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence. When these are wanting the court is passive and does nothing."

Where the petition on its face does not show diligence on the part of the one asking for an injunction, it is not error to refuse the relief sought. *Morris v. Edwards*, 62 Tex. 205; *Nevins v. McKee*, 61 Tex. 412; *Contreras v. Haynes*, 61 Tex. 104; *Johnson v. Templeton*, 60 Tex. 238; *Schleicher v. Markward*, 61 Tex. 102; *Montgomery v. Carleton*, 56 Tex. 361; *Plummer v. Power*, 29 Tex. 14; *Snow v. Hawpe*, 22 Tex. 168; *Burnley v. Rice*, 21 Tex. 171; *Jones v. Ben-*

nett, 1 Bro. P. C. 528; Smith v. Whitmore, 1 H. & M. 576.

Where with the full knowledge and in the presence of the owner of land a chartered railroad company wrongfully or without lawful right enters upon and takes possession, destroying the fences and superstructures thereon, and builds a line of railroad and runs its cars over it, the owner making no objection other than that the amount of damages offered by the company is not satisfactory, and the owner of the land lies by for over nine months without attempting to prevent the taking possession and occupation by the company, a court of equity will not enjoin the company from continuing to run its cars over the road. The conduct of the owner amounts to an acquiescence in the construction of the road over his land, and the public have acquired rights upon such acquiescence which will not be interfered with by a court of equity by injunction. *Pensacola etc. R. Co. v. Jackson*, 21 Fla. 146; *Griffin v. Augusta etc. R. Co.*, 70 Ga. 164. See *Hentz v. L. I. R. Co.*, 13 Barb. (N. Y.) 646, 655; *Bassett v. Salisbury Manf. Co.*, 47 N. H. 426; *Goodin v. Cin. & W. Canal Co.*, 18 Ohio St. 169; *Easton v. N. Y. etc. R. Co.*, 24 N. J. Eq. 49; *Pickert v. Ridgefield Park R. Co.*, 25 N. J. Eq. 316, 323 (*cited* *Greenhalgh v. Manchester etc. R. Co.*, 3 Myl. & Cr. 784; s. c., 33 Beav. 290; 4 Railroad and Canal Cases, 69); *Atty. Gen. v. Del. etc. R. Co.*, 27 N. J. Eq. 631; *Meredith v. Sayre*, 32 N. J. Eq. 557; *Provolt v. Chicago etc. R. Co.*, 57 Mo. 256; *Pettibone v. La Crosse etc. R. Co.*, 14 Wis. 443, 447; *Sheldon v. Rockwell*, 9 Wis. 180; *Carson v. Coleman*, 3 Stock. (N. J.) 106. And it does not alter the case that complainant at the time when the lot was taken supposed the railroad company were entitled to enter and take the land under the statute. *Greenhalgh v. Manchester etc. R. Co.*, 3 Myl. & Cr. 784.

The general rule is, that if a corporation, having the right to take lands in the exercise of the power of eminent domain, enters upon them without making just compensation to the owner, a court of equity will intervene for the protection of the owner until such compensation is made; but the application must be seasonably made, the right to relief being lost by laches in seeking the protection of the court. *Western Union Tel. Co. v. Judkins*, 75 Ala. 428.

While the constitution of 1877 Ga. (Code, § 5024) provides that private property shall not be taken or damaged for public use unless just and adequate compensation be first paid, yet where a land owner permitted a railroad company to lay out and construct its road through his land, and appropriate timber thereon, without any objection until the road had been completed and equipped at large expense, his property forming but a small fraction thereof, he could not then enjoin the use of the entire road until his damages should be assessed and settled. One cannot stand by and suffer another to expend large amounts of money on his land as a part of a great system of improvement, and then stop by injunction the entire system until he is paid. *Griffin v. Augusta etc. R. Co.*, 70 Ga. 164.

Where the owner of a water power stands by, and, not objecting, permits a city, without first assessing and paying his damages, to erect works for a water supply by drawing water from the stream and thus diminishing his power, he creates an equitable estoppel, so that he will not be protected by injunction, but will be left to assert his rights at law. *Logansport v. Uhl*, 99 Ind. 531; s. c., 50 Am. Rep. 109.

The surety on a claim bond, after judgment of forfeiture, sought to enjoin the execution on the ground that the principal (which was a corporation) never executed the bond, but that its name was signed thereto without authority. The surety made no effort for eight months to ascertain whether the attorney who assumed to represent the principal had authority; his co-surety was dead; the residence of the corporation was in a distant State, and the surety took no steps to defend against proceedings on the bond. *Held*, that he was not entitled to injunction. *Clegg v. Darragh*, 63 Tex. 357.

Where the annexation proceedings are of doubtful legality, or even clearly illegal, if the residents and property owners of the annexed territory are guilty of laches and neglect in asserting their legal rights, and acquiesce for a number of years in the validity of such annexation, during which time they voted for city officers, and were represented in the common council of the city by councilmen of their own selection, and by their action and the votes of their representatives large debts were contracted by the city for its improvement, in all the benefits of which they

13. Real Property.—The proper office of the court, upon an application for an injunction affecting the title to real estate, is not to ascertain the existence of a legal right, but solely to protect the property until that right can be determined by the jurisdiction to which it properly belongs.¹ So an injunction will be

shared, such long-continued acquiescence in such annexation constitutes a complete equitable defence in bar of this suit to enjoin the collection of the city taxes, assessed against the property so annexed in a court of equity. *Logansport v. La Rose*, 99 Ind. 117.

To justify resort to a court of equity to stay the collection of public revenues, the party must make a case strictly within the bounds of equity jurisdiction—an injury otherwise not remediable; and he must seek and prosecute his remedy with promptitude. *American Dock etc. Co. v. School Trustees*, 35 N. J. Eq. 181.

An act of the legislature providing a stock law for a county, enacted that upon the written petition of a majority of the registered voters of certain townships, presented to the commissioners and justices at their regular joint meeting in June, 1885, they might, by resolution, suspend the operation of the act in such townships. The registered voters of some of these townships prepared the petitions and sent them to the joint meeting, but on account of some disorder in the meeting it adjourned without acting on them, and the commissioners proceeded to build a common fence around the entire county. *Held*, first, that the petitioners had a right to be heard, and as this had been denied, another meeting should be called for that purpose, although the petitioners had unnecessarily delayed bringing their action. Second, that the words of the act do not make it obligatory on the justices and commissioners to exclude the townships on the filing of the petitions, but it is left to their discretion. Third, that the restraining order should not put a stop to the work on the fence altogether, but only on such portions as would interfere with the rights of the petitioning townships, if the meeting should conclude to exempt them from the operation of the act. *McNair v. Bucombe Co.*, 93 N. Car. 370; *Grady v. Comm.*, 74 N. Car. 101; *Bushman v. Comm.*, 80 N. Car. 121.

1. *Clayton v. Shoemaker*, 67 Md. 220; *Chesapeake etc. Co. v. Young*, 3

Md. 480; *Hart v. Mayor etc. of Albany*, 9 Wend. (N. Y.) 571; *Echelkamp v. Schrader*, 45 Mo. 505; *East etc. R. Co. v. East Tenn. etc. R. Co.*, 75 Ala. 275; *Smith v. Jameson*, 91 Mo. 31; *Benner v. Kendall*, 21 Fla. 584; *Gatewood v. Leak*, 99 N. Car. 375; *Esbridge v. Esbridge*, 51 Miss. 522; *Perry v. Parker*, 1 Woodb. & M. (U. S.) 280; *Pillsworth v. Hopton*, 6 Ves. 50; *Smith v. Collyer*, 8 Ves. 89.

The plaintiffs filed a bill in equity to restrain the defendant from erecting a house partly on ground claimed by the plaintiffs, and from using the wall of the plaintiffs' house as a party wall. The defendant resisted the application and set up a title in himself. On appeal from a decree of the court below, making the injunction perpetual, and thereby prohibiting the defendant from erecting his building, and requiring him to remove the building materials from the ground in dispute, and the joists, etc., inserted in the wall of the plaintiffs' house, it was *held*, that the court below erred in undertaking to determine the legal title in controversy, and in making the injunction perpetual. *Clayton v. Shoemaker*, 67 Md. 216.

Where land is levied on in execution, and claims are successively interposed and withdrawn, equity will restrain the claimant from withdrawing his claim, and the holder of the title from transferring the same, until the rights of the parties can be heard and adjudicated. *Fields v. Ralston*, 30 Ga. 79.

A bill was filed by purchasers for specific performance of a contract to sell land. The bill suggested that the bargainor could not make a good title, and prayed that, until he could, he should be enjoined from enforcing a judgment obtained by him for the purchase money. The defendant filed a deed with the bill, and such deed was alleged to convey a good title. *Held*, that in such cases it was the practice of the court to continue the preliminary injunction which had been already obtained in the case, until a report should come in from the master upon a reference to him as to the sufficiency of

granted to preserve the property pending the litigation.¹

(a) *Actions Involving Title to Real Estate*.—As a general rule, a court of equity will not enjoin proceedings at law which affect the title to real property, except in case of fraud, accident or mistake.² To authorize the interference of a court of equity in other cases, it must clearly appear that the remedy at law is inadequate.³

the title tendered. *Kilpatrick v. Harris*, Phill. (N. Car.) Eq. 222.

1. *Hess v. Winder*, 34 Cal. 270.

Plaintiffs commenced action against several defendants for the possession of land on which was standing a large crop of unharvested grain, and to set aside a conveyance of the land made by one of said defendants to the others, on the ground that it was made in fraud of the rights of plaintiffs. *Held*, first, that the grain crop was part of the land and plaintiffs were entitled thereto if entitled to recover the land, and second that an order made by the court, *pendente lite*, restraining defendants from alienating or encumbering the land during the litigation and appointing a receiver to take possession, harvest and preserve the grain crop, was properly made. *Corcoran v. Doll*, 35 Cal. 476.

2. *Rogers v. Cross*, 3 Chand. (Wis.) 34; *Evans v. Lovengood*, 1 Jones Eq. (N. Car.) 298; *Cameron v. White*, 3 Tex. 152; *Crawford v. Paine*, 19 Iowa 172; *Lamb v. Drew*, 20 Iowa 15.

Damschroeder v. Thias, 51 Mo. 100. The complainant and defendant were the owners of adjoining town lots. The complainant employed a surveyor to fix the dividing line between the lots, which the surveyor, by mistake, mislocated and thereupon complainant, supposing that he was building upon his own land, inadvertently placed a small part of his house a few inches over on defendant's lot, the defendant being also then unaware of the encroachment. *Held*, that equity would not enjoin an action of ejectment by defendant against complainant to recover possession of the strip so built upon. *Kirchner v. Miller*, 39 N. J. Eq. 355.

Hall v. Theisen, 61 Cal. 524, was an action brought to obtain an injunction restraining the defendants from selling certain real property under an execution. The plaintiff claimed under a tax sale and deed; the defendants were proceeding to sell under an execution against the prior owners. The court said: "The complaint alleges an assess-

ment of the property to the California Consolidated Mining Company, omitting the objectionable addition expressed in the deed. It may be admitted that if the plaintiff holds a valid certificate of sale for nonpayment of taxes, he may have the sale under execution enjoined, on the ground that such subsequent sale would be a cloud upon his title or his right to have title. But, in endeavoring to have the sale enjoined, he must aver and show that he has full right to protection; in other words, that everything has occurred which would be necessary to occur in order to vest in him the right claimed." It was *held* that injunction should be refused on the ground that the plaintiff had an adequate remedy at law.

But an equitable owner of lands in actual possession and claiming title in fee simple can maintain a bill to enjoin a suit in ejectment brought against him by persons claiming under a succession of conveyances given in bad faith and for the purpose of defeating creditors; and in the same bill he can also ask for a release of the apparent title held by such claimants. *McKibbin v. Bristol*, 50 Mich. 319.

Possession of Land Acquired by Force.

—When possession of land is acquired by such force as to entitle the party evicted to maintain an action of forcible entry and unlawful detainer, equity will not entertain a bill founded on such possession, to enjoin the action, and to remove a cloud from complainant's title to the land. *Turnley v. Hanna*, 67 Ala. 101.

3. Thus where a sale of real estate upon execution would transfer no title to the purchaser, but would cast a cloud on the title of the complainant, as where land had been sold to a *bona fide* purchaser under an execution to enjoin a sale under an elder judgment the lien of which had become dormant. *Norton v. Beaver*, 5 Ohio 178; *Bank v. Shultz*, 2 Ohio 471. So where the defendant is in possession under an equitable title which is not available as a defence in an action at law to recover the posses-

A mere denial of the plaintiff's title by the defendant will not prevent the court from granting an injunction, especially in cases of irreparable injury.¹ But ordinarily the injunction will be refused against a defendant in possession until the title is established at law.²

sion. *De Groot v. Receivers*, 2 Green Ch. 198; *Schlecht's Appeal*, 60 Pa. St. 172; *Pfeltz v. Pfeltz*, 14 Md. 376; *Tomlinson v. Rubio*, 16 Cal. 202; *Tevis v. Ellis*, 25 Cal. 515; *Christie v. Hale*, 46 Ill. 117; *Pettit v. Shepherd*, 5 Paige (N. Y.) 493; *Key etc. Co. v. Munsell*, 19 Iowa 305; *Bennett v. McFadden*, 61 Ill. 334; *Vogler v. Montgomery*, 54 Mo. 577; *Uhl v. May*, 5 Neb. 157; *Pixley v. Huggins*, 15 Cal. 127; *Oakley v. Williamsburgh*, 6 Paige (N. Y.) 262. But see *contra*, *Coughron v. Swift*, 18 Ill. 414.

1. *Catlin v. Valentine*, 9 Paige (N. Y.) 575; *Atty. Gen. v. Nichol*, 16 Ves. 338; *Crawford v. Paine*, 19 Iowa 172; *Lamb v. Drew*, 20 Iowa 15.

On motion for a preliminary injunction to restrain defendant from laying its railroad track over lands to which both parties claimed title, and from digging and removing gravel therefrom, it appeared that the chief value of the land was the gravel beneath its surface, and that defendant's agents had expressed a determination to remove gravel from, and defendant had graded a roadway for a railroad across, the land. *Held*, that as the acts of defendant worked an irreparable injury to and destroyed the inheritance, a preliminary injunction should issue until the titles were settled. Following 11 Atl. Rep. 495; *Newall v. Staffordville Gravel Co.* (N. J.) 13 Atl. R. 270.

The mere fact that some one has asserted a claim on the land, and that fact is generally known in the community where the land is situated, is insufficient to justify a court of equity in restraining a sale under a trust deed given to secure the purchase money on the land. *Kinpor v. Rawson*, 30 W. Va. 345.

So while the court having jurisdiction of a defendant may no doubt enjoin him from wasting or interfering with property, or asserting title thereto, though the property be situated in a foreign country, it will not grant such injunction, asked for on the sole ground that certain acts of the officials of a foreign government, creating defendant's title to the property, are alleged

to be void. A bill asking such relief on such ground is properly demurrable. *Marshall v. Turnbull*, 34 Fed. Rep. 827.

2. *Eskridge v. Eskridge*, 51 Miss. 522; *Chesapeake etc. Co. v. Young*, 3 Md. 480; *Pillsworth v. Hopton*, 6 Ves. 50; *Smith v. Collyer*, 8 Ves. 89; *Hart v. Mayor etc. of Albany*, 9 Wend. (N. Y.) 571; *Echelkamp v. Schrader*, 45 Mo. 505; *Preston v. Smith* (Mo.), 26 Fed. Rep. 884; *Old Telegraph M. Co. v. Central S. Co.*, 1 Utah 331; *Carr v. Pensacola City Co.*, 19 Fla. 266; *Perry v. Parker*, 1 Woodb. & M. (U. S.) 280. See *Jersey City Gas Light Co. v. Consumers' Gas Co.*, 40 N. J. Eq. 427.

An injunction will not lie as an original and independent proceeding to determine the title to land and mines located thereunder, where the same are held by the defendants, under claim of right and color of title. *Smith v. Jameson*, 91 Mo. 13.

So an injunction will not be granted on a petition alleging that complainant is in possession of land and has a good title thereto, but apprehends that defendant may attempt to sell it, and asking the court, before his right is invaded, to adjudge that his title is good, and restrain defendant from interfering with it. *Gatewood v. Leak*, 99 N. Car. 375.

Averments in a bill filed by one railroad corporation against another, to enjoin the defendant from constructing its railroad on the complainant's right of way, that the defendant has wrongfully taken possession of lands of which the complainant was possessed, and is appropriating the same to its uses, that it had not proceeded to the condemnation of the lands in the mode prescribed by law, and had not, in obedience to the constitution, made just compensation therefor, give the court jurisdiction to prevent the further invasion of the property of the defendant, without regard to any question of irreparable injury. If, however, in such case, the right and title of the complainant are not clear, or if the whole controversy resolves itself into a naked dispute as to the strength of the legal title, and it

(b) *Disposition of Debtor's Property*.—A debtor will not be enjoined from disposing of his property in fraud of his creditor until such creditor has obtained judgment.¹

(c) *A stranger to the title* of real property, though in possession, cannot go into equity and enjoin the purchasers and owners thereof from setting up and enforcing their title on the ground that it was fraudulently acquired.²

(d) *Encroachments on Land*.—Equity will enjoin encroachments upon land by making excavations, erecting permanent buildings and the like.³

is not shown that an action of trespass or of ejectment will not afford all necessary relief, the court will not intervene by injunction. East etc. R. Co. v. East Tenn. etc. R. Co., 75 Ala. 275.

In a contest between two sets of trustees of a camp-meeting ground, one holding an appointment under the quarterly conference of the Methodist church, and the other under a grant from the superior court, by virtue of authority claimed to be derived from the act of 1872, Code, § 1677, and both claiming to hold the title for the use of the Methodist church of Warren county for camp-meeting worship, and no allegation being made that either has interfered or threatens to interfere with the beneficiaries in the enjoyment of the religious worship at said camp ground, equity will not interfere by injunction, but will leave the parties to settle the legal title by information in the nature of a *quo warranto*. Harris v. Pounds, 64 Ga. 121.

To entitle a party to relief on a bill in equity filed by him to enjoin a sale of property claimed by him, which, if the sale occurred, would be a cloud on his title, he must show title in himself. If he fails to do so he cannot be injured by such a sale. Benner v. Kendall, 21 Fla. 584.

The rule that an injunction will not issue unless the complainant's right to the subject matter in dispute, and also to the remedy, is clear, applied to a case where complainant verbally rented a lot, and claims also to have rented an adjoining lot, which the landlord has sold to the defendant, his tenure of the latter lot being disputed, and, at best, appearing to be a mere verbal licence to cross it, which could be revoked at any time by the landlord, and was, in fact, revoked by his conveying the lot to the defendant, whose acts in cutting trees and digging a cellar thereon for a

house are sought to be enjoined as an irreparable trespass. Harper v. McElroy, 42 N. J. Eq. 280.

But in Kinsport v. Rawson, 30 W. Va. 345, it was held that equity will enjoin the collection of purchase money on land, on the ground of defect of title, after the vendee has taken possession under conveyance from the vendor, with general warranty, if the title is questioned by a suit, either pending or threatened, or if the purchaser can show clearly that the title is defective.

1. Wiggins v. Armstrong, 2 Johns. (N. Y.) Ch. 144. In Angell v. Draper, 1 Vern. 399, it was held that the creditor must have completed his title at law by judgment and execution, before he can question the disposition of the debtor's property. And in Bennett v. Musgrave, 2 Ves. 51, and in a case before Lord Nottingham, cited in Batch v. Wastall, 1 P. Wms. 445, the same doctrine was declared. The reason of the rule seems to be that until the creditor has established his title he has no right to interfere and it would lead to an unnecessary and perhaps a fruitless and oppressive interruption of the exercise of the debtor's rights. Unless he has a certain claim upon the debtor he has no concern with his frauds.

2. Treadwell v. Payne, 15 Cal. 496.

Where it appears on the face of a bill of complaint that the complainants have no title or interest in the land, the sale of which is sought to be enjoined, they have no standing in court to enable them to maintain their suit. Setz v. Unna, 6 Wall. (U. S.) 327.

3. Chicago etc. R. Co. v. Porter, 72 Iowa 426; Clayton v. Shoemaker, 67 Md. 216.

Equity will restrain a corporation from entering upon land and committing irreparable injury, where a permission to enter has been granted

(e) *Judicial Sale of Real Estate*.—In the absence of fraud or gross injustice, and irremediable injury, courts of equity will not entertain jurisdiction in restraint of judicial sales of real estate under executions against third parties having no title to the property sold.¹

(f) *Cloud Upon Title*.—A chancery court has the power to intervene and prevent the sale of real estate under legal process upon the allegation that such a proceeding would culminate in casting a cloud upon complainant's title.²

(g) *Defective Title*.—In the case of an unexecuted contract for the sale of real estate, the vendee is entitled to have that for which he contracts before he can be compelled to pay, and, if the vendor has no title at the time he agreed to convey, equity will

upon the express condition that such injury should not be inflicted. *Unangst's Appeal*, 55 Pa. St. 128.

Where land is held in trust for use as a public square by the corporate authorities of a city, by virtue of St. of Wis. 1839, p. 160, § 5, the city and adjacent lot owners may maintain an action to restrain private individuals claiming title thereto, from erecting thereon any superstructures whereby their lots would be depreciated, or access thereto impeded. *Williams v. Smith*, 22 Wis. 594.

A court of equity will not restrain trustees of a town engaged in laying out a highway, from making an excavation within a certain distance on adjoining land. Such trustees will be left free to act on their responsibility without any other restriction than their sense of duty and the laws of the land. *Flemingsburg v. Wilson*, 1 Bush. (Ky.) 203.

An owner of a lot of land in Pensacola, fronting on the bay, is not entitled to an injunction requiring the removal of a structure built in shoal water in front of his lot, and restraining the erection of similar structures, which impede navigation, unless he has sustained special damage. *Alden v. Pinney*, 12 Fla. 348.

1. *High on Inj.*, § 367; *Freeman v. Elmendorf*, 3 Halst. (N. J.) 655; *Coughron v. Swift*, 18 Ill. 414; *Bouldin v. Alexander*, 7 Mon. (Ky.) 425; *Watkins v. Logan*, 3 Mon. (Ky.) 21; *Hall v. Davis*, 5 J. J. Marsh. (Ky.) 290; *Henderson v. Morrill*, 12 Tex. 1; *Carlin v. Hudson*, 12 Tex. 202; *Whitman v. Willis*, 51 Tex. 421; *Wilson v. Hyatt*, 4 S. Car. 360. See *contra*, *Downing v. Mason*, 43 Ala. 266; *Brummel v. Hurt*, 3 J. J. Marsh. 709; *McCulloch v. Hol-*

lingsworth, 27 Ind. 115; *Budd v. Long*, 13 Fla. 288; *Bach v. Goodrich*, 9 Rob. La. 391.

A court of equity will grant relief by injunction, and restrain the sale of property levied upon, when the same belongs to a party other than the judgment debtor, who has no complete and adequate remedy at law, notwithstanding a statute providing for the taking of an indemnifying bond by the officer levying on the property. *Walker v. Hunt*, 2 W. Va. 491.

A court of equity will enjoin a sale of real estate on an execution against a party not the owner, upon proof that such property is not subject to the judgment upon which the execution issued. *Key City etc. Co. v. Munsell*, 19 Iowa 305.

2. *Irwin v. Lewis*, 50 Miss. 363; *Pettit v. Shepherd*, 5 Paige (N. Y.) 493; *Chistie v. Hale*, 46 Ill. 117; *Hinckley v. Haines*, 69 Me. 76; *Oakley v. Williamsburgh*, 6 Paige (N. Y.) 262.

See *contra*, *Montgomery v. McEwen*, 9 Minn. 103; *Armstrong v. Sanford*, 7 Minn. 49; overruled in *Conkey v. Dike*, 17 Minn. 457.

A court of chancery will restrain a sale on an execution. Where it appears that a deed acquired at such a sale would only be a cloud on the title of a bona fide purchaser. *Christie v. Hale*, 46 Ill. 117; *Norton v. Beaver*, 5 Ohio 178; *Bank of U. S. v. Schultz*, 2 Ohio 471; *Bennett v. McFadden*, 61 Ill. 334; *Vogler v. Montgomery*, 54 Mo. 577; *Uhl v. May*, 5 Neb. 157; *Key City etc. Co. v. Munsell*, 19 Iowa 305; *Pixley v. Huggins*, 15 Cal. 127. And see *Oakley v. Williamsburgh*, 6 Paige (N. Y.) 262; *Pettit v. Shepherd*, 5 Paige (N. Y.) 493.

enjoin him from proceeding at law upon the vendee's bond for the purchase money.¹

(h) *Ejectment*.—A court of equity will not restrain a person from the assertion of a title to real estate in ejectment proceedings unless the case is entirely free from doubt.²

(i) *Writ of Restitution*.—One who is the owner of land and in possession of the same is not entitled to an injunction to restrain a sheriff from executing a writ of restitution issued on a judgment rendered against third parties to which judgment the plaintiff is a stranger.³

(j) *Landlord and Tenant*.—A court of equity will in a proper case grant an injunction to restrain the tenant from doing a certain act, whether it amounts to waste or not, provided it be directly contrary to the tenant's own covenant, or even in contravention of an agreement which may be inferred from the course of dealing between the parties.⁴

(k) *Homesteads*.—The court of equity freely extends relief for the purpose of preventing an enforced sale under execution of premises in the actual occupancy of the debtor as a homestead,

1. Dorsey's Admr. v. Hobbs, 10 Md. 412; Koger v. Kane, 5 Leigh (Va.) 606; Clarke v. Hardgrove, 7 Gratt. (Va.) 399; Miller v. Argyle's Exr., 5 Leigh (Va.) 460; Gay v. Hancock, 1 Rand. (Va.) 72; Yonge v. McCormick, 6 Fla. 368; Bullit's Exrs. v. Songster's Admr., 3 Munf. (Va.) 55. *Contra*, Abbott v. Allen, 2 Johns. (N. Y.) Ch. 519; Bumpus v. Platner, 1 Johns. (N. Y.) Ch. 213; Swain v. Burnley, 1 Mo. 404; Wilkins v. Hogue, 2 Jones (N. Car.) Eq. 479; Beale v. Seiveley, 8 Leigh (Va.) 658; Gayle v. Fattle, 14 Md. 69; Truly v. Wanzer, 5 How. (U. S.) 141; Senter v. Hill, 5 Sneed (Tenn.) 505; Elliott v. Thompson, 4 Humph. (Tenn.) 99.

2. Stockton v. Williams, 1 Doug. (Mich.) 546. See also Savage v. Allen, 54 N. Y. 458; Bishop of Chicago v. Chiniquy, 74 Ill. 317. Where a party who was in full possession of certain real estate, the record title to which was incomplete, and ejectment was brought by several parties as to a portion thereof, *held*, that, as he had a clear right to file a bill to quiet his title to the remaining lots, the question being the same as to all, it was proper to enjoin the ejectment suit and thus avoid multiplicity of suits, and the questions in controversy be determined in one proceeding. Woods v. Monroe, 17 Mich. 238.

3. Tevis v. Ellis, 25 Cal. 515.

4. Frank v. Brunneman, 8 W. Va.

462; Pratt v. Brett, 2 Madd. 62; Farant v. Lovel, 3 Atk. 723; Pulteney v. Shelton, 5 Ves. 147; Walton v. Johnson, 15 Sim. 352; Baugher v. Crane, 27 Md. 36; Maddox v. White, 4 Md. 72; Steward v. Winters, 4 Sandf. (N. Y.) Ch. 587; Douglass v. Wiggins, 1 Johns. (N. Y.) Ch. 435; Lewis v. Christian, 40 Ga. 187; Thomas v. Jones, 1 Y. & C. 510; Parker v. Garrison, 61 Ill. 250.

The plaintiff leased premises to A, who covenanted that the same should not be used for any purpose extra-hazardous on account of the fire; and also not to underlet. *Held*, that where the premises were used for and extra-hazardous purpose by an under-tenant of A, the plaintiff might enforce the covenant as to the use of the premises, by injunction against A and his tenant, and in the same action obtain damages for the breach against A. Gillilan v. Norton, 6 Rob. (N. Y.) 546.

Where a lease contained a covenant on the part of the lessee not to underlet the premises to anyone whose business or signs should be considered objectionable to the lessors, it was *held* that an injunction against making an objectionable use of the premises could only issue against sub-lessees, and that an injunction restraining both the sub-lessees and the original lessee from making such use was erroneous. Importers etc. Ins. Co. v. Christie, 5 Rob. (N. Y.) 169.

and which are protected from levy and sale under the homestead exemption statutes of the State.¹

14. Sale of Mortgaged Property.—The power of sale in a mortgage is conferred for the purpose of effecting a speedy payment of the mortgage debt. The power is conferred alone by the contract between the parties, and is to be governed by the terms therein set forth, modified in some of the States by statute. In the absence of fraud or other illegal means in obtaining the mortgage, the mortgagee who exercises his right of foreclosure in the mode pointed out in the power will not be enjoined, although he act contrary to the desire and interest of the mortgagor.²

(a) *Tender*.—The amount justly due upon a mortgage must be tendered to mortgagee where the mortgagor admits in his bill that a portion of the debt is justly due.³

1. *Colley v. Duncan*, 47 Ga. 668; *Brown Admr. v. Thornton*, 47 Ga. 474; *Judd v. Hatch*, 31 Iowa 491; *Irwin v. Lewis*, 50 Miss. 363; *Johnson v. Griffin etc. Co.*, 55 Ga. 691; *Tucker v. Kenniston*, 47 N. H. 267. See also *Loeb v. McMahon*, 89 Ill. 487; *White v. Givens*, 29 La. An. 571; *Moore v. Granger*, 30 Ark. 574.

2. *McCormick v. Hartley*, 107 Ind. 248; *Gorch v. Vaughan*, 92 N. Car. 610; *Carpenter v. Black Hawk etc. Co.*, 65 N. Y. 43. See *Armstrong v. Sanford*, 7 Minn. 49; *Walker v. Radford*, 67 Ala. 446; *Kornegay v. Spicer*, 76 N. Car. 95; *Woodruff v. Halsey*, 8 Pick. (Mass.) 333; *Welch v. Whittemore*, 25 Me. 86; *Mosly v. Hodge*, 76 N. Car. 387; *Pritchard v. Sanderson*, 84 N. Car. 299; *Pierson v. Ryerson*, 1 McCart. (N. J.) 181; *Iligh Shoals etc. Co. v. Grier*, 4 Jones (N. Car.) Eq. 132; *Platt v. McClure*, 3 Woodb. & M. (U. S.) 151; *Brown v. Cherry*, 56 Barb. (N. Y.) 635; s. c., 38 How. (N. Y.) Pr. 352; *Bridgers v. Morris*, 90 N. Car. 32.

Robertson v. Norris, 4 Jur., N. S. 155. It is said: "The legitimate purpose for which the power to sell in this defendant's mortgage deed was given, was to secure him repayment of his mortgage money. If he uses the power to sell which he gets for that purpose for another purpose from an ill motive, to effect means and purposes of his own, or to serve the purpose of other individuals, the court considers that to be what it calls a fraud in the exercise of the power, because it is using the power for a purpose foreign to the legitimate purposes for which it was given."

While courts permit the use of powers of sale in mortgages, they regard them with much suspicion and watchfulness, and will enjoin their execution when an attempt is made to use them for the purpose of oppressing or obtaining an unfair advantage over the mortgagor. *Gooch v. Vaughan*, 92 N. Car. 610; *Kornegay v. Spicer*, 66 N. Car. 95; *Mosly v. Hodge*, 76 N. Car. 387; *Pritchard v. Sanderson*, 84 N. Car. 299; *Welch v. Whittemore*, 25 Me. 86; *Walker v. Radford*, 67 Ala. 446.

Contracts for the maintenance of suits, or for champerty, are void. A mortgage, given as a security for the performance of such a contract, being founded on an illegal consideration, and contravening public policy, a court of equity will interfere and restrain the mortgagee from executing a power of sale it may contain. *Gilbert v. Holmes*, 64 Ill. 548.

A mortgagee of personal property, notwithstanding the mortgage debt is not due, and without regard to the solvency or insolvency of the mortgagor, may maintain a suit to enjoin the enforcement of a judgment of foreclosure rendered upon a mortgage executed to defraud him. *McCormick v. Hartley*, 107 Ind. 248.

3. *Sloan v. Coolbaugh*, 10 Iowa 31; *Cassady v. Bosler*, 11 Iowa 242; *Stringham v. Brown*, 7 Iowa 33; *Jenkins v. Jones*, 2 Gif. 99; *Robertson v. Norris*, 1 Gif. 421; *Davey v. Durrant*, 1 De G. & J. 535; *Whitworth v. Rhodes*, 20 L. J., Ch. 105; *Close v. Phipps*, 7 M. & G. 586. *Rhodes v. Buckland*, 16 Beav. 212; *Whitworth v. Rhodes*, 20 L. J. (U. S.) Ch. 105; *Vechte v. Brownell*, 8 Paige

(N. Y.) 212; Meysenburg v. Schliefer, 46 Mo. 209; Powell v. Hopkins, 38 Md. 1.

Where complainant prays an injunction to restrain the sale of land under a trust deed, but does not tender the amount admitted in his bill to be due, the injunction should not be granted. Stringham v. Brown, 7 Iowa 33.

A tender to pay a particular sum without producing the money, under § 1816, Iowa Rev. of 1860, must be made in writing. Cassady v. Bosler, 11 Iowa 242.

Where a person applies to equity for relief against usurious contracts, he must tender or offer to pay the principal and the legal rate of interest, or the court will not take jurisdiction. Tooke v. Newman, 75 Ill. 215; Walker v. Cockey, 38 Md. 75.

Where there is no consideration for a mortgage, and the rights of third parties do not intervene, no doubt that fact may be shown without a tender; so where there is doubt of the validity of the mortgage, as where certain directors executed a mortgage to themselves the sale was enjoined until the hearing of the case. South Boat Co. v. Muntz, 12 W. R. 330. The party defrauded, however, must raise the objection and a purchaser from him cannot do so without paying the entire amount due. Foster v. Wightman, 123 Mass. 100.

The general rule is that a sale by a mortgagee will be restrained only on payment into court by the mortgagor of the amount which the mortgagee swears to be due to him; but this does not apply where the court can see on the terms of the deed that this amount cannot be due on the security. Hill v. Hirkwood, 28 W. R. 358; Hickson v. Darlow, 23 L. R., Ch. D. 690; s. c., 48 L. T. 449; 31 W. R. 417. Nor does it apply to a case where the mortgagee, at the time of taking the mortgage, was the solicitor of the mortgagor. Macleod v. Jones (No. 1), 24 L. R., Ch. D. 289; s. c., 49 L. T. 321; 32 W. R. 43; 53 L. J., Ch. 145.

Payment and Release.—A mortgagor of land, having paid the mortgage indebtedness, obtained a release of the mortgage, sold the premises to a third person with warranty. *Held*, that upon the bringing of a bill to foreclosure by the late mortgagee, equity would enjoin the suit upon application by the mortgagor, and compel the mortgagee to cancel the mortgage upon the record. Hubbard v. Jasinski, 46 Ill. 160; Dock-

rey v. French, 69 N. Car. 308; Robinson v. Maguire, 9 Ired. Eq. 268; Pierson v. Ryerson, 1 McCart. (N. J.) 181.

Where, after the foreclosure of a mortgage, the defendant filed an affidavit of illegality to the execution thereon upon the ground that it had been paid, and the issue formed by such affidavit was passed upon by a jury, who found in favor of the plaintiff in *fi. fa.*, upon a bill then filed to enjoin the execution, an injunction should have been refused. Neal v. Henderson, 72 Ga. 209. Compare Brown v. Boynton, 69 Ga. 754.

Parties.—In a bill by an administrator to enjoin a sale of real estate by a trustee, on the ground that the debt has been paid by the debtor in his lifetime, the heirs of the grantor are necessary parties. Stewart Admr. v. Jackson, 8 W. Va. 29. See Beall's Admr. v. Taylor's Admr., 2 Gratt. (Va.) 532.

A bill should not be dismissed merely for the want of proper parties if it otherwise appears that plaintiffs may be entitled to relief. Jameson v. Deshields, 3 Gratt. (Va.) 4. If, however, the plaintiff does not desire to amend, an order of dismissal is proper. Stewart Admr. v. Jackson, 8 W. Va. 31.

A mortgagor in receipt of the rents and profits has a sufficient interest to enable him to maintain an action for an injunction to restrain an injury done to the mortgaged property without joining the mortgagee. F, being owner of copyhold land, covenanted with S to stand seized thereof in trust for him and his heirs, subject to a rent, and subject to a covenant by S not to use any building erected thereon as a beerhouse. All the estate of S vested in the defendant. F sold the land to the plaintiff, B advancing the purchase money, and it was conveyed to B subject to a proviso for conveyance to the plaintiff upon payment to him by B of the amount advanced. The defendant used the building erected upon the land as a beerhouse. *Held*, that upon the general principles of equity the plaintiff was entitled to restrain the defendant by injunction from using the building for that purpose without joining B. Clough v. Marshall, 4 Ex. D. 37.

Injunction and Receiver.—Where W sues a mortgagor and mortgagee of personal property, claiming that he has an equal and undivided interest with the mortgagor in a portion of the

(b) *Pleadings*.—The bill for an injunction must contain a statement of the facts which it is claimed show fraud, illegality in the consideration, or an abuse of power, whereby the sale would be against good conscience.¹ An allegation that the sale would materially embarrass and injure the plaintiff is a mere conclusion, and furnishes no ground for relief.²

mortgaged property, and asking that the mortgagor and mortgagee shall be enjoined from disposing of the mortgaged property, that a receiver be appointed to take charge of the same, that the same be sold, that the plaintiff shall receive one half of the proceeds of the sale of that portion of the same in which he claims to have an interest, and that the proceeds of the sale of the remainder of the property be used in paying the mortgage; and on a hearing before the judge, at chambers, as to whether the injunction should be allowed and the receiver appointed, or not, the plaintiff claims that his interest in the property is of the value of \$1,300, and admits that the value of his interest does not exceed that sum; and thereupon the defendants deposit in court the sum of \$1,750, as security for any judgment which the plaintiff might obtain against them, and in pursuance and because of this deposit the judge refuses both the injunction and the receiver. *Held*, not error. *Welch v. Henry*, 32 Kan. 425.

But the rule is well established that inadequacy of the mortgaged premises as a security for indebtedness coupled with insolvency of the mortgagor, will warrant a court of equity in appointing a receiver over the mortgaged property and enjoining the mortgagor from any interference with such receiver or the property. *Ruggles v. Southern Minnesota R. Co.*, 5 Chicago Leg. N. 110; *Brown v. Chase*, Walk. (Mich.) 43; *Keep v. Michigan Lake Shore R. Co.*, 6 Chicago Leg. N. 101; *Quincy v. Cheeseman*, 4 Sandf. (N. Y.) Ch. 405; *Hyman v. Kelly*, 1 Nev. 179; *Hill v. Robertson*, 24 Miss. 368; *Lea Ins. Co. v. Stebbins*, 8 Paige (N. Y.) 565; *Hill v. Hill*, 59 Vt. 125. See *Chapman v. Smith*, 9 Vt. 153; *Seaver v. Durant*, 39 Vt. 103.

Remedy at Law.—A mortgagee in a chattel mortgage, in an action against the mortgagor after condition broken, praying for an injunction restraining the latter from disposing of the property, and that the amount he is entitled to recover be adjudged a lien thereon, and for such other or further relief as

may be just, etc., is not entitled to a temporary injunction to restrain a threatened sale of the property, because he has an adequate remedy by replevin. *Minn. Linseed Oil Co. v. Maginnis*, 32 Minn. 193. See *Alston v. Wheatley*, 47 Ga. 646; *Bailey v. Simpson*, 57 Ala. 523.

1. *Vaughan v. Marable*, 64 Ala. 60; *Foster v. Reynolds*, 38 Mo. 553; *Montgomery v. McEwen*, 9 Minn. 103; *Street v. Rider*, 14 Iowa 506; *Moss v. Pittingill*, 3 Minn. 145; *Armstrong v. Sanford*, 7 Minn. 49; *Merest v. Murray*, 14 L. T., N. S. 321. See *Conkey v. Dike*, 17 Minn. 457.

Where the answer denies all the equities set up in the complaint, and a petition for injunction pending the action discloses no others, it is improper to grant the injunction. *Montgomery v. McEwen*, 9 Minn. 103.

So an injunction will not be granted to enable the court to decree payment to the purchaser for improvements placed upon the property by him, where there is no allegation of the insolvency of the trust estate and the improvements were on real estate, and where there was no prayer except for specific performance. *Berrien v. Thomas*, 65 Ga. 61.

Mortgagee alleging that a senior mortgagee held but an equitable mortgage, though in form an absolute deed, and that, by reason of usurious payments, his debt was nearly paid, that he was about to sell to an innocent purchaser, etc.; the evidence being conflicting, discretion not abused by grant of an injunction. *Brumby v. Bell*, 65 Ga. 116.

2. *Montgomery v. McEwen*, 9 Minn. 103; *Foster v. Reynolds*, 38 Mo. 553.

Where a petition for an injunction to restrain a sale under a deed of trust, alleged that it was executed to secure the payment of a part of the purchase money of certain personal property which the complainant purchased under a false impression and belief as to its character, without alleging either a warranty or false and fraudulent representations, it was *held* insufficient, and

(c) *Fraud in the inception of the mortgage* may be sufficient to avoid it, and when the mortgage is doubtful validity, a sale may be restrained until the hearing.¹

the injunction dissolved. *Street v. Rider*, 14 Iowa 306.

So mere general statements or opinions of the complainant as to the injury likely to ensue, are insufficient. *Montgomery v. McEwen*, 9 Minn. 103.

1. *Southampton Boat Co. v. Muntz*, 12 W. R. 330.

Montgomery v. McEwen, 9 Minn. 93; *Struve v. Childs*, 63 Ala. 473; *Baltimore Co. v. Robinson*, 55 Md. 410; *Foster v. Hughes*, 51 How. Pr. (N. Y.) 20; *Smith v. Mechanics' etc. Assn.*, 73 N. Car. 372; *Ponton v. McAdoo*, 71 N. Car. 101; *Pierson v. Ryerson*, 1 McCart. (N. J.) 181; *Platt v. McClune*, 3 Woodb. & M. (U. S.) 151; *Boone Mort.*, §§ 257, 258, 285; *Woodruff v. Halsey*, 8 Pick. (Mass.) 333; *Welch v. Whittemore*, 25 Me. 86; *Jones Mort.*, § 684; *Walker v. Radford*, 67 Ala. 446; *Robertson v. Norris*, 4 Jur. (N. S.) 155. See *Brown v. Cherry*, 56 Barb. (N. Y.) 635; *Kornegay v. Spicer*, 76 N. Car. 95; *Mosly v. Hodge*, 76 N. Car. 387; *Pritchard v. Sanderson*, 84 N. Car. 299; *Bridgers v. Morris*, 90 N. Car. 32.

When Equity Will Enjoin Sale Under Power in Mortgage.—A court of equity will enjoin the execution of a power of sale in a mortgage, at the instance of a purchaser of the property, who bought subject to the mortgage, when it clearly appears that the power is perverted from its legitimate purpose to oppress the purchaser, or to aid others in obtaining an unconscionable advantage over him; as where the mortgagee colludes with third persons, who are attempting to subject the lands to an alleged outstanding vendor's lien, to prevent the purchaser from successfully defending that suit, the litigation casting a cloud on his title, and preventing him from raising money on the property to pay off the mortgage debt, and thereby force him into a settlement or compromise of the asserted vendor's lien—the sale will be enjoined until the termination of the vendor's suit. *Struve v. Childs*, 63 Ala. 473.

Where a wife, who owned the fee, tendered the mortgagee the amount of his debt, and asked for an assignment of the mortgage, which he refused to make, and the evidence showed that the mortgage was being foreclosed in the interest of the husband, in order

to force her to settle a suit by her to annul the marriage, and litigations then pending about other property, as a new mortgage could not then be obtained, on account of the litigation, the court ordered that, if the mortgagee refused to assign, the proceedings should be stayed. *Foster v. Hughes*, 51 How. Pr. (N. Y.) 20.

A and J M had a vendor's lien for unpaid purchase money on land in Baltimore county, sold by them in 1877 to the B Co., which land the company held under a bond of conveyance from the M. To enforce their lien the M, in February, 1880, instituted proceedings in equity, making all encumbrancers parties. In December, 1878, R filed a mechanic's lien against buildings and fixtures on the land. He obtained judgment in February, 1880, on notes for the amount of his lien in the Baltimore city court, on which he issued execution, on the 8th of July, 1880, to Baltimore county, to obtain a lien on the personal property of the B Co.; he also instituted proceedings on his mechanic's lien claim to sell the property bound by it. On the 8th March, 1879, the B Co. executed a mortgage to P and H of the land and its machinery, etc., and personal property. On the 24th of March, 1879, the B Co. executed another mortgage of the land and another of the machinery, etc., and personal property to B and S, trustees. B and S, trustees, under the powers in the mortgages to them, advertised all the property of the B Co. for sale on the 12th July, 1880, free from all encumbrances, and to give possession to purchasers. R, on the same day, applied to the circuit court for Baltimore county, wherein the proceedings of the M and of R were pending, for an injunction to restrain B and S, trustees, from selling, and for the appointment of receivers of the B Co. The court, on the bill and exhibits, granted the injunction and appointed receivers. *Held*, that the injunction was properly granted, as to the personal property, and that as to the real estate, B and S, trustees, should be restricted to selling their equitable interest in the real estate subject to the prior liens; but that the appointment of receivers was premature. *Baltimore etc. Co. v. Robinson*, 55 Md. 410.

(d) *Mistake*.—Where there is a mistake in the description, so that the mortgage does not cover the entire premises intended to be conveyed, a purchaser at the foreclosure sale who purchased all the property intended to be covered by the mortgage may enjoin the mortgagor, or one claiming under him, from prosecuting an action in ejectment for that portion of the premises omitted in the description.¹

Where an absolute conveyance is given as security for a debt, the grantee will be enjoined from selling and conveying the property as his own.²

(e) *A sale under a power* to secure the purchase money will not be enjoined upon the ground that the plaintiff claims title under a conveyance under a former deed of trust which the trustee had no authority to make, or because the description, which is the same as that in the plaintiff's deed, is insufficient.³

(f) *Amount Due Uncertain*.—When the amount due on the mortgage is uncertain, and the accounts between the parties complicated, a sale may be enjoined until the equities between the parties can be adjusted and the amount justly due ascertained.⁴

1. *Waldron v. Letson*, 2 McCart. (N. J.) 126; *Smith v. Mechanics' Assoc.*, 73 N. Car. 372; *Ponton v. McAdoo*, 71 N. Car. 101.

Where A filed a bill praying for an injunction to restrain the sale by a trustee of a tract of land conveyed to secure the purchase money, alleging "that since the purchase was made the plaintiff had caused a survey of the land to be made, and instead of there being fifteen hundred acres as represented, there were only nine hundred acres," and this being the only allegation in the bill on the ground on which relief was asked, it was *held* that the bill did not present sufficient equity on its face to justify the interference of a court of equity. *Reed v. Patterson*, 7 W. Va. 263.

2. *Peeler v. Barringer*, *Winston's L. & Eq.*, pt. 2, 5.

3. *McCarley v. Tippah Co.*, 58 Miss. 483.

4. *Kornegay v. Spicer*, 76 N. Car. 95; *Capehart v. Biggs*, 77 N. Car. 261; *Purnell v. Vaughan*, 77 N. Car. 268; *Van Bergen v. Demarest*, 4 Johns. (N. Y.) Ch. 37; *Cole v. Savage*, *Clark v. N. Y.*) Ch. 361; *Goodrich v. Foster*, 131 Mass. 217; *Tillery v. Wrenn*, 86 N. Car. 217; *Heilig v. Stokes*, 63 N. Car. 612; *Jarman v. Saunders*, 64 N. Car. 367; *Dockery v. French*, 69 N. Car. 308; *High on Injunction*, §§ 3, 5, 6, 7, 8; *Craft v. Bullard*, 1 Sm. & M. (Miss.) Ch. 366; *Hooker v. Austin*, 41

Miss. 717; *Waite v. Ballou*, 19 Kan. 601; *McCorkle v. Brem*, 76 N. Car. 407.

Where it appears in an application to enjoin a mortgagee from selling the mortgaged property under the power of sale, that there are many and complicated accounts between the mortgagor and mortgagee, and the balance due is uncertain, the court will restrain the execution of the power of sale until an account can be stated and the amount due ascertained. In such case, the rule which requires a mortgagee, in certain cases, to pay the amount admitted to be due before the injunction will be granted, does not apply, because no definite sum is known to be due. *Gooch v. Vaughan*, 92 N. Car. 610.

An injunction will be granted to postpone a sale of land by a mortgagee under the power contained in the deed, until the hearing of the case, where the affidavits show there is a controversy as to the amount due, arising out of numerous business transactions between the parties; and in such case it was proper in the court to make the restraining order conditional upon the mortgagor's executing a bond with justification to indemnify the mortgagee. *Bridgers v. Morris*, 90 N. Car. 32.

The plaintiff executed to the defendant a mortgage to secure the amount due upon a note one year

(g) *Usury*.—Except in those States where the statute makes an usurious contract void, a court of equity will not enjoin the trustee from selling under the power and applying the proceeds on the debt justly due.¹

(h) *Penalty*.—Where the mortgage and note provide for a rate of interest in excess of the legal rate after the note becomes due, the contract is not thereby rendered illegal, but a sale under the power may be enjoined until the amount actually due can be ascertained.²

thereafter; before the day of payment she purchased two notes on defendant (who was insolvent), past due, and demanded a credit for the sums due thereon upon her note; the defendant refused to allow the credits, alleging that he had sold the note before it became due; that one of the notes against him was barred by the statute of limitations; that he was entitled to the amount of the plaintiff's note as personal property exemption, and advertised the mortgaged premises for sale; *held*, that the plaintiff was entitled to have the sale enjoined until the issue arising upon the controverted facts were properly tried. *Harrison v. Bray*, 92 N. Car. 488.

In *Mosly v. Hodge*, 76 N. Car. 387, the motion was to dissolve an injunction issued to restrain a sale by the mortgagee, to pay the secured debt, which was allowed in the superior court, and on appeal the ruling reversed. The chief justice who delivered the opinion, after stating that the exercise of such powers by the mortgagee acting for his own benefit was looked upon "with extreme jealousy," proceeds to say: "The exercise of the power is only allowed in plain cases where there is *no complication and no controversy* as to the amount due upon the mortgage debt, and the power is given merely to avoid the expense of foreclosing the mortgage by action; but that where there is such complication and controversy, the court will interfere and require the foreclosure to be made under the direction of the court after all the controverted matters have been adjusted and the balance due is fixed, so that," etc.

In *Kornegay v. Spicer*, 76 N. Car. 95, decided at the same term upon a similar motion, the chief justice uses this language: "The idea of allowing the mortgagee to foreclose the equity of redemption, by a sale made by himself, instead of a decree for foreclosure and a

sale made under the order of the court, was yielded to, after great hesitation, on the ground that in a plain case, when the mortgage debt was agreed on and nothing was to be done except to sell the land, it would be a useless expense to force the parties to come into equity, when *there were no equities to be adjusted*, and the mortgagor might be reasonably assumed to have agreed to let a sale be made after he should be in default."

The same rule was affirmed and enforced in *Capehart v. Biggs*, 77 N. Car. 261, upon the like state of facts, and the mortgagees were forbidden to make sale until the disputed account could be investigated and the indebtedness determined.

1. *Tooke v. Newman*, 75 Ill. 215. The debtor in order to obtain an injunction must tender the amount of the debt with lawful interest. *Cassady v. Bosler*, 11 Iowa 242; *Walker v. Cockey*, 38 Md. 75; *Gantt v. Grindall*, 49 Md. 310.

Where usury renders the contract void, a sale under a power in a usurious mortgage may be enjoined. *Burnet v. Denniston*, 5 Johns. (N. Y.) Ch. 35; *Ilyland v. Stafford*, 10 Barb. (N. Y.) 558.

Where a person in borrowing money agrees to pay a usurious interest, and thereafter he pays the principal of the loan with legal interest, and pays all that either law or equity would require that he should do or pay, equity will interfere, upon a proper application, to prevent the collection of the usurious interest. *Waite v. Ballou*, 19 Kan. 601. *Hooker v. Austin*, 41 Miss. 717; *Purnell v. Vaughan*, 77 N. Car. 268.

The mortgagor, however, will not be allowed to enjoin the enforcement of the mortgage upon the ground of usury when there is ample remedy at law. *Alston v. Wheatley*, 47 Ga. 646.

2. *Culbertson v. Lennon*, 4 Minn. 51; *Bidwell v. Whitney*, 4 Minn. 76;

(i) *Junior Lien*.—The holder of a junior lien is entitled to an injunction to restrain the sale of the property under a senior lien which has been paid.¹

(j) *Waste by Mortgagor*.—A mortgagee is the owner of the fee against the mortgagor, or those claiming under him, and is entitled to an injunction to prevent waste being committed on the mortgaged land.²

15. Leases.—Where a lessee covenants for a particular use of the demised premises, equity will restrict him to that use without any irreparable or even substantial injury being shown from a breach of the covenant.³

Banker v. Brunt, 4 Minn. 521; *Purnell v. Vaughan*, 77 N. Car. 268; *Hooker v. Austin*, 41 Miss. 717; *Purnell v. Vaughan*, 77 N. Car. 268.

A court of chancery will enjoin a trustee from proceeding to sell under a deed of trust given for the purpose of securing a loan of money at a usurious rate of interest. *Hooker v. Austin*, 41 Miss. 717; *Waite v. Ballou*, 19 Kan. 601; *Purnell v. Vaughan*, 77 N. Car. 268.

1. *Brigham v. White*, 44 Iowa 677. See *Hughes v. Worley*, (Bibb (Ky.) 200; *Drings v. Parshall*, 7 Hun (N. Y.) 522; *Bloomington v. Barnard*, 7 Hun (N. Y.) 460; *Meysenberg v. Schlieker*, 46 Mo. 209.

2. *Nelson v. Pinegar*, 30 Ill. 473; compare *Parsons v. Hughes*, 12 Md. 1; *Brown v. Stewart*, 1 Md. Ch. 87; *Moulton v. Stowell*, 16 N. H. 221; *Ensign v. Colburn*, 11 Paige (N. Y.) 503; *Robinson v. Russell*, 24 Cal. 467; *Hastings v. Perry*, 20 Vt. 272; *Bunker v. Locke*, 15 Wis. 635.

An injunction will be granted at the suit of the mortgagee of real property to restrain the commission of waste upon mortgaged premises; but before it is granted it must be made to appear that the commission of the threatened waste will materially impair the value of the mortgaged property so as to render it inadequate security for the mortgaged debt, and that the defendants are insolvent, or unable to respond in damages for the threatened injury. *Robinson v. Russell*, 24 Cal. 467; *Nelson v. Pinegar*, 30 Ill. 473; *Fairbank v. Cudworth*, 33 Wis. 358; *Brady v. Waldon*, 2 Johns. (N. Y.) Ch. 148; *Cooper v. Davis*, 15 Conn. 561; *Murdock's Case*, 2 Bland (Md.) 461; *Salmon v. Claggett*, 3 Bland (Md.) 126; *Ensign v. Colburn*, 11 Paige (N. Y.) 503.

A mortgagor who is insolvent will be

restrained from cutting timber from the mortgaged premises, where such cutting will render the mortgagee's security inadequate. *Bunker v. Locke*, 15 Wis. 702; *Jones v. Costigan*, 12 Wis. 757; *Brown v. Stewart*, 1 Md. Ch. 87; *Maryland v. Northern etc. R. Co.*, 18 Md. 193; *Gray v. Baldwin*, 8 Blackf. (Ind.) 164.

But in the foreclosure of an ordinary mortgage to obtain an injunction against waste, it is not necessary to show the insolvency of the mortgagor. *Fairbank v. Cudworth*, 33 Wis. 358; *Northrup v. Trask*, 39 Wis. 515.

Where the mortgagor in possession threatens waste which involves irreparable injury to the land, the mortgagee is entitled to an injunction against such waste without averring or proving that the mortgagor is insolvent. *Fairbank v. Cudworth*, 33 Wis. 358.

Removal of fixtures from mortgaged premises included in mortgage, will warrant an interference by injunction. *Robinson v. Preswick*, 3 Edw. (N. Y.) Ch. 247. See *Mut. Life Ins. Co. v. Newburgh Bank*, 18 Hun (N. Y.) 371. So the removal from mortgaged real estate of buildings which form a part of the realty, and which the mortgagor has conveyed to a purchaser who seeks its removal. *State Savings Bank v. Kercheval*, 65 Mo. 682.

3. *De Wilton v. Saxon*, 6 Ves. 106; *Fielden v. Slater*, L. R., 7 Eq. 523; *Barrow v. Richards*, 8 Paige (N. Y.) 357; *Seymour v. McDonald*, 4 Sandf. (N. Y.) Ch. 503; *Blagrove v. Blagrove*, 1 De G. & Sm. 252; *Gillilan v. Norton*, 6 Robt. (N. Y.) 546; *Kemp v. Sober*, 1 Sim. (U. S.) 520; *Tipping v. Eckersley*, 2 Kay & J. 264; *Frank v. Brunemann*, 8 W. Va. 462; *Niagara Bridge Co. v. Great Western R. Co.*, 39 Barb. (N. Y.) 212; *Hodson v. Coppard*, 29 Beav. 4; *Clements v. Welles*, L. R., 1 Eq. 200; *Dodge v. Lambert*,

Covenants to use the premises for a particular purpose and no other run with the land, and an assignee, although not named in the lease, will hold subject to the conditions.¹ But a subtenant may engage in any lawful business on the premises not prohibited in the lease to his lessor or his own, such business not being injurious to the premises.²

A lessee will also be enjoined from making material alterations in the leased property, as by changing a dwelling house into a store or warehouse whereby the building will be permanently injured.³

A tenant will be protected in a proper case against a breach of covenant by his landlord, which would work a forfeiture of the tenant's estate.⁴

16. Waste is spoil or destruction in houses, gardens, trees or other corporeal hereditaments, to the disherison of him that hath the remainder or reversion in fee simple or fee tail.⁵

It is essential that the wrong-doer shall be in the actual or constructive possession of the premises, as such possession constitutes the distinction between waste and trespass, the latter being an injury to the possession itself.⁶

2 Bosw. (N. Y.) 570; *Parker v. Whyte*, 1 Hen. & M. (Va.) 167; *Doe v. Spry*, 1 Barn. & Ald. 617; *Altman v. Royal Aquarium Soc.*, 3 Ch. D. 228; *Wilds v. Layton*, 1 Del. Ch. 226; s. c., 12 Am. Dec. 91; *Longhurst v. Dixey*, Toth. 255; *Kimpton v. Eve*, 2 Ves. & B. 352. See *Lambert v. Lambert*, 2 I. Eq. Rep. 210; *Doran v. Carroll*, 11 I. Ch. Rep. 379; *Att. Gen. v. Sheffield Gas Co.*, 3 De G. M. & G. 321. *Hunt v. Browne*, San. & Sc. 178; *Cregan v. Cullen*, 16 I. Ch. Rep. 339.

In *Steward v. Winters*, 4 Sandf. (N. Y.) Ch. 587, the lease contained a provision that the store was "to be occupied by the regular dry goods jobbing business, and for no other kind of business," and an injunction was granted for breach of the covenant.

1. *Mayor v. Pattison*, 10 East 136; *Brouwer v. Jones*, 23 Barb. (N. Y.) 153; *De Forest v. Byrne*, 1 Hilt. (N. Y.) 43; *Steward v. Winters*, 4 Sandf. (N. Y.) Ch. 587; *Kemp v. Sober*, 1 Sim. N. S. 520; *Hodson v. Coppard*, 29 Beav. 4; *Clements v. Welles*, L. R., 1 Eq. 200.

2. *Taylor v. Moffat*, 2 Blackf. (Ind.) 305. See *Niagara Bridge Co. v. Great Western R. Co.*, 39 Barb. (N. Y.) 212; *Parkman v. Aicardi*, 34 Ala. 393.

3. *Douglass v. Wiggins*, 1 Johns. Ch. (N. Y.) 435; *Agate v. Lowenbein*, 57 N. Y. 604; *Jungerman v. Bovee*, 19 Cal. 354; *Baughner v. Crane*, 27 Md. 36; *Smith v. Carter*, 18 Beav. 78; *Mayor*

etc. of *London v. Hedger*, 18 Ves. 355; *Hindley v. Emery*, L. R., 1 Eq. 52; *Welton v. Saxton*, 6 Ves. 106. See *Bathurst v. Burden*, 2 Bro. C. C. 64; *Williams v. Day*, 2 Ch. Cas. 32; *Nicholson v. Rose*, 4 De G. & J. 10; *Pratt v. Brett*, 2 Mad. Ch. 62.

4. *Rogers v. Danforth*, 9 N. J. Eq. 289.

5. 2 Bl. Com. 281.

The ancient equity doctrine which would refuse an injunction to restrain waste where a bill is filed for an account has been greatly modified; and in cases where irremediable mischief is being done or threatened—such as the extraction of ores from a mine, or the cutting down of timber—an injunction will issue, though the title to the premises be in litigation. *Lanier v. Alison* (Ga.), 31 Fed. Rep. 100.

An injunction may issue to restrain the destruction of an Osage hedge fence by a stranger to the inheritance. *Sapp v. Roberts*, 18 Neb. 299.

Cutting down growing timber is generally a sufficient cause for an injunction. *Natoma etc. Co. v. Clarkin*, 14 Cal. 544; *S. P., De La Croix v. Villere*, 11 La. Ann. 39; *Tainter v. Mayor*, 19 N. J. Eq. 46.

6. *Cooley on Torts*, 232; *Davis v. Leo*, 6 Ves. 784; *Poindexter v. Henderson*, Walk. (Miss.) 177; *Pillsworth v. Hopton*, 6 Ves. 51; *Talbot v. Hope Scott*, 4 Kay & J. 96; *Nevitt v. Gillo-*

Many acts which would be waste in England do not constitute waste in this country, by reason of the difference in the conditions. The question becomes, therefore, to a great extent, one of usage for a jury to determine.¹ To constitute waste, the acts complained of must either increase the burdens upon the estate, impair the evidence of title of the reversioner, or diminish the value of the property; in other words, must lessen or destroy the value of the reversion.²

An injunction will be granted to stay waste, and for an account, but the account is a mere incident of the injunction, and if the waste has already been committed, an injunction will be granted; hence the action cannot be maintained as one for an account alone, the remedy at law being insufficient.³

An injunction may be issued in all cases to prevent the injury,

pie, 1 How. (Miss.) 108; *Thurston v. Mustin*, 3 Cranch (U. S.) C., 335; *Denny v. Brunson*, 29 Pa. St. 382. But see *More v. Massini*, 32 Cal. 590; *Smith v. Wilson*, 10 Cal. 528.

An injunction will not be granted to restrain waste where an action of ejectment is pending and the title is in dispute. *Philadelphia v. Griscom*, 5 Phila. (Pa.) 532.

1. *Jackson v. Brownson*, 7 Johns. (N. Y.) 227. VAN NESS, J., in delivering the opinion of the court, says (p. 233): "In England that species of wood which is denominated *timber* shall not be cut down, because felling it is considered as an injury done to the inheritance, and thereupon *waste*; here, from the different state of many parts of the country, *timber* may and must be cut down to a certain extent, but not so as to cause an irreparable injury to the reversioner. To what extent wood may be cut before the tenant is guilty of waste must be left to the sound discretion of a jury under the direction of the court as in other cases." See also *Jackson v. Tibbits*, 3 Wend. (N. Y.) 341; *Pyncheon v. Stearns*, 11 Met. (Mass.) 304; *Keeler v. Eastman*, 11 Vt. 293; *Drown v. Smith*, 52 Me. 143; *Lyman's Appeal*, 31 Pa. St. 46; *Kidd v. Dennison*, 6 Barb. (N. Y.) 9; *Crockett v. Crockett*, 2 Ohio St. 180.

2. *Huntley v. Russell*, 13 Q. B. 588; *Proffitt v. Henderson*, 29 Mo. 327; *McGregor v. Brown*, 10 N. Y. 114.

3. *Crockett v. Crockett*, 2 Ohio St. 187. In *Parrott v. Palmer*, 3 Myl. & K. 632, the rule is stated "that unless in the case of mines the rule is, no injunction no account." *Watson v. Hunter*, 5 Johns. Ch. (N. Y.) 169; *Col-*

lege v. Bloom, 3 Ark. 262; *Allison's Appeal*, 77 Pa. St. 221; *Fleming v. Collins*, 2 Del. Ch. 230.

"From this very brief view of some of the more important cases of equitable interference in cases of waste, the inadequacy of the remedy at common law as well to prevent waste as to give redress for waste already committed, is unquestionable, and there is no wonder that the resort to the court of law has in a great measure fallen into disuse. The action of waste is of rare occurrence in modern times; an action on the case for waste being generally substituted in its place whenever any remedy is sought at law. The remedy by a bill in equity is so much more easy, expeditious and complete that it is almost invariably resorted to. By such a bill not only may future waste be prevented, but, as we have already seen, an account may be decreed and a compensation given for past waste." 2 Story Eq. Juris., § 917.

If the waste is of such a nature that the party aggrieved is remediless at law and would sustain great injury by withholding an account, it will be granted, even though an injunction will not be allowed. *Gath v. Cotton*, 3 Atk. 751; *Parrott v. Palmer*, 3 Myl. & K. 632.

And in the case of equitable waste committed in the life time of one deceased, an account will be allowed against his assets where an injunction would not be appropriate. *Lansdowne v. Lansdowne*, 1 Madd. 116; *Morris v. Morris*, 3 De G. & J. 323.

In the case of mines and collieries the account may be allowed regardless of whether an injunction will lie.

where the plaintiff, after the commission of the waste, could maintain action at law for the damages.¹ So an injunction will be granted at the suit of a *mesne* remainder man for life.²

The remedy by injunction is applicable to every species of waste to prevent a known and certain injury,³ and an injunction will be granted in many cases where, at common law, an action of waste would not lie.⁴ An injunction may also be granted, in a case free from doubt, where the estate of the plaintiff is purely equitable, as that of the vendee against the vendor on the land contract.⁵ But an injunction will not be granted to stay waste unless the defendant be insolvent or the injury is irreparable, so

Winchester v. Knight, 1 P. Wms. 406; Pulteney v. Warren, 6 Ves. 89; Story v. Windsor, 2 Atk. 630.

But a person who is not a tenant in possession, but possesses a right to dig ore, is not guilty of committing a waste or trespass when he takes out more ore than his contract or his right calls for, and a court of equity cannot restrain him by injunction. Nor will a court of equity in such a case decree an account where the account is a mere matter of charge for a certain number of tons of ore, with no entries on the other side of the account. This is clearly the subject of an action of assumpsit at law. Grubb's Appeal, 90 Pa. St. 228.

1. Hawley v. Clowes, 2 Johns. (N. Y.) Ch. 122; Kane v. Vanderburgh, 1 Johns. (N. Y.) Ch. 11; Watson v. Hunter, 5 Johns. (N. Y.) Ch. 169; Markham v. Howell, 33 Ga. 508; Peak v. Hayden, 3 Bush (Ky.) 125; Northrup v. Trask, 39 Wis. 515; Mut. Life Ins. Co. v. Newburg Bank, 79 N. Y. 568; LeRoy v. Wright, 4 Sawy. (U. S.) 530; Hale v. Thoveas, 7 Ves. 589; Twort v. Twort, 16 Ves. 128.

2. Denny v. Brunson, 29 Pa. St. 382; Dennett v. Dennett, 43 N. H. 503; Birch-Wolfe v. Birch, L. R., 9 Eq. Cas. 693; Darell v. Champness, 1 Eq. Cas. Ab. 400; compare Mallineaux v. Paschal, 3 P. Wms. 268.

Where a testator devises land to his daughter, provided she shall have lawful issue, and there is a remainder over in fee, the devisee takes a life estate subject to the fee on birth of such issue, and the remainderman until issue is born has such an interest in the estate as will sustain an injunction to restrain the devisee for life from committing unauthorized waste. Coward v. Meyers, 99 N. Car. 198.

3. Hawley v. Clowes, 2 Johns. Ch.

(N. Y.) 122; Duvall v. Waters, 1 Bland (Md.) 569, 576; Smith v. City Council of Rome, 19 Ga. 89; Griffin v. Sketoe, 30 Ga. 300; Markham v. Howell, 33 Ga. 508.

A defendant, properly served, may be enjoined from committing waste upon or otherwise impairing the value of property in which the complainant is interested, even though the property is situated abroad. Marshall v. Turnbull, 32 Fed. Rep. 124.

Destruction of Town Property.—An injunction lies to restrain the unauthorized invasion or destruction of town property. Kankakee v. Kankakee etc. R. Co., 115 Ill. 88.

4. Duvall v. Waters, 1 Bland (Md.) 576; Lyon v. Hunt, 11 Ala. 295; Attaquin v. Fish, 5 Met. (Mass.) 140; Lewis v. Christian, 40 Ga. 187; Smith v. Rome, 19 Ga. 89; Ware v. Ware, 7 Hals. (N. J.) 117; Sarles v. Sarles, 3 Sandf. (N. Y.) Ch. 601; Perrot v. Perrot, 3 Atk. 94; Robinson v. Litton, Atk. 209; Clement v. Wheeler, 25 N. H. 361.

5. Smith's Appeal, 69 Pa. St. 474; Brashear v. Marcey, 3 J. J. Marsh. (Ky.) 89; Nelson v. Pinegar, 30 Ill. 473; Bunker v. Locke, 15 Wis. 635; Robinson v. Russell, 24 Cal. 467; Parsons v. Hughes, 12 Md. 1; State v. North etc. R. Co., 18 Md. 193; Cooper v. Davis, 15 Conn. 556; Nethery v. Payne, 71 Ga. 374; Smith v. Price, 39 Ill. 28; McCaslin v. State, 44 Ind. 151; Tufts v. Little, 56 Ga. 316; Gunby v. Thompson, 56 Ga. 316; Chappell v. Boyd, 56 Ga. 578.

An injunction to stay waste ought to be granted to a vendor against a vendee, to whom he has sold a tract of land in fee simple, retaining the title as a security for the purchase money, who brings his suit to subject the land to the payment of the purchase money, and

that adequate compensation in damages cannot be attained at law.¹

The cutting and removal of timber will be enjoined pending an action at law to try disputed titles, when such timber constitutes

the bill charges the defendant with cutting timber on the land in a manner calculated to render it an incompetent security for the payment of the purchase money. In such a bill it is not necessary to allege the insolvency of the defendant. *Core v. Bell*, 20 W. Va. 169; *Scott v. Wharton*, 2 Hen. & M. (Va.) 25; *Van Wyck v. Alliger*, 6 Barb. (N. Y.) 507.

Foreclosure of Land Contract.—In an action to foreclose a land contract, the purchaser may be enjoined from removing structures which have become a part of the realty, without showing that he is insolvent, at least when such removal would leave the premises of very little value, and very greatly damaged. *Taylor v. Collins*, 51 Wis. 123.

In *Scott v. Wharton*, 2 Hen. & M. (Va.) 25, it was *held* that an injunction to stay waste ought not to be granted to a vendor against a vendee, to whom he has sold a tract of land in fee simple retaining the title as a security for the purchase money, unless he brings his suit to subject the land to the payment of the purchase money, and charges the defendant with cutting timber in a manner calculated to render the land an incompetent security, in which case such injunction to stay waste pending the suit may be awarded.

In *Van Wyck v. Alliger*, 6 Barb. (N. Y.) 507, in which the decision in *Scott v. Wharton*, 2 Hen. & M. (Va.) 25, was approved, it was *held* that under a contract for the sale and purchase of land, by which time is given for the payment of the purchase money, and the purchaser is to have the possession of the premises in the meantime, the purchaser is in equity deemed the owner of the premises, having the same rights as a mortgagor in possession; and the vendee stands in the situation of an equitable mortgagee; and the court will not restrain the purchaser by injunction from committing waste by cutting timber on the land, unless he does so to such an extent as to render the land an inadequate security for the unpaid purchase money. In that case the court by MASON, Judge, said: "Under the rule, which obtains in a court of equity, the defendant, by the contract of

sale, is deemed the equitable owner of the premises, and the plaintiff stands in the situation of an equitable mortgagee." 6 Ves. 349, note a; 15 Ves. 138; 2 Story's Eq. Jur., p. 628, §§ 789, 790, 1212; *Champion v. Brown*, 6 Johns. (N. Y.) Ch. 403; *Livingston v. Newkirk*, 3 Johns. (N. Y.) Ch. 316; *Swartwout v. Burr*, 1 Barb. (N. Y.) 495; *Edgerton v. Peckham*, 11 Paige (N. Y.) 359.

1. *Hillman v. Hurley*, 82 Ky. 626; *Fleming v. Collins*, 2 Del. Ch. 230; *Green v. Keen*, 4 Md. 98; *Nethery v. Payne*, 71 Ga. 374; *Lurting v. Conn*, 1 Ired. Ch. 273; *Hamillon v. Ely*, 4 Gill (Md.) 34; *Bogey v. Shute*, 4 Jones (N. Car.) Eq. 174.

"The jurisdiction, then, of courts of equity to interpose by way of injunction in cases of waste may be referred to the broadest principles of social justice. It is exerted where the remedy at law is imperfect, or is wholly denied; where the nature of the injury is such that a preventive remedy is indispensable, and it should be permanent; where matters of discovery and account are inadequate to the proper relief, and where equitable rights and equitable injuries call for redress, to prevent a malicious, wanton and capricious abuse of their legal rights and authorities by persons who have but temporary and limited interests in the subject matter." 2 Story's Eq. Jur., § 919; 3 Pomeroy's Eq. Jur., § 1348; *Wood's Landlord v. Ten.*, §§ 427, 429, and notes.

In *Fleming v. Collins*, 2 Del. Ch. 230, it was *held* that the cutting of timber is an injury of irreparable nature and remediable in equity, by whomsoever committed, and that equity, having jurisdiction to restrain waste, will decree an account and satisfaction for the waste committed. *Allison & Evans*, App. 77 Pa. St. 225; *Kane v. Vanderbaugh*, 1 Johns. (N. Y.) Ch. 11.

The U. S. circuit court, on a bill for account and to restrain waste, may enjoin the cutting of timber and boxing it for turpentine, and under the state statute the injunction may issue although there is no averment therein of defendant's insolvency. *Lanier v. Alison*, 31 Fed. Rep. 100.

The mere allegation that the defend-

the chief value of the land, and when it is shown that defendant would be unable to respond in damages.¹

ant is felling timber of the complainant is not enough without further averment as to some peculiar value of the timber, for some particular purpose, to warrant an injunction to restrain the defendant. *Hatcher v. Hampton*, 17 Ga. 49.

1. *Kinsler v. Clarke*, 2 Hill (N. Y.) Ch. 617; *Erhardt v. Boaro*, 113 U. S. 537; *Cornelius v. Post*, 9 N. J. Eq. (1 Stock.) 196; *Snyder v. Hopkins*, 31 Kan. 557; *Tainter v. Mayor*, 19 N. J. Eq. 46; *S. P. De La Croix v. Villere*, 11 La. An. 39; *Natoma etc. Co. v. Clarkin*, 14 Cal. 544. But see *Philadelphia v. Griscom*, 5 Phila. (Pa.) 532.

The complaint avers title in plaintiff to a tract of land, that the possession of defendant is forcible and unlawful, that an action for forcible entry has been commenced by plaintiff against defendants and is still pending and undetermined and asks for an injunction to restrain defendants from cutting and removing timber from the land, without seeking in this suit to be restored to the possession, the object of the suit being to preserve the property during the pendency of that action. *Held*, that injunction lies, although no action at law has been brought to try the title; that the jurisdiction of equity in such cases to grant first a temporary and subsequently a perpetual injunction, does not depend upon the question whether or not such action at law has been brought that the rule under the English chancery system was the same and that our statute is not more restrictive. *Hicks v. Michael*, 15 Cal. 107.

One tenant in common may maintain a suit to enjoin a tenant in actual possession from committing waste, where the latter is insolvent. *Stout v. Carry*, 110 Ind. 514.

Injunction may be granted for the cutting down and removal of timber where no action is pending. *Kane v. Vanderburgh*, 1 Johns. (N. Y.) Ch. 11. *KENT*, Chancellor, in delivering the opinion, says: "Chancery goes greater lengths than the courts of law in staying waste. It is a wholesome jurisdiction, to be liberally exercised in the prevention of irreparable injury, and depends on much latitude of discretion in the court. The tenant for life is here suffering injury to his own interest, and

he, by his tenants, is doing great injury to the inheritance, which it is his duty to prevent. He is bound to stop the mischief, or be responsible himself. To suppose that an ejectment must be actually commenced before the injunction can issue is certainly an error. This would be placing the operation of waste beyond the reach of control during the period of the six months' notice."

Removing Fruit Trees.—Entry on land and digging up and removing fruit trees thereon is waste which may be enjoined. *Silva v. Garcia*, 65 Cal. 591.

Proper thinning out of trees so as to enhance the value of the remaining timber does not constitute waste. *Cowley v. Wellesley*, 1 L. R., Eq. 656.

Young trees or saplings cut by a tenant which have not attained such a growth as to be ranked as timber does not constitute such waste as to warrant an injunction when the trees are not planted for ornament or shelter. *Dunn v. Bryan*, 1 R. 7 Eq. 143.

Timber already cut ceases to be a part of the realty and its removal cannot be restrained by injunction. *Van Wyck v. Alliger*, 6 Barb. (N. Y.) 507; *Watson v. Hunter*, 5 Johns. (N. Y.) Ch. 169.

Timber cut necessary for repairs and the cultivation of the land will not be enjoined. *Duvall v. Waters*, 1 Bland (Md.) 569.

Young Timber.—A tenant for ninety-nine years with the privilege of renewal forever, and with leave to purchase the reversion at a stipulated price, will be restrained from cutting young timber which constitutes the chief value of the land. *Thurston v. Mustin*, 3 Cranch (U. S.) C. C. 335.

Timber Upon Pine Lands.—The cutting of such timber which is valuable chiefly for the wood is not such a case of irreparable injury as to warrant the injunction, whether the defendant sets up an adverse claim to a part of the land and the title and the real ownership are in doubt. *West v. Walker*, 2 Green (N. J.) Ch. 279. But the cutting of timber upon pine timber lands to the prejudice of the inheritance constitutes such waste as to warrant relief in equity by injunction. *Smith & Fleck's App.*, 69 Pa. St. 474.

(a) *A threat to commit waste* will justify the granting of an injunction, although no waste has actually been committed.¹

(b) *Mortgagor and Mortgagee*.—An injunction may be obtained by a mortgagor against the mortgagee in possession to restrain the commission of acts which would tend to depreciate or destroy the value of the estate.² The mortgagor may also be enjoined from committing waste where it is liable to impair the security.³

(c) *Reversioner*.—The preventive jurisdiction of a court of equity, through the aid of an injunction, is freely exercised to protect the reversioner against waste by the tenant in possession, whether the waste may consist in an actual abuse of or injury to the premises, or in their misuse, or in their conversion to uses prohibited by or repugnant to the terms of the lease.⁴

(d) *Tenants in Common*.—An injunction to stay waste between tenants in common lies in special cases, as to prevent one tenant in common in possession from cutting down timber on the land, and not wanted for the necessary use of the farm.⁵

(e) *Lessees*.—In the United States the ancient doctrine of the common law in relation to waste has been relaxed in favor of modern tenancies, particularly as to buildings erected for the purpose of trade and manufactures; therefore it is not waste for

1. *Rodgers v. Rodgers*, 11 Barb. (N. Y.) 595; *Loudon v. Warfield*, 5 J. J. Marsh. (Ky.) 196; *White Water etc. Co. v. Comegys*, 2 Ind. 469; *Duvall v. Waters*, 1 Bland (Md.) 569; *Sheridan v. McMullen*, 12 Oreg. 150; *Erhardt v. Boaro*, 113 U. S. 537; *More v. Massini*, 32 Cal. 590; *Campbell v. Algood*, 17 Beav. 628; *Gibson v. Smith*, 2 Atk. 182.

A landlord need not wait until waste is actually committed; for if he ascertains that the tenant is about to commit any act which would operate as a *permanent injury* to the estate the court will interfere, and restrain him from doing such act; and whether he begins or threatens or shows intention to commit waste, an injunction will be granted. *Taylor on Landlord & Tenant*, § 691; *Poertner v. Russel*, 33 Wis. 193; *Brock v. Dole*, 66 Wis. 142; *McDaniels v. Callam*, 75 Ala. 327.

2. *Rawlings v. Stewart*, 1 Bland (Md.) 17; *Downing v. Palmateer*, 1 Mon. (Ky.) 64; *Youle v. Richards*, 1 N. J. Eq. (Sax.) 534; *Smith v. Moore*, 11 N. H. 55; *Irwin v. Davidson*, 3 Ired. Eq. (N. Car.) 311; *Nelson v. Pinegar*, 30 Ill. 473; *Parsons v. Hughes*, 12 Md. 1; *Moulton v. Stowell*, 16 N. H. 221; *Brown v. Stewart*, 1 Md. Ch. 87; *Ensign v. Colburn*, 11 Paige (N. Y.) 503;

Hastings v. Perry, 20 Vt. 272; *Bunker v. Locke*, 15 Wis. 635; *Robinson v. Russel*, 24 Cal. 467.

3. *Core v. Bell*, 20 W. Va. 169; *Scott v. Wharton*, 2 Hen. & M. (Va.) 25.

Ensign v. Colburn, 11 Paige. (N. Y.) 504. In this case the injunction was granted against the removal of trees already cut the mortgagor being bankrupt and the timber constituting the principal security. If it is not made to appear that the mortgagor is insolvent, he will not be enjoined. *Robinson v. Russel*, 24 Cal. 467; *Brady v. Waldron*, 2 Johns. (N. Y.) Ch. 148; *Robinson v. Preswich*, 2 Edw. (N. Y.) Ch. 246; *Salmon v. Clagget*, 3 Bland (Md.) 126.

4. 1 High on Injunctions, § 434; *Parkman v. Aivardi*, 34 Ala. 393; *McDaniel v. Callam*, 75 Ala. 327.

5. *Hawley v. Clowes*, 2 Johns Ch. (N. Y.) 122. The CHANCELLOR says (p. 123.) "The statute of W. 2, 13 Edw. 1, ch. 22 (sess 10, ch. 6) gives an action of waste by one tenant in common against another. It is therefore an injury recognized by law, and the remedy by injunction is applicable to every species of waste."

A mortgagor in possession, committing waste after a decree of foreclosure had been rendered, but before it has

the tenant to erect a new edifice upon the demised premises, provided it can be done without materially injuring or destroying the buildings or other property already existing thereon.¹ The landlord cannot restrain the tenant from removing a building from the demised premises to which it is not shown that the landlord has the reversion.²

While a court of equity has, and will fully exercise its preventive jurisdiction, by injunction, to protect the reversion against waste by the tenant in possession, it will not interfere, unless it is shown that a positive injury to the premises, repugnant to the terms of the lease, or a positive misuse of the premises, or their conversion to uses unauthorized, is contemplated and reasonably apprehended.³

(f) *Tenant for Life*.—Every tenant for life, at common law, where there are no covenants to the contrary, has a right to firebote, house bote, fence bote and plow bote, or the right to take from the premises the wood necessary for the fences, fuel and necessary buildings for agriculture.⁴

been executed, may be restrained by injunction. *Malone v. Marriott*, 64 Ala. 486. *Stout v. Curry*, 110 Ind. 514.

1. *Winship v. Pitts*, 3 Paige (N. Y.) 259.

In cases of this kind the court proceeds upon the ground of irreparable injury. *Doran v. Carroll*, 11 I. Ch. Rep. 379; *Lambert v. Lambert*, 2 I. Eq. Rep. 210; *Atty. Gen. v. Sheffield Gas Co.*, 3 De G. M. & G. 321. And where a positive stipulation has been entered into between the parties, either party has a right to insist upon its literal performance by the other, irrespective of the question of damage. *Kemp v. Sober*, 1 Sim. (U. S.) 520; *Tipping v. Eckersley*, 2 Kay & J. 264; *Perrine v. Marsden*, 34 Cal. 14.

"Any material change in the nature and character of the buildings made by the tenant is waste, although the value of the property should be enhanced by the alteration." *Kidd v. Dennison*, 6 Barb. (N. Y.) 13; *Douglass v. Wiggins*, 1 Johns. (N. Y.) Ch. 435; *Brock v. Dole*, 66 Wis. 142; *Story's Eq. Jur.*, § 913; *Willard's Eq. Jur.* 373.

It is waste for a tenant, whether rightfully or wrongfully in possession, to make any material alteration in a building, such as the erection of a chimney where there has been none, without the landlord's consent. *Brock v. Dole*, 66 Wis. 142; *Davenport v. Magoon*, 13 Oreg. 3; s. c., 57 Am. Rep. 1; *Farrant v. Lovell*, 3 Atk. 72; *Galagher v. Shipley*, 24 Md. 427; *Middle-*

brook v. Corwin, 15 Wend. (N. Y.) 169; *Lewis v. Lyman*, 22 Pick. (Mass.) 437; *Lewis v. Jones*, 17 Pa. St. 262; *Daniel v. Pond*, 21 Pick. (Mass.) 367.

Instances.—A lessee began to pull down and remove a brick building erected by him upon the demised premises. *Held*, that a suit to enjoin him from so doing was properly brought by the lessor, who might also recover therein damages claimed in his complaint. *Jungermann v. Bovee*, 19 Cal. 354.

A party praying for an injunction against a lessee for waste, alleging himself to be a purchaser from the lessor by deed, must exhibit his deed and prove its execution in order to obtain an injunction. *Loudon v. Warfield*, 5 J. J. Marsh. (Ky.) 196.

2. *Perrine v. Marsden*, 34 Cal. 14; *Estabrook v. Hughes*, 8 Neb. 496.

3. *McDaniel v. Callan*, 75 Ala. 327; *Perrine v. Marsden*, 34 Cal. 14.

Where, by the terms of the lease, the tenant is not only expressly authorized, but is required, as one of the considerations moving the landlord in its execution, to reduce to cultivation during the term uncleared portions of the demised premises, a court of equity will not intervene by injunction to restrain him from cutting down timber on the lands, for the purpose authorized by the lease. *McDaniel v. Callan*, 75 Ala. 327.

4. *Coke La.* 416. See *Hunt v. Browne*, San & Sc. 178; *Coppinger v.*

(g) *Act of God*.—Waste which ensues by the act of God is excusable, as if a building is injured or destroyed by a storm, trees broken down by the wind or other like causes, the tenant is excusable.¹ A tenant for life may make a new opening in a coal mine which has formerly been opened, but cannot open a new mine.²

(h) *Equitable waste* consists of such acts of the tenant as are of manifest injury to the inheritance, although not inconsistent with the legal rights of the party commuting them. It is a wanton and unconscientious abuse of the tenant's rights, ruinous to the rights of other parties, which may be enjoined.³

(i) *Property in Litigation*.—Where the property is in litigation, an injunction will issue to restrain waste, or substantial or injurious change in its condition.⁴

(j) *Adverse Possession*.—An injunction to stay waste is never granted against a defendant in possession and claiming by title adverse to that of the plaintiff.⁵

Gubbins, 9 Ir. Eq. 304; Calvert v. Gason, 2 Sch. & Lef. 561.

1. Bacon's Abr., Waste (F.)

2. Clavering v. Clavering, 2 P. Wms. 389; Whitfield v. Benit, 2 P. Wms. 240. The courts of New York applied this rule to an iron mine. Coates v. Cheever, 1 Cow. (N. Y.) 460, 477. It is said, "In Sanders' Case, 5 Co. 12, it was decided in the common pleas that a lessee for years or for life, may dig mines which are open, but shall not open new ones unless he has a lease on them specifically, and then he may dig them. In Clavering v. Clavering, 2 P. Wms. 389, it was decided by Lord Chancellor King that a tenant for life may open the earth in new places in pursuit of an old vein of coals, when the coal mine had been opened before he came to the estate, etc."

3. 2 Story's Eq. Juris., § 915; Erhardt v. Boaro, 113 U. S. 537; Vane v. Barnard, 1 Salk. 161; s. c., 2 Vern. 738; Clement v. Wheeler, 25 N. H. 360; Packington v. Packington, 3 Atk. 215; Strathmore v. Bowes, 2 Bro. C. C. 88; Petland v. Somerville, 2 Ir. Ch. 289; Aston v. Aston 1 Ves. 264; Marker v. Marker, 9 Hare 1; Perrot v. Perrot, 3 Atk. 94; Robinson v. Litton, 3 Atk. 210; Farrant v. Lovel, 3 Atk. 723; Garth v. Cotton, 1 Ves. 556; Turner v. Wright, 2 De G. F. & J. 234, 245; Abraham v. Bubb, 2 Freem. (Miss.) Ch. 53; Downshire v. Sandys, 6 Ves. 107; Wombwell v. Bellasyse, 6 Ves. 110; Burgess v. Lamb, 16 Ves. 185.

4. Snyder v. Hopkins, 31 Kan. 557;

People v. Simonson, 10 Mich. 335; Baldwin v. York, 71 N. Car. 463; Bell v. Chadwick, 71 N. Car. 329; Akrill v. Selden, 1 Barb. (N. Y.) 316; Felton v. Justice, 51 Cal. 529; Crown v. Leonard, 32 Ga. 241; Seymour v. Morgan, 45 (Ga.) 201; *Ex parte* Foster, 11 Ark. 304; Chesapeake etc. Co. v. Young, 3 Md. 480; High on Injunctions (1st ed.), §§ 4, 251, 262, 421 and 458.

Where irremediable mischief, going to the destruction of the substance of the estate, is being done by the person in possession to an estate in litigation at law, an injunction will be issued to prevent it. Erhardt v. Boaro, 113 U. S. 537. See Storm v. Mann, 4 Johns. Ch. (N. Y.) 21; Thompson v. Williams, 1 Jones Eq. (N. Car.) 176; Brown v. Folwell, 3 Halst. Ch. (N. J.) 593.

While an action of ejectment is pending, the title of the land disputed and undetermined by a judgment at law, equity may interfere by injunction to restrain the cutting of timber, the quarrying of rock, or any other act which is in the nature of waste; but it will not interfere to disturb the possession or prevent the occupant from the customary use of the premises, or the full beneficial enjoyment of all the profits and advantages of possession. Snyder v. Hopkins, 31 Kan. 557.

5. Pillsworth v. Hopton, 6 Ves.; Storm v. Mann, 4 Johns. (N. Y.) Ch. 21; Lansing v. North River etc. Co., 7 Johns. Ch. (N. Y.) 164; Nethery v. Payne, 71 Ga. 374; Davies v. Leo, 6

17. Bills of peace may be entertained and an injunction granted

Ves., 784; *Talbot v. Hope* Scott, 4 Kay & J. 96; *Nevitt v. Gillispie*, 1 How. (Miss.) 108; *Poindexter v. Henderson*, Walk. (Miss.) 177. Compare *Cornelius v. Post*, 1 Stock. (N. J.) 196; *Shubrick v. Guerard*, 2 Dessaus. (S. Car.) Eq. 616.

H brought ejectment against S to recover a piece of woodland. S set up adverse possession for more than twenty years, and the action was discontinued. H shortly afterwards took up his residence in a house close to the wood, and frequently walked in the wood, turned cattle into it, and cut the brambles there. He cut down a tree in the wood, and threatened to cut more, upon which S filed his bill for an injunction. Held (affirming the decision of the Master of the Rolls), that after H had, by bringing ejectment, admitted S to be in possession of the wood, the acts done by H must be looked upon only as acts of trespass not putting him in possession, and that S, being in possession, was entitled to an interlocutory injunction to restrain him from cutting timber. *Lowndes v. Bettie*, 10 Jur. (N. S.) 226; s. c., 12 W. R. 399; 33 L. J. (Ch.) 451, approved and followed. *Stanford v. Hurlstone*, 9 Ch. 116.

Equity will not restrain waste, except upon unquestioned evidence of complainant's title; and where the defendant is in possession under adverse title, or where complainant's title is not clear, the relief will be refused. Prescriptive title being shown by the holder of land, an injunction will not be granted to restrain the free use thereof and of the minerals thereon; especially where complainant's title is not free from doubt. *Nethery v. Payne*, 71 Ga. 374; *Lowe v. Lucey*, 1 Ir. Eq. 93; *Whitelegg v. Whitelegg*, 1 Bro. C. C. 58.

In *Shubrick v. Guerard*, 2 Dessaus. (S. Car.) Eq. 616, JUDGE DESSAUSSURE says: "Chancellor Rutledge granted the injunction in this case restraining the defendant from cutting timber or committing other waste till the trial and determination at law of the rights of the parties. No note has been preserved of the grounds of the decree. The defendant afterwards filed a demurrer, but it was never argued, the parties having compromised. This is the only case, which is remembered, of the court of equity in this State having ever granted an injunction to restrain a

defendant in possession, and claiming by an adverse title, from cutting down timber or exercising other act of ownership over his property till the trial and determination of the right at law." In a note to the report he reviews many English cases, none of which countenance such a practice, and says at the close of his review: "The only case which I find decided in America on this point is that of *Stevens v. Beekman*, 1 Johns. (N. Y.) Ch. 318. It was argued before Chancellor Kent, of New York, who refused to grant the injunction against the repetition of the trespass by defendants who claimed under an adverse title or had no title. That eminent judge said it was the case of an ordinary trespass on land and cutting down timber. The plaintiff was in possession, and had complete and adequate remedy at law. And if the precedent were once set, it would lead to a revolution in practice, and would be productive of public inconvenience. There was nothing special or peculiar in the case to call for this particular relief."

He concluded his able note as follows: "It appears from this review of the decided cases, that the court has relaxed the ancient strictness of the rule, and has granted injunctions to restrain the commission of trespass in certain specified cases. These are where irreparable damage might be the consequence, if the act continues, or where the trespass has grown into a nuisance; or where the principle of the prevention of a multiplicity of suits among numerous claimants was applicable; or where the persons cutting timber got possession under articles to purchase, as in 15 Ves. 138; or where the trespasser colluded with the tenant. But that without the special circumstances which have induced the relaxation, the rule remains in force, to wit, that in case of trespass committed by a person who is a mere stranger, or claims under an adverse title, the court will not enjoin but leave the plaintiff to his remedy at law."

There can be no reason for an injunction to restrain the cutting of timber on land pending a suit to try the title to the land, unless the defendant is insolvent, or it appears that if the injunction is not granted the plaintiff will suffer irreparable damage. Where there is a

to prevent a multiplicity of suits and to restrain vexatious and useless litigation.¹

To authorize the granting of an injunction the plaintiff must have satisfactorily established his right at law, or the persons who controvert the plaintiff's right must be so numerous as to render an issue under the direction of the court indispensable to embrace all the parties concerned, and to save a multiplicity of suits.² Ordinarily the court will refuse to interfere between two individuals until the right has been determined at law.³ In consequence of modern legislation making judgments in ejectment conclusive unless set aside, the necessity for bills of peace is greatly diminished, yet there are cases where it is necessary to file such bills to prevent a multiplicity of suits.⁴

18. Nuisance is defined as anything done to the hurt or annoyance of the lands, tenements or hereditaments of another.⁵

Formerly, courts of equity restrained a nuisance by injunction only in extreme cases, and generally after the existence of the nuisance had been established at law, but at the present time the courts of equity of England and this country freely grant injunction to abate a nuisance for the protection of private rights, and to prevent a multiplicity of suits. The rule therefore now is that where the injury is not susceptible of adequate compensation in damages, or where the injury is a constantly recurring grievance, a court of equity will enjoin its continuance.⁶

complete and adequate remedy at law, a court of equity will not interfere. *Cox v. Douglass*, 20 W. Va. 180.

1. *Eldridge v. Hill*, 2 Johns. (N. Y.) Ch. 281; *West v. New York*, 10 Paige (N. Y.) 539; *Lapeer Co. v. Hart*, Harr. (Mich.) 157; *Patterson etc. R. Co. v. Jersey City*, 1 Stock. (N. J.) 434; *Dedman v. Chiles*, 3 Mon. (Ky.) 426; *Bath v. Sherwin*, 1 Prec. Ch. 261; *Eveline Hospital v. Andover*, 1 Vern. 266; *Huntington v. Nicholl*, 3 Johns. (N. Y.) 566; *Tenham v. Herbert*, 2 Atk. 483. See *Minor v. Webb*, 10 Abb. (N. Y.) Pr. 284.

2. *Eldridge v. Hill*, 2 Johns. (N. Y.) Ch. 281. CHANCELLOR KENT says (p. 282): "A bill of peace enjoining litigation at law seems to have been allowed only in one of these two cases; either where the plaintiff has already satisfactorily established his right at law, or where the persons who controvert it are so numerous as to render an issue under the direction of the court indispensable to embrace all the parties concerned and to save a multiplicity of suits." *Lord Bath v. Sherwin*, 1 Bro. P. C. 266; *Eveline v. Andover*, 1 Vern. 266; *Leighton v. Leighton*, 1 P. Wms. 571; *Huntington v. Nicholl*, 3 Johns.

(N. Y.) 566; *Tenham v. Herbert*, 2 Atk. 483. In the case in *Atkins*, Lord Hardwick refused to interfere between two individuals until the right was first tried at law.

3. *Eldridge v. Hill*, 2 Johns. (N. Y.) Ch. 280. Bills of peace are intended to supply a defect in the common law by reason of which a judgment in ejectment was not a bar to a second or other action. This rule is changed by statute and a judgment regularly rendered is a bar unless set aside.

4. *Tenham v. Herbert*, 2 Atk. 483. "Where a man sets up a general exclusive right, and where the persons who controvert it are very numerous and he cannot by one or two actions at law quiet that right, he may come into this court first, as in disputes between lords of manors and their tenants, and between the tenants of one manor and another; for in these cases there would be no end of bringing actions of trespass, since each action would determine only the particular right in question between the plaintiff and defendant."

5. 3 Bl. Com. 216.

6. *Dent v. Auction Mart Co.*, 35 L.

J. (Ch.) 555; Heiskell v. Gross, 3 Brewst. (Pa.) 430; s. c., 7 Phila. (Pa.) 317; Bunnell's Appeal, 69 Pa. St. 59; New York v. Mapes, 6 Johns. (N. Y.) Ch. 46; Mohawk etc. R. Co. v. Artcher, 6 Paige (N. Y.) 83; Dana v. Valentine, 5 Met. (Mass.) 8; Elmhurst v. Spencer, 2 Mac. & G. 45; Broadbent v. Imperial G. Co., 7 De G. M. & G. 436; Reynolds v. Clarke, 2 Ld. Raym. 1399; Weston v. Woodcock, 5 M. & W. 587; Earl of Ripon v. Hobart, 3 Myl. & K. 180; Dunning v. Aurora, 40 Ill. 481; Town of Lakeview v. Litz, 44 Ill. 81; Remington v. Foster, 42 Wis. 608; Powell v. Foster, 59 Ga. 790; Parker v. Winnipiseogee etc. Co., 2 Black (U. S.) 545; Bruce v. Delaware etc. Co., 19 Barb. (N. Y.) 371; Bostock v. N. Staff. R. Co., 3 Sm. & G. 283; Atty. Gen. v. Southampton, 1 Giff. 363. In McCord v. Iker, 12 Ohio 388, the supreme court of Ohio says: "The ground upon which the interference of a court of equity is invoked is that the mischief to complainant's property is irreparable and that actions at law furnish no adequate relief. Whilst this is an admitted ground of equity jurisdiction, courts of chancery will carefully abstain from interference where the injury will support an action at law unless the party seeking such aid brings himself within the clearest principle of equitable relief. But if it be necessary to prevent a permanent injury to property, or its entire ruin from the erection and continuance of a nuisance, and the law cannot prevent the evil, equity will interfere, although the property itself may be of small value." See also Dana v. Valentine, 5 Met. (Mass.) 8; New York v. Mapes, 6 Johns. (N. Y.) Ch. 46; Arnold v. Klepper, 24 Mo. 273; Rhea v. Forsyth, 37 Pa. St. 503; Porter v. Witham, 17 Me. 292; Mohawk etc. R. Co. v. Artcher, 6 Paige (N. Y.) 83; Carlisle v. Cooper, 21 N. J. Eq. 576; Norris v. Hill, 1 Mich. 202; Davis v. Longgreen, 8 Neb. 43; State v. Mobile, 5 Port. (Ala.) 279; s. c., 30 Am. Dec. 564; Whitfield v. Rogers, 26 Miss. 84; Robeson v. Pittenger, 1 Green (N. J.) Ch. 57; s. c., 32 Am. Dec. 473.

Jurisdiction.—The ground of the jurisdiction of a court of equity to restrain the commission or continuance of a private nuisance, is its ability to afford more complete remedies than courts of law. It interferes only when there is immediate, pressing necessity for the prevention of an injury, inca-

pable of adequate compensation in damages at law, or such as, from its continuous or permanent mischief, must occasion a constant, recurring grievance, which cannot be otherwise prevented than by an injunction. When the thing sought to be restrained is not unavoidably and in itself obnoxious, but only that which may, according to circumstances, prove so, then the court will refuse to interfere until the matter has been tried at law. *Ogletree v. McQuaggs*, 67 Ala. 584; *Kingsbury v. Flowers*, 65 Ala. 484; *St. James v. Arrington*, 36 Ala. 548; *Rosser v. Randolph*, 7 Port. (Ala.) 245; *Ferguson v. Selma*, 43 Ala. 400; *Dorsey v. Allen*, 85 N. Car. 358; s. c., 39 Am. Rep. 704; *Green v. Lake*, 54 Miss. 540; s. c., 28 Am. Rep. 378; *Demarest v. Hardham*, 34 N. J. Eq. 469; *Ray v. Lynes*, 10 Ala. 64; *Van Bergen v. Van Bergen*, 3 Johns. Ch. (N. Y.) 287; *Davidson v. Isham*, 1 Stock. (N. J.) 186.

And another ground of the jurisdiction of equity, in assuming to restrain nuisances is the imperative necessity of preventing irreparable injury and a multiplicity of suits at law. *State v. Mobile*, 5 Port. (Ala.) 279; 1 High on Inj., § 739; 2 Story's Eq., § 925. It is the exercise of an extraordinary power, which, as was long ago said by the court of equity, should be "cautiously and sparingly exercised." *Ray v. Lynes*, 10 Ala. 63. An injunction, therefore, of a private nuisance will generally be granted only where there is a strong and mischievous case of pressing necessity, and not because of a trifling discomfort or inconvenience suffered by the party complaining. *Coker v. Birge*, 9 Ga. 425; s. c., 54 Am. Dec. 347, note; *St. James's Church v. Arrington*, 36 Ala. 546.

In the case of *Earl of Ripon v. Hobart*, 3 Myl. & K. cited in 2 Story's Eq., § 924, note 1, LORD BROUGHAM says that "No instance can be produced of the interposition of courts of equity by injunction in the case of an eventual or contingent nuisance." See *Laugheim v. Lamasco*, 6 Ind. 223; *Dunning v. Aurora*, 40 Ill. 481; *Lake View v. Letz*, 44 Ill. 81; *Kirkman v. Handy*, 11 Humph. (Tenn.) 406; *Rhodes v. Dunbar*, 57 Pa. St. 274.

In the leading case of *Earl of Ripon v. Hobart*, 3 Myl. & K. 169; s. c., Cooper's Case, Temp. Brough 333, the LORD CHANCELLOR uses this language: "If the thing sought to be prohibited is in itself a nuisance, the court will interfere

to stay irreparable mischief, without waiting for the result of a trial, and will, according to the circumstances, direct an issue or allow an action, and if need be, expedite the proceedings the injunction being in the meantime continued. But where the thing sought to be restrained is not unavoidable and in itself noxious, but only something which may, according to circumstances, prove so, the court will refuse to interfere until the matter has been tried at law, generally by an action, though in particular cases an issue may be directed for the satisfaction of the court where an action could not be framed so as to meet the question." See *Porter v. Whitham*, 17 Me. 292; *Van Bergen v. Van Bergen*, 3 Johns. (N. Y.) Ch. 282; *Rhea v. Forsyth*, 37 Pa. St. 503; *Arnold v. Klepper*, 24 Mo. 273; *Mammoth etc. Co.'s Appeal*, 54 Pa. St. 183; *Rochester v. Curtiss*, 1 Clarke (N. Y.) Ch. 336; *McCord v. Iker*, 12 Ohio 387; *White v. Forbes*, Walk. (Mich.) 112; *Pennsylvania R. Co. v. New York etc. R. Co.*, 8 C. E. Green (N. J.) 157; *Sprague v. Rhodes*, 4 R. I. 301.

Instance—Noise—Crowds.—A circus, the performances in which were to be carried on for eight weeks, was erected near the plaintiff's house, and the performances, which took place every evening, lasted from about half-past seven till half-past ten. It was proved that the noise of the music and shouting in the circus could be distinctly heard all over the plaintiff's house, and was so loud that it could be heard above the conversation in the dining room, though the windows and shutters were closed, and several persons were talking in the room. *Held* (affirming the decision of *Malins, V. C.*), that this was such a nuisance as the court would restrain by injunction. If the evidence is satisfactory, the court will grant an injunction against a nuisance without having the question, whether there is a nuisance, tried before a jury. *Inchbald v. Robinson* and *Inchbald v. Barrington*, 4 Ch. 388.

A chinese laundry in the basement of a building, so conducted as to injure the business of the occupant of the next story may be enjoined as a nuisance. *Warwick v. Wah Lee*, 31 Leg. Int. (Pa.) 268; s. c., 22 Pitts. L. J. (Pa.) 27; *S. P. Richardson v. Oberholtzer*, 2 W. N. C. (Pa.) 332.

The injury must be actual, substantial, not technical, nor inconsequential;

thus, the parties owning adjoining lots in a village, the court refused to enjoin the defendant from building a wall in front of her own lot, although partly constructed within the surveyed limits of the highway, and obstructing the orator's carriage road from his house to the main street, when a few rods distant he had another way equally available and in daily use; and, although the obstructed way added somewhat to the beauty of the premises, the court holding the injury to be a mere fancy. *Sargent v. George*, 56 Vt. 627.

Barn and Privy.—When lots are laid out in a city with an established frontage, those who purchase inside lots do so with the expectation that the owners of corner lots will build in accordance with the established frontage; and if they change their frontage, and so build as to cause the rear of their lots to abut upon the inside lots, equity will so control the location of their out buildings as to prevent them from interfering with the enjoyment of the occupant of the inside lots. *Cook v. Benson*, 62 Iowa 170. See also *Rand v. Wilber*, 19 Ill. App. 395; *Kenopsky v. Davis*, 27 La. An. 174.

Factory.—A bill was filed by the appellee against the appellants for an injunction to perpetually restrain injury to the complainant's property, brought about, as alleged, by the manufacturing of vitriol and sulphuric acid in a factory upon premises adjoining those of the complainant, conducted, controlled and operated by T. C. C. and The C. C. and F. Co. After averring the injury to the complainant's property, the bill prayed "that they may upon their several and respective corporal oaths answer the premises, and that they may set forth and discover whether they, or one of them (and if one, which one), do not conduct, control and operate a factory at the place hereinbefore mentioned, wherein vitriol, sulphuric acid or sulphurous acid, or some of these products are made; and that they may be perpetually enjoined, restrained and prohibited from keeping up and maintaining the aforesaid factory, and from making vitriol, sulphuric and sulphurous acid, and other obnoxious and unwholesome products in the place where the said factory is situated; and that your orator may have such other and further relief as his case may require." The defendants each severally demurred to this bill, mainly on the ground of multifariousness. *Held*: 1st.

That the demurrers were properly overruled by the court below. 2nd. That the averments of the bill in regard to the nuisance and injury complained of were sufficient to warrant the granting of relief by injunction. *Chappell etc. Co. v. Funk*, 57 Md. 465.

Brick.—Where one manufacturing brick upon his lands uses a process in burning by which noxious gases are generated, which are borne by the winds upon the adjacent lands of his neighbor, injuring and destroying trees and vegetation, this is a nuisance, and the party injured is entitled to an injunction to restrain the use of the process complained of. *Campbell v. Seaman*, 63 N. Y. (18 Sick.) 568; s. c., 20 Am. Rep. 567. See also *Walter v. Selfe*, 4 De G. & S. 315; *Cavey v. Ledbitter*, 13 C. B. (N. S.) 470; *Pollock v. Lester*, 11 Hare 266; *Beardmore v. Tredwell*, 31 L. T. (N. S.) 893; *Hutchins v. Smith*, 63 Barb. (N. Y.) 251; *Weir's Appeal*, 74 Pa. St. 230; *Mulligan v. Elias*, 12 Abb. (N. Y.) N. S. 259. And it is no reason for refusing an injunction in such a case that the fumes tend to neutralize a malaria existing in the locality, or that the place is a manufacturing place, nor will relief be denied on the ground that the nuisance existed before the plaintiff acquired his property or built his house at least, where there is not shown so long a continuance as to establish a prescriptive right. *Mulligan v. Elias*, 12 Abb. (N. Y.) N. S. 259. It has however been *held*, that brick making being a useful and necessary employment, will not be restrained by injunction, although carried on in the outskirts of a city, because it occasions some discomfort or even some injury to those residing in the vicinity. *Huckenstine's Appeal*, 70 Pa. St. 102; s. c., 10 Am. Rep. 668. See *Atty. Gen. v. Cleaver*, 18 Ves. 219; *Sellers v. Parvis etc. Co.*, 30 Fed. Rep. 164.

Blowing Sand.—Defendant maintained an uncovered pile of moulding sand near plaintiff's residence, from which sand was blown when the wind was in a certain direction, causing annoyance and discomfort to the inmates of such residence, and injury to the furniture. *Held*, that while such was lawful if properly conducted, a finding that the same was so improperly conducted as to constitute a nuisance was warranted, and that an injunction

properly issued restraining its continuance. *Dunsbach v. Hollister*, 2 N. Y. S. 94.

Electric Light Station.—Defendant operated an electric light station before plaintiff purchased the adjoining houses, but later erected an extension and placed therein a 400-horsepower engine and a sixteen-foot cog-wheel. The machinery could have been driven with smaller engines and belts, with a little injury to plaintiff's property, but the large engine and wheel caused a jar and annoying noises after night, without causing permanent injury to the building. The extension and engine were properly constructed and the business carefully conducted. Smaller engines would occupy more space and require greater expense. Defendant had invested about \$200,000, and furnished light to the city and many merchants. New buildings were under construction, into which defendant intended removing, when the station complained of would be discontinued. *Held*, that while defendant's business was a nuisance and should be restrained, in view of the fact that compensation in damages could be made, and that great loss to the defendant and inconvenience to the public would result from its immediate suspension, time should be given defendant to remove its plant before the judgment should take effect. *Braender v. Harlem Lighting Co.*, 2 N. Y. S. 245.

Trifling Nuisance.—The amount of annoyance which will induce the court to interfere between the owners of adjoining buildings discussed and defined, and the nature and value of evidence in such cases considered. Where a trifling trespass or an interference with an ancient right has been submitted to for six years, the court will not exercise its jurisdiction, but will leave the plaintiffs to their rights at law. Decree of the master of the rolls reversed. *Gaunt v. Fynney*, 8 Ch. 8.

Temporary Nuisance.—The owner or lessee of houses let or sublet to weekly tenants cannot maintain a suit to restrain a temporary nuisance, such as the noise of machinery in adjacent premises, but—*Seemle*, such a suit could be maintained by a weekly tenant if the nuisance were of such a nature as to be injurious to his health or comfort. *Jones v. Chappell*, 20 Eq. 539.

Lawful Business.—The erection of a

passenger railway upon a public street, which has been authorized by statute, cannot be enjoined as a nuisance. *Faust v. Passenger R. Co.*, 3 Phila. (Pa.) 164. See *Richards' Appeal*, 57 Pa. St. 105.

The use of a snow plough and sweeping machine for cleaning the streets of New York will not be enjoined as a nuisance. *Johnson v. Christopher etc. R. Co.*, 7 N. Y. Da. Reg. 429.

But an unauthorized occupation of a street by a railroad track company is a nuisance *per se* which will be enjoined. *Atty. Gen. v. Lombard etc. R. Co.*, 32 Leg. Int. (Pa.) 238; s. c., 1 W. N. C. (Pa.) 489. So where a lawful business, such as that of tinsmith and sheet-iron worker, is carried on, at unreasonable hours, to the annoyance and discomfort of the neighbors and until it becomes a nuisance, equity will interfere by injunction. *Dennis v. Eckhardt*, 3 Grant (Pa.) 390; s. c., 11 Am. L. Reg. 166.

Nuisance per se.—The rule has long been recognized as quite different where the thing sought to be prohibited is *per se* a nuisance, and where it is not unavoidably noxious in itself, but may prove so according to circumstances, or otherwise. In the first class of cases an injunction will ordinarily be granted without waiting for the result of a trial at law. In the second class the court will generally refuse to interfere until the matter has been tried at law. *St. James's Church v. Arrington*, 36 Ala. 546; *Adams' Eq.* (7th Am. ed.) 211, note 1.

The cases are numerous where equity has intervened to prevent the carrying on of a business or vocation, although lawful in itself, on the ground of its being obnoxious to the health, comfort or convenience of neighboring residents, by reason of disagreeable noises, offensive odors, noxious gases and the like. *Babcock v. N. J. etc. Co.*, 5 C. E. Green (N. J.) 296; *Atty. Gen. v. Steward*, 5 C. E. Green (N. J.) 405; *Cleveland v. Citizens*, 5 C. E. Green (N. J.) 201; *Ross v. Butler*, 4 C. E. Green (N. J.) 294; *Robinson v. Baugh*, 31 Mich. 290; *Imperial Co. v. Broadbent*, 7 H. L. 600; *Hutchins v. Smith*, 63 Barb. (N. Y.) 251; *White v. Cohen*, 1 Drew 313; *Soltan v. De Held*, 2 Sim. N. S. 133.

No general rule can be laid down sufficiently specific and certain to apply to all cases; but, as often said, each case

must be decided upon its own particular state of facts, and the whole question must be largely one as to degree, being determined in the light of human experience.

Where the injury complained of is not a nuisance *per se*, but may become so by reason of circumstances—being uncertain, indefinite or contingent—equity, as we have said, will not interfere. *Laughlin v. Lamasco*, 6 Ind. 223; *Lake View v. Letz*, 44 Ill. 81; *Kirkman v. Handy*, 11 Humph. (Tenn.) 406; *Dunnig v. Aurora*, 40 Ill. 481; *Given v. Melmoth, Freeman*. (Miss.) Ch. 505; *Rhodes v. Dunbar*, 57 Pa. St. 274; *Thebaut v. Canova*, 11 Fla. 143; *Simpson v. Justice*, 8 Ired. (N. Car.) Eq. 115; *Duncan v. Hays*, 7 C. E. Green (N. J.) 25; *Mohawk Co. v. Utica etc. R. Co.*, 6 Paige (N. Y.) 554; *Earl of Ripon v. Hobart*, 3 Myl. & K. 169. So the public benefit will be considered, and when it preponderates over the private inconvenience, no relief will generally be granted. *Dorsey v. Allen*, 85 N. Car. 358; s. c., 39 Am. Rep. 704. It is a rule of universal recognition, that in *doubtful cases* an injunction will always be denied, or dissolved on motion when granted *ad interim*. A very strong case must, therefore, be made by the bill, and if there be a reasonable doubt as to the probable effect of an alleged nuisance, either on the proof, affidavits, or on the construction of the facts stated in the bill, there will be no interference until the matter is tested by experiment in the actual use of the property. *Wood on Nuisances*, §§ 796-97.

The erection on defendant's lot of a two story wooden house, and its use thereafter as a gin house, is not a nuisance *per se*, but is a lawful exercise by appellees of their dominion over their property, against which adjoining proprietors cannot complain, unless it is shown that, from the peculiar manner of its erection and use, irreparable injury will result to them. *Rhodes v. Dunbar*, 57 Pa. St. 274.

See also, as to what constitutes a nuisance *per se*, *Quinn v. Electric Light Co.*, 140 Mass. 106; *Shivery v. Streeper* (Fla.), 3 So. Rep. 865, and note; *Appeal of Art Club* (Pa.), 13 Atl. Rep. 537; *Gilford v. Hospital*, 1 N. Y. Supp. 448; *Dunsbach v. Hollister*, 2 N. Y. Supp. 94; *Rogers v. Elliott*, 146 Mass. 349; *Burke v. Smith* (Mich.), 37 N. W. Rep. 838; *Cook v. Anderson* (Ala.), 4 So. Rep. 713.

(a) *Nuisance at Law*.—The wrong complained of must be a nuisance at law for which damages, if only for a nominal sum, could be recovered.¹

There are cases where the plaintiff could have no remedy at law, in which a court of equity will grant relief, as where a right is violated, which should be protected, and irreparable injury would result from the failure of the court to grant relief.²

Relief will not be given where the benefit to the public to be deprived from the existence of the thing complained of outweighs the private inconvenience.³ So where either party may suffer by the granting or withholding of an injunction, the rule in equity requires the court to balance the inconvenience likely to be incurred by the respective parties by means of the action of the court, and to grant or withhold the injunction according to a sound discretion.⁴

In the cases of private nuisance, the jurisdiction of courts of equity and of law is often concurrent, though many cases will sustain a legal action which would not justify relief in equity.⁵

(b) *The fears of mankind*, said Chancellor Hardwick, though they may be reasonable ones, will not create a nuisance.⁶ This statement, however, is a subject to some qualification. As where powder is kept in large quantities within a town or near where a

A coal yard adjoining a private residence is not *per se* a nuisance. *Russell v. Popham*, 4 Ch. Dec. (N. Y.) 80; s. c., N. Y. Leg. Obs. 272.

The erection of a blacksmith's shop in a city is not a nuisance *per se* which will be enjoined. *Raub v. Tammany*, 5 Luz. L. Reg. (Pa.) 114; s. c., 1 Leg. Chron. (Pa.) 80.

But the erection of a fat boiling establishment in a city is a nuisance *per se*, and will be enjoined. *Peck v. Elder*, 3 Sandf. (N. Y.) 126; s. c., 6 Ch. Dec. (N. Y.) 38.

1. *Kilmovey v. Thackery*, 2 Bro. C. C. 65; *Bathurst v. Burden*, 2 Bro. C. C. 64. Thus a swamp from which malaria is exhaled, causing sickness in the neighborhood, is not in law a nuisance so long as it remains in a natural state. When, however, the party in possession does any act upon the land which increases the injurious effects he becomes liable. *Cooley on Torts*, 567.

Smoke, accompanied with noise or with noxious vapor; noise alone; and offensive odors alone, although not injurious to health, may severally constitute a nuisance. The material question in all such cases is, whether the annoyance produced is such as materially to interfere with the ordinary

comfort of human existence. The court of chancery will restrain the continuance of a nuisance by injunction, wherever substantial damages might be recovered in respect of it by an action at law. An injunction granted to restrain the issuing of smoke and effluvia from a factory chimney, and the making of noise in the factory, although it was situated in a manufacturing town; it being proved that such smoke, effluvia and noise were a material addition to previously existing nuisances. *Crump v. Lambert*, 3 Eq. 409.

2. *Dyke v. Taylor*, 3 D. F. & J. 467; *Wood v. Sutcliffe*, 8 Eng. L. & Eq. 217; *Ripon v. Holbart*, 3 Myl. & K. 175.

3. *Eason v. Perkins*, 2 Dev. (N. Car.) Eq. 38; *Wilder v. Strickland*, 2 Jones (N. Car.) Eq. 386; *Atty. Gen. v. Lea's Heirs*, 3 Ired. (N. Car.) Eq. 302.

4. *Richards' Appeal*, 57 Pa. St. 105. See *Eastman v. Amoskeag Manuf. Co.*, 47 N. H. 71.

5. *Parker v. Winnip. etc. Co.*, Black (U. S.) 545. Compare *Holsman v. Boiling Spring etc. Co.*, 14 N. J. Eq. (1 McCart.) 335; *Burnham v. Kempton*, 44 N. H. 78; *Gardner v. Newburgh*, 2 Johns. (N. Y.) Ch. 162.

6. *Garth v. Cotton*, 3 Atk. 751.

number of people reside, so as to render the powder dangerous to the lives of the citizens in case of an explosion either by accident or danger.¹

(c) *Legal Right*.—Where a clear legal right is injured, and there is danger of its being destroyed, an injunction ordinarily will be granted.²

(d) *Preventive*.—A court of equity exercises its jurisdiction to prevent a nuisance, therefore, where the wrong has been committed it will not exercise its jurisdiction unless to prevent its repetition, or where the nuisance itself is continuous.³

(e) *Where a building itself is not a nuisance*, its erection will not be enjoined because it may become a nuisance by the use to which its occupants may put it.⁴

1. *Myers v. Malcolm*, 6 Hill (N. Y.) 292; *Hepburn v. Lordan*, 2 H. & M. 345; *Bradley v. People*, 56 Barb. (N. Y.) 72.

2. *Walker v. Brewster*, L. R., 5 Eq. Cas. 25; *Herz v. Bank*, 2 Giff. 686; *Goose v. Bedford*, 21 W. R. 449. A distinction is to be observed, however, between a temporary and a continuous nuisance. *Swaine v. G. N. R. Co.*, 4 D. G. I. and S. 211; *Rochester v. Curtiss*, 1 Clarke (N. Y.) 336; *Harrison v. Newton*, 9 N. Y. Leg. Obs. 311; s. c., 1 Code R., N. S. (N. Y.) 207; *Frankford v. Lennig*, 2 Phila. (Pa.) 403; s. c., 1 Am. L. Rep. 357; *Hough v. Doylestown*, 4 Brewst. (Pa.) 333; *Bunnell's Appeal*, 69 Pa. St. 59; *Hieskell v. Gross*, 3 Brewst. (Pa.) 430; s. c., 7 Phila. (Pa.) 317; *Philadelphia's Appeal*, 78 Pa. St. 33; s. c., Phila. (Pa.) 499.

Chancery will not enjoin an alleged nuisance unless the right be clear, definite and certain; or capable of being clearly ascertained; otherwise, the party will be left to his remedy at law. *Fisk v. Wilber*, 7 Barb. (N. Y.) 395.

To obtain an injunction to restrain an act otherwise lawful, on the ground that it will create a public nuisance, a clear case must be made out; it is not enough to show a possible danger. *Rochester v. Erickson*, 46 Barb. (N. Y.) 92.

3. *Peck v. Elder*, 3 Sandf. (N. Y.) 126; *Atty. Gen. v. N. J. R. Co.*, 2 Green (N. J.) Ch. 136. An injunction will not be issued as punishment; its office is to prevent injury. *Lexington etc. Bank v. Gwynn*, 6 Bush (Ky.) 486; *Wangelin v. Goe*, 50 Ill. 459. It will not be issued simply because the business is unlawful. *Babcock v. N. J. etc. Co.*, 20 N. J. Eq. 296. Nor where the

right of the plaintiff is not clear, or the law relating to the case doubtful. *Higbee v. Camden etc. R. Co.*, 20 N. J. Eq. 435.

4. *Atty. Gen. Steward*, 20 N. J. Eq. 415.

A was the owner of a homestead occupied by himself and family, the dwelling being within thirteen feet of a tract of vacant land belonging to B. B commenced erecting a house upon his ground close to the line. Thereupon A filed his bill for an injunction, alleging that B, out of spite and because A had refused to sell him his homestead at a grossly inadequate price, was going to erect small tenement houses close to the line and fill them with worthless negroes. After issue joined the case went to trial, and from plaintiff's testimony it appeared that defendant had erected within four feet of the line a small tenement house of two rooms, without cellar or foundation walls, and in such condition that it could easily be moved; that the house was painted and looked neat, and was occupied by a colored preacher and his family, who were well behaved, and that such a house would rent at five or six dollars a month. It also appeared that defendant threatened to punish plaintiff for refusing to sell his homestead at the price he had offered, and said that he would build small tenement houses in close proximity to such homestead, and then plaintiff would be glad to get a much less sum than he had offered. A demurrer to the evidence was sustained and judgment entered for the defendant. *Held*, that the court did not err; that although the defendant was acting from spite, yet the buildings which he was erecting were legitimate and profitable improvements of his property,

(f) *Dwellings*.—When a business, although lawful in itself, becomes obnoxious to neighboring dwellings, and renders their enjoyment uncomfortable, whether by smoke, cinders, noise, offensive odors, noxious gases or otherwise, the carrying on of such business is a nuisance which equity will restrain. Nor is it necessary that the nuisance be injurious to health to warrant the interference, but mere noise will, in a proper case, suffice to justify a court of equity in interfering, and the relief has been granted against the ringing of the bells in a church in such manner as to annoy a neighboring resident.¹

were used for legitimate purposes, and could not be adjudged nuisances, no matter how disagreeable and annoying they might be to plaintiff. *Falloon v. Schilling*, 29 Kan. 292; s. c., 44 Am. Rep. 642.

Plaintiffs, residents and owners of property in a thickly populated neighborhood, filed a bill asking that defendants should be enjoined from erecting buildings for a bone boiling establishment. *Held*, that an injunction restraining the use of the buildings as a bone boiling establishment was properly issued, but that the erection of the buildings was not a nuisance, and the portion of an injunction restraining that must be dissolved. Appeal of *Czarniecki* (Pa.), 11 Atl. Rep. 660. See also *Harrisburg's Appeal* (Pa.), 10 Atl. Rep. 787.

It is usual and proper, where a building or works are being erected that can only be used for a purpose that is unlawful, to restrain the erection. But when it is not made to appear that the business for which the building is intended cannot possibly be carried on without becoming a nuisance, the injunction will be denied, and the defendant will be left at liberty to proceed with the erection of the building at the risk of being restrained in the use of it, if a nuisance is ultimately created. *Cleveland v. Citizens' Gas Light Co.*, 20 N. J. Eq. 201. See *Cunningham v. Rice*, 28 Ga. 30; *Thebaut v. Canova*, 11 Fla. 143; *Barnes v. Calhoun*, 2 Ired. (N. Car.) Eq. 199.

1. *Luscombe v. Steer*, 17 L. T., N. S. 229; *Ross v. Butler*, 4 C. E. Green (N. J.) 294; *Cleveland v. Citizens*, 5 C. E. Green (N. J.) 201; *Babcock v. New Jersey etc. Co.*, 5 C. E. Green (N. J.) 296; *Attv. Gen. v. Steward*, 5 C. E. Green (N. J.) 415; *Robinson v. Baugh*, 31 Mich. 290; *Hutchinson v. Smith*, 63 Barb. (N. Y.) 251; *Imperial Co. v. Broadbent*, 7 H. L. 600; *White v.*

Cohen, 1 Drew 313; *Soltan v. De Held*, 2 Sim., N. S. 133; *Bell v. Blount*, 4 Hawks (N. Car.) 384; s. c., 15 Am. Dec. 526; *Linnig v. Geddes*, 1 McCord (S. Car.) Eq. 304; s. c., 16 Am. Dec. 606; *Society v. Morris Canal Co.*, 1 Sax. (N. J.) 157; s. c., 21 Am. Dec. 41; *Scudder v. Trenton Delaware Falls Co.*, 1 Sax. (N. J.) 694; s. c., 23 Am. Dec. 756; *Lasala v. Holbrook*, 4 Paige (N. Y.) Ch. 169; s. c., 25 Am. Dec. 524; *State v. Mobile*, 5 Port (Ala.) 279; s. c., 30 Am. Dec. 564; *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565; s. c., 36 Am. Dec. 502.

Where by the erection and use of limekilns by the defendants, upon their own premises, in close proximity to the residence of the plaintiff, the plaintiff's premises were by reason of the smoke, gas and dust issuing from the kilns rendered unfit for a comfortable habitation, and the smoke and gas when inhaled by persons of sensitive lungs were alike unpleasant and uncomfortable, as well as, to some extent, detrimental to health; it was *held* that the plaintiff was entitled to enjoy his premises free from the presence of the smoke, gas and dust proceeding from the kilns and that the defendants had no right thus to pollute the air and disturb the comfortable occupation and enjoyment of his premises by the plaintiff; and that their doing so amounted to a nuisance. *Held*, also, that the plaintiff was entitled to a perpetual injunction to restrain the continuance of the nuisance caused by opening the limekilns, to the annoyance or injury; and to damages for past injuries. *Hutchins v. Smith*, 63 Barb. (N. Y.) 252.

Manufacturing gas in such a manner as to produce annoyance to persons dwelling in adjoining houses, and to injure plaintiff's vegetation and crops, whether by smoke, gases, effluvia, or odors that may issue from the works, is

(g) *Annoyance of Neighbors*.—While the doing of certain acts by a person in the use of his premises as a dwelling house might not in themselves amount to a private nuisance, yet when the

such a nuisance as to warrant the interposition of a court of equity by injunction. *Cleveland v. Citizens' G. L. Co.*, 5 C. E. Green (N. J.) 201; *Broadbent v. Imperial Gas Co.*, 7 De Gex M. & G. 436.

Gunpowder making is not a nuisance *per se*, but may become so when it endangers the safety of persons living near it, and may be enjoined. *Wier's Appeal*, 74 Pa. St. 230.

Brick Burning.—The manufacture of brick, where so near a dwelling as to expose the premises to danger from fire and to imperil the health of the inmates. *Held*, that complainants were entitled to an injunction. *Walter v. Selve*, 4 Eng. L. & E. 15; s. c., 4 De G. & Sm. 315. See also *Fuselier v. Spalding*, 2 La. An. 773; *White v. Jamison*, L. R., 18 Eq. 303; *Beardmore v. Tredwell*, 31 L. J., Ch. 892; 7 L. T., N. S. 207; *Pollock v. Lester*, 11 Hare 266; *Boreham v. Hall*, 22 L. T., N. S. 116.

Brick burning is a nuisance to persons living within the limit affected by it, and 240 yards is not an extreme limit, and therefore an injunction to abate such a nuisance will be ordered. *Roberts v. Clarke*, 18 L. T., N. S. 49.

Noise.—A bill prayed that a defendant might be restrained from working a steam hammer in such a way as to cause a nuisance or injury to the plaintiff and his premises. *Held*, that an injunction should be granted. *Goose v. Bedford*, 21 W. R. 449. See also *Heather v. Pardon*, 37 L. T., N. S. 393; *Crump v. Lambert*, 3 L. R., Eq. 409; s. c., 15 W. R. 417; *Gullick v. Tremlett*, 20 W. R. 358.

Noise and obstruction occasioned by the loading and unloading of carts in a public highway or street opposite to a dwelling house. *Held*, in the absence of evidence showing an intention to make the nuisance permanent, not to be such an injury to the dwelling house as entitled the owner to the same, in reversion on a lease, to an injunction against the nuisance. *Mott v. Schoolbred*, 20 L. R., Eq. 22; s. c., 44 L. J., Ch. 380; 23 W. R. 545.

A perpetual injunction was granted to restrain the performances of a circus (intended to last for eight weeks) at a

distance of 115 yards from the plaintiff's house, on the ground that the performances caused an amount of noise such as to interfere with the ordinary peace of the dwelling house. *Inchbald v. Robinson*, *Inchbald v. Barrington*, 17 W. R. 459; s. c., 21 L. T., N. S. 259; 4 L. R., Ch. 388.

The occupier of a house is liable for allowing the continuance on his premises of any artificial work which causes a nuisance to a neighbor, even though it has been put there before he took possession. In a suit by the owner and occupier of a house against the occupier of an adjoining house, complaining of noise from the defendant's stable and of damp from an artificial mound on which it stood; *held*, that the plaintiffs were entitled to an injunction to prevent the defendant from keeping horses in his stable so as to be a nuisance; and that the defendant was also liable for not preventing the damp from going through the plaintiff's wall. *Broder v. Saillard*, 2 Ch. D. 692. And see *Ball v. Ray*, 8 L. R., Ch. 467; s. c., 28 L. T., N. S. 346; 21 W. R. 282.

House of Ill Fame.—The continuance of houses of ill fame will be enjoined at the suit of private persons who are deprived of the comfortable enjoyment of their property by the close proximity of such nuisance. *Hamilton v. Whitridge*, 11 Md. 128. See *Anderson v. Doty*, 33 Hun (N. Y.) 160. So an injunction will lie to restrain any nuisance that shocks the sense of decency, as the keeping and standing of jacks and stallions within the immediate view of one's dwelling. *Hayden v. Tucker*, 37 Mo. 214.

Cattle Yards.—The smell or stench arising from the keeping of live hogs in cattle yards from such numbers and for such length of time as to affect the health or comfort of surrounding residents, is a nuisance which equity will enjoin. *Babcock v. New Jersey etc. Co.*, 5 C. E. Green (N. J.) 296.

Ringling Bells.—The plaintiff's house being so near the church that the ringing of five o'clock bell in the morning disturbed her; she came to an agreement in writing with the church wardens and inhabitants at a vestry that she erect a cupola and clock at the church, in consideration of which the

same acts are done wantonly and maliciously, for the mere purpose of annoying his neighbor, and to destroy the peace and quiet of his home, and they have such effect, they may amount to a nuisance which a court of equity will restrain.¹

(*h*) *Threatened Nuisance*.—Equity has jurisdiction to enjoin a threatened injury, whenever its nature is such that it cannot be adequately compensated by damages, and its continuance will occasion a constantly recurring grievance.²

bell was not to be rung in the morning; this agreement good and decreed to be binding in equity and an injunction was granted. *Martin v. Nutkin*, 2 P. W. 266. And see *Soltan v. De Held*, 2 Sim., N. S. 133; s. c., 21 L. J., N. S. Ch. 153; 16 Jur. 326.

1. *Medford v. Levy* (W. Va.), 8 S. E. Rep. 302. See *Frazier v. Brown*, 12 Ohio St. 294; *Walker v. Cronin*, 107 Mass. 564; *Panton v. Holland*, 17 Johns. (N. Y.) 92; *Mahan v. Brown*, 13 Wend. (N. Y.) 261; *Phelps v. Nowlen*, 72 N. Y. 39; *Chatfield v. Wilson*, 28 Vt. 49.

Domestic Broils.—Where two families are occupying rooms in the same house, using in common the halls and stairways, a court of equity will not restrain the one from committing a nuisance against the other, unless the proof of the existence of such nuisance is clear and strong. A court of equity will, as far as it can, discourage a resort to its aid for the purpose of interfering in mere domestic broils. *Medford v. Levy* (W. Va.), 8 S. E. Rep. 302.

2. *St. James's Church v. Arrington*, 36 Ala. 546; *Rouse v. Martin*, 75 Ala. 510; s. c., 51 Am. Rep. 463; *Kingsbury v. Flowers*, 65 Ala. 479; s. c., 39 Am. Rep. 14; *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565; s. c., 36 Am. Dec. 502; *Thebaut v. Conova*, 11 Fla. 143; *Harrison v. Brooks*, 20 Ga. 537; *Whitaker v. Hudson*, 65 Ga. 43; *Rounsaville v. Kohlheim*, 68 Ga. 668; s. c., 45 Am. Rep. 505; *Lake View v. Letz*, 44 Ill. 81; *Laughlin v. Lamasco*, 6 Ind. 223; *Keiser v. Loveth*, 85 Ind. 240; s. c., 44 Am. Rep. 10; *Shiros v. Olinger*, 50 Iowa 571; s. c., 32 Am. Rep. 138; *Adams v. Michael*, 38 Md. 123; s. c., 17 Am. Rep. 516; *Dumesnil v. Dupont*, 18 B. Mon. (Ky.) 800; s. c., 68 Am. Rep. 750; *Rogers v. Danforth*, 9 N. J. Eq. 289; *Butler v. Rogers*, 9 N. J. Eq. 487; *Wolcott v. Melick*, 11 N. J. Eq. 204; s. c., 66 Am. Dec. 790; *Cleveland v. Citizens' Gas Light Co.*, 20 N. J. Eq. 201; *Atty. Gen. v. Steward*, 20 N. J. Eq.

415; *Duncan v. Hays*, 22 N. J. Eq. 25; *Mohawk Bridge Co. v. Utica etc. R. Co.*, 6 Paige (N. Y.) 554; *Hudson etc. Canal Co. v. New York etc. R. Co.*, 9 Paige (N. Y.) 323; *Phoenix v. Comm. of Emigration*, 1 Abb. Pr. (N. Y.) 466; *Barnes v. Calhoun*, 2 Ired. (N. Car.) Eq. 199; *Simpson v. Justice*, 8 Ired. (N. Car.) Eq. 115; *Clark v. Lawrence*, 6 Jones (N. Car.) Eq. 83; *Frizzle v. Patrick*, 6 Jones (N. Car.) Eq. 354; *Dorsey v. Allen*, 85 N. Car. 358; s. c., 39 Am. Rep. 704; *Biddle v. Ash*, 2 Ashm. (Pa.) 211; *Hough v. Doylestown*, 4 Brewst. (Pa.) 333; *Sellers v. Pennsylvania R. Co.*, 10 Phila. (Pa.) 319; *Rhodes v. Dunbar*, 57 Pa. St. 274; *Dilworth's Appeal*, 91 Pa. St. 247; *Lining v. Geddes*, 1 McCord (S. Car.) Ch. 304; s. c., 16 Am. Dec. 606; *Kirkman v. Handy*, 11 Humph. (Tenn.) 406; s. c., 54 Am. Rep. 45; *Ramsey v. Riddle*, 1 Cranch (U. S.) C. C. 399; *Flint v. Russell*, 5 Dill. (U. S.) 151; 3 *Pomeroy's Eq. Jur.*, § 1350; 1 *High on Inj.*, § 742; *Kerr on Inj.* 340; *Wier's Appeal*, 74 Pa. St. 230; *Aldrich v. Howard*, 7 R. I. 87; *Philips v. Socket*, 1 Tenn. 200; *Coalter v. Hunter*, 4 Rand. (Va.) 58; s. c., 15 Am. Dec. 726; *Keystone Bridge Co. v. Summers*, 13 W. Va. 476; *Walker v. Shepardson*, 2 Wis. 384; s. c., 60 Am. Dec. 423; *Hamilton v. Whitridge*, 11 Md. 128; s. c., 69 Am. Dec. 184; *Atty. Gen. v. Sheffield Gas Consumers' Co.*, 3 De G. M. & G. 304; *Dawson v. Paver*, 5 Hare 415, 430; *Potts v. Levy*, 2 Drew 272; *Elwell v. Crowther*, 31 Beav. 163; *State v. Mobile*, 5 Port. (Ala.) 279; s. c., 30 Am. Dec. 564; *Coker v. Birge*, 9 Ga. 425; s. c., 54 Am. Dec. 347; *De Give v. Seltzer*, 64 Ga. 423; *People v. St. Louis*, 5 Gilman. (Ill.) 351; s. c., 48 Am. Dec. 339; *Dunning v. Aurora*, 40 Ill. 481, 486; *Wahle v. Reinbock*, 76 Ill. 322; *Fuselier v. Spalding*, 2 La. An. 773; *Blanc v. Murray*, 36 La. An. 162; s. c., 51 Am. Rep. 7; *Whitfield v. Rogers*, 26 Miss. 84; *Society etc. v. Morris Canal etc. Co.*, 1 N. J. Eq. 57; *Morris v. Butler*, 19

To authorize an injunction to restrain a threatened nuisance, all the facts upon which the right to relief is based should be set forth in the bill, and if the facts are denied in the answer, they must be sustained by proof on the trial.¹

(i) *Irreparable injury* is not necessarily such injury as is beyond the possibility of reparation or compensation in damages.

N. J. Eq. 294; *Gardener v. Newburgh*, 2 Johns. (N. Y.) Ch. 162; s. c., 7 Am. Dec. 526; *Belknap v. Belknap*, 2 Johns. (N. Y.) Ch. 463; s. c., 7 Am. Dec. 548; *Catlin v. Valentine*, 9 Paige (N. Y.) 575; s. c., 38 Am. Dec. 567; Atty. Gen. *ex rel. Bell v. Blont*, 4 Hawks (N. Car.) 384; s. c., 15 Am. Dec. 526; *Clark v. Lawrence*, 6 Jones (N. Car.) Eq. 83.

In *Rogers v. Danforth*, 9 N. J. Eq. 289, the CHANCELLOR says: "Where the complainants ask for an injunction to protect them from apprehended danger, and the answer denies that such apprehensions are well founded, the court, as a general rule, will give to the defendants the full benefit of such denial and refuse the injunction; and where the parties come before the court with affidavits, the court will refuse the injunction, unless the complainants made out a very clear case by their bill and affidavits." A court of equity will not restrain by injunction any lawful business because it is supposed, or alleged, that such business will be a nuisance to a dwelling near it; it must be clear that the business will be a nuisance, and that it cannot be carried on so as not to be such. *Duncan v. Hays*, 22 N. J. Eq. 25.

To justify an injunction to restrain an existing or threatened nuisance to a dwelling house, the injury must be shown to be of such a character as to diminish materially the value of the property as a dwelling, and seriously interfere with the ordinary comfort and enjoyment. *Adams v. Michael*, 38 Md. 123; s. c., 17 Am. Rep. 516.

An injunction will not be granted where the apprehended injury is merely contingent. *Cleveland v. Citizens*, etc. Co., 20 N. J. Eq. 201; *Rhodes v. Dunbar*, 57 Pa. St. 274; *Wood Nuisance*, § 789.

This is especially true where the anticipated injury arises from the use to which the property is to be put, and not from the nature of the structure itself. *Duncan v. Hays*, 22 N. J. Eq. 25; *Flint v. Russell*, 5 Dill. (U. S.) 151.

Courts of equity will not, in advance,

enjoin the erection and use of a building when the use of it may not prove essentially injurious to others. *Loring v. Small*, 50 Iowa 271; s. c., 32 Am. Rep. 136; *Curtis v. Winslow*, 38 Vt. 690.

Action of Highway Commissioners.—Where commissioners of highways are proceeding to do an act within the powers conferred on them by law, and it does not appear with certainty that such act may prove injurious to the private rights of another or become a private nuisance, a court of equity will not enjoin their proposed action until the question of nuisance is determined by actual experience. *Thornton v. Rice*, 118 Ill. 351.

1. *Imperial Gas Co. v. Broadbent*, 7 H. L. Cas. 600; *Ripon v. Hobart*, 3 Myl. & K. 169; *Haines v. Taylor*, 10 Beav. 75; *Thebaut v. Canova*, 11 Fla. 143, 224.

In *Ross v. Butler*, 19 N. J. Eq. 294, and *Duncan v. Hays*, 22 N. J. Eq. 25, it is said that the proof must exclude reasonable doubt, but probably all the proof that is required is a preponderance as in other civil actions.

The allegations upon which they found their title to relief must be direct and positive, clear and unambiguous. *R. R. Co. v. Lancaster*, 62 Ala. 562; *Read v. Walker*, 18 Ala. 329. And not upon information and belief. *Spence v. Duren*, 3 Ala. 253; *Ex parte Reid*, 50 Ala. 444; 1 Dan. Ch. Pl. & Pr. 313; *Adams v. Michael*, 38 Md. 125. They must set forth fully and particularly the nature and character of the threatened nuisance they seek to restrain; in what it will consist, and their knowledge as to the use as well as the nature and character of the injury that will result to the parties complaining. *Thebaut v. Canova*, 11 Fla. 143, 225.

The bill must set forth such a state of facts as leave no doubt upon the question of nuisance and of its injurious results; for if there is any doubt upon either of these points, the benefit will be given to the defendant. A mere allegation of great and apprehended danger is not enough; facts must be

It is that species of injury by which a right of the plaintiff has been unlawfully violated, and such violation is continuous,¹ or where a wrong of the kind mentioned is about to be committed.²

(j) *A continuous nuisance* is not necessarily an unceasing and constant injury, but one which occurs at stated periods, as where a land owner, by means of a ditch, unlawfully caused the water which accumulated in a pond on his farm from rains and melted snow, to be thrown upon the land of an adjoining land owner.³

In such case an injunction is the proper remedy, as a court of equity looks at the nature of the injury and its constant repetition or continuance rather than the magnitude of the damages in affording relief.⁴

stated that show it. *Kingsbury v. Flowers*, 65 Ala. 486; *Wolcott v. Melick*, 3 Stock. (N. J.) 205; *Branch Turnpike v. Yuba Co.*, 13 Cal. 190; *Clark v. Lawrence*, 6 Jones (N. Car.) Eq. 83; *Cleveland v. Gas Light Co.*, 20 N. J. Eq. 202.

The intervention of a court of equity by injunction, to restrain a threatened private nuisance, is one of its extraordinary powers, which is always exercised cautiously. If the thing sought to be enjoined is not in itself a nuisance, but only something which may become so under certain circumstances, the court will not interfere until the matter has been tried at law, unless a case of pressing necessity and irreparable injury is clearly shown. Facts must be stated, and not mere inferences, opinions, or conclusions; and allegations on information and belief are not sufficient. *St. James's Church v. Arrington*, 36 Ala. 548; *Dumesnil v. Dupont*, 18 B. Mon. (Ky.) 800; *Kirkman v. Handy*, 11 Humph. (Tenn.) 406; *Lake View v. Letz*, 44 Ill. 81; *Ellison v. Commissioners*, 5 Jones' Eq. (N. Car.) 57; 2 Story's Equity, §§ 925-6; *High on Injunctions*, 271, § 488, note 1; 2 Dan. Ch. Pr. 1636; *Ross v. Butler*, 19 N. J. Eq. 204; *Williams v. N. Y. Cent. R. Co.*, 18 Barb. (N. Y.) 222; *Higbee v. Camden etc. R. Co.*, 20 N. J. Eq. 435; *Cleveland v. Gas Light Co.*, 20 N. J. Eq. 206; *Rhodes v. Dunbar*, 57 Pa. St. 274; *Rosser v. Randolph*, 7 Port. 245; *Ferguson v. Selma*, 43 Ala. 400; *Leigh v. Westervelt*, 2 Duer (N. Y.) 618; *Wallace v. McVey*, 6 Ind. 303; *Wolcott v. Melick*, 3 Stock. (N. J.) 204; *Branch Turnpike Co. v. Yuba Co.*, 13 Cal. 190, *Thebaut v. Canova*, 11 Fla. 143; *Adams v. Michael*, 38 Md. 125; *Fort v. Groves*, 29

Md. 193; *Miss. etc. R. Co. v. Ward*, 2 Black (U. S.) 494; *Clark v. Lawrence*, 6 Jones' Eq. (N. Car.) 83; *Atty. Gen. v. Steward*, 21 N. J. 340; *Duncan v. Hays*, 22 N. J. Eq. 29; *McConnel v. Gibson*, 12 Ill. 128; *Lockard v. Lockard*, 16 Ala. 430; *Lancaster v. Railroad*, 62 Ala. 562; 1 *Spence's Equity*, 672; 74 Pa. St. 241; *Harrison v. Brooks*, 20 Ga. 537.

1. *Wood v. Sutcliffe*, 2 Sim. (N. S.) 165; *Elmhurst v. Spencer*, 2 Mc. & G. 50; *Atty. Gen. v. Tel. Co.*, 30 Beav. 287; *Corning v. Troy etc. Co.*, 40 N. Y. 191.

2. In *Clowes v. Staffordshire etc. Co.*, L. R., 8 Ch. App. 125, the question is discussed with great ability. It is said: "The very fact that a right has been violated, and that this violation is constantly going on, and that a court of law cannot in damages compensate the injury or stop the wrong, furnishes the best possible reason for the interference of a court of equity, and the fact that the actual injury resulting from the violation of the right is small, and the interest to be affected by the injunction is large, is not to weigh against the interposition of preventive power when on the one hand a right is violated and on the other a wrong committed."

But where the nuisance was merely temporary and easily removed—as a fence across a public road, an injunction was refused until the right had been established at law. *Bunnell's Appeal*, 69 Pa. St. 62; *Clark's Appeal*, 62 Pa. St. 447.

3. *Davis v. Londgreen*, 8 Neb. 43.

4. *Davis v. Londgreen*, 8 Neb. 43.

The discharge of filthy sewage upon the land of another, which may probably cause injury to the health and

(k) *Where the nuisance is public*, the plaintiff, to obtain an injunction, must allege in his bill and prove if need be, special damages peculiar to himself *distinct* from the public at large.¹

(l) *Any intrusion on the freehold* of another, even if it be

sickness in the family of such person, and where the nuisance is continuing and likely to be permanent, and where the consequences are not barely possible, but to a reasonable degree certain, a court of equity may interpose to arrest such nuisance before completed, and that a nuisance causes special damage to an individual, in which the public do not participate, such special damage gives a right of action, and as an action may be brought for every day the nuisance continues, equity, which abhors a multiplicity of suits, will entertain jurisdiction so as to do full and complete justice between the parties and terminate the litigation. *Georgia Chemical etc. Co. v. Colquitt*, 72 Ga. 172; *Norwood v. Dickey*, 18 Ga. 528.

Where an injury resulting to a particular person from a nuisance is manifest and continuous or constantly recurring (as where a bayou or other natural outlet which serves to drain his land has been dammed, and thus caused to flood his land), and the right in such person to have the same abated is clear, a court of equity will grant the appropriate relief, without requiring that the injured party shall have first established the injury by an action at law. *Learned v. Hunt*, 63 Miss. 373.

1. *Shed v. Hawthorne*, 3 Neb. 179; *Sparhaw v. Union Passenger R. Co.*, 54 Pa. St. 401; *Meckling v. Kittanning Bridge Co.*, 1 Grant (Pa.) 416; *Peterson v. Railway Co.*, 5 Phila. (Pa.) 199; *Perry v. Maurer*, 5 Luz. L. Reg. (Pa.) 97; *Blanchard v. Reyburn*, 32 Leg. Int. (Pa.) 239; s. c., 1 W. N. C. (Pa.) 529; *Passenger R. Co. v. Philadelphia*, 2 W. N. C. (Pa.) 639; s. c., 33 Leg. Int. (Pa.) 264; *Sutton v. Eshleman*, 3 L. Bar, 10th Aug., 1871; *Passenger R. Co. v. Passenger R. Co.*, 1 W. N. C. (Pa.) 492; *Horner v. Craig*, 2 W. N. C. (Pa.) 11; *Frink v. Lawrence*, 30 Conn. 117; *Corning v. Lowerre*, 6 Johns. (N. Y.) Ch. 439; *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565; *Doolittle v. Broome Co.*, 18 N. Y. 160; *O'Brien v. Norwich etc. R. Co.*, 17 Conn. 372; *Allen v. Board*, 2 Beas. (N. J.) 68; *Hinchman v. Patterson etc. R. Co.*, 2 C. E. Green (N. J.) 75; *Beveridge v. Lacey*, 3 Rand.

(Va.) 63; *Walker v. Shepardson*, 2 Wis. 384; *Mechling v. Kittanning Bridge Co.*, 1 Grant's (Pa.) Cas. 416; *Barnes v. Racine*, 4 Wis. 454; *Ewell v. Greenwood*, 26 Iowa 377; *Williams v. Smith*, 22 Wis. 594; *Green v. Lake*, 54 Miss. 540; *Engs v. Peckham*, 11 R. I. 210; *Coast Line R. Co. v. Cohen*, 50 Ga. 451; *Prince v. McCoy*, 40 Iowa 533; *Illinois Co. v. St. Louis*, 2 Dill. (U. S.) 70; *Higbee v. Camden etc. L. Co.*, 4 C. E. Green (N. J.) 276. *Contra*, *Whitfield v. Rogers*, 26 Miss. 84.

In order to entitle a party to an abatement of a public nuisance by injunction, he must show that the injury of which he complains is such in its nature and extent as to call for the interposition of a court of equity. *Stanford v. Lyon*, 37 N. J. Eq. 94; *High Inj.*, § 762, note 5. "Of whatever character it is requisite that the injury complained of should be, in order to lay the foundation for this remedy, it is necessary that it should be a *substantial*, and not merely a technical or inconsequential injury. There must not only be a violation of the orator's rights, but such a violation as is, or will be, attended with *actual or serious damage*. Even although the injury may be such that an action at law would lie for damages, it does not follow that a court of equity would interpose by the summary, peculiar and extraordinary remedy of injunction." *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565. It is a power to be exercised only in cases of necessity, where other remedies may be inadequate, and then with great discretion and carefulness. *Sargent v. George*, 56 Vt. 627.

See *O'Brien v. Norwich etc. R. Co.*, 17 Conn. 375; *Clark v. Saybrook*, 21 Conn. 327; *Irwin v. Dixon*, 9 How. (U. S.) 28; *Norwich Gas Light Co. v. Norwich City Gas Co.*, 25 Conn. 36; *Cumberland Valley R. Co.'s Appeal*, 62 Pa. St. 227; *Buck Mountain Coal Co. v. Lehigh Coal & Nav. Co.*, 50 Pa. St. 99; *Peterson v. Navy Yard etc. R. Co.*, 5 Phila. (Pa.) 201; *Shed v. Hawthorne*, 3 Neb. 185; *Dover v. Portsmouth Bridge*, 17 N. H. 215; *Allen v. Board of Freeholders*, 13 N. J. Eq. 74; *Hinchman v. Paterson R. Co.*, 17 N. J. Eq. 79; *Doo-*

little *v. Broome Co.*, 18 N. Y. 161; s. c., 16 How. Pr. (N. Y.) 518.

A bill in equity was brought by an individual against a railroad company alleging that the defendants were engaged in extending their road across a certain cove which is an arm of the sea, in which the tide ebbs and flows, communicating with the ocean through a navigable river; that the waters of the cove are navigable, and that from time immemorial have been used and enjoyed as such; and that the plaintiff and all other persons have been accustomed to pass and repass, at their pleasure, up and down the cove into the river, to the ocean or elsewhere, in boats, schooners or other vessels without molestation or obstruction; and that by means of the road so extended the navigation of the cove will be greatly obstructed and rendered almost wholly useless; that the plaintiff resided near the head of the cove; that the right to navigate the cove was a common right the enjoyment of which was valuable to him, in respect to trade and commerce, the building and launching of vessels, and for agricultural purposes and fisheries; and that he was in danger of being deprived of his lawful right to navigate the cove. It was held that the case stated by the bill was that of a public nuisance, but the bill would not be sustained because it failed to show a particular injury to the plaintiff, distinct from that which he suffers in common with the rest of the public. *O'Brien v. Norwich etc. R. Co.*, 17 Conn. 372.

Wharf.—The obstruction of a navigable river by a wharf owner driving piles into the bed of the river and extending his wharf so as to occupy a space of three feet, out of a width of sixty feet available for navigation may be enjoined. *Atty. Gen. v. Terry, L. R.*, 9 Ch. 423.

A crib or pier erected in the waters of a harbor is a public nuisance unless the party erecting the same is authorized to build it by some power competent to confer an authority, and the remedy to prevent its erection is by injunction at the suit of the attorney general. *People v. Vanderbilt*, 28 N. Y. 396; affirming s. c., 38 Barb. (N. Y.) 282. See *Davis v. Mayor*, 4 Kern. (N. Y.) 526; *People v. N. Y. etc. Co.*, 68 N. Y. 71; affirming s. c., 7 Hun (N. Y.) 105.

Floating Elevator.—The use by defendants of a floating elevator in a

canal or basin forming part of the harbor of a city for the purpose of transferring grain in bulk from vessels to canal boats does not constitute such a public nuisance as to warrant an injunction upon the application of the attorney general in behalf of the people. *People v. Horton*, 4 N. Y. 510; affirming s. c., 5 Hun (N. Y.) 516. See *Hart v. Albany*, 9 Wend. (N. Y.) 572; affirming s. c., 3 Paige (N. Y.) 213.

A bone boiling establishment is a public nuisance, if carried on in a populous part of a city, and will be restrained by injunction; though when first erected the neighborhood was sparsely settled. *Smith v. Cummings*, 2 Pars. (Pa.) 92.

A soap factory which has been established for many years, but which has become a public nuisance by reason of the advance of population, will be enjoined. *Howard v. Lee*, 3 Sandf. (N. Y.) 281; s. c., *Mulligan v. Elias*, 12 Abb. Pr. N. S. (N. Y.) 259; *Campbell v. Seaman*, 2 Thomp. & C. (N. Y.) 231.

Slaughter House.—The occupation of a building in a city as a slaughter house is *prima facie* a nuisance to the neighboring inhabitants, and may be restrained by injunction. *Catlin v. Valentine*, 9 Paige (N. Y.) 575; *Brady v. Weeks*, 3 Barb. (N. Y.) 157.

Railroad Track in Street.—If a street in a city be occupied by the side tracks of a railroad company, and its cars and engines, without authority of law, it is a public nuisance. If the owner of adjoining property suffer special damage therefrom, in which the public do not participate, this entitles her to maintain an action. And if the injury, from its nature, is not susceptible of being adequately compensated by damages at law, or is such that, from its continuance, a permanent mischief must occasion a constantly recurring grievance, which cannot be otherwise prevented, equity will enjoin it. *Kavanagh v. Mobile etc. R. Co. (Ga.)*, 4 S. E. Rep. 113.

A complaint alleging that the running of defendant's trains on a public street in front of plaintiff's house, without right, causes a great vibration of the ground, and jars plaintiff's house, inasmuch that the walls have been cracked, and that the trains are run at short intervals from early in the morning until 7 or 8 o'clock at night, making a great noise and emitting a large

amount of smoke and gases, noxious and offensive to plaintiff, and that the operation of the trains causes plaintiff intense mental anxiety and destroys her peace, shows sufficient special injury to plaintiff to entitle her to an injunction on a demurrer which admits the wrongful occupation of the street. *Wilcken v. West Brooklyn R. Co.*, 1 N. Y. S. 791.

Two or more persons, owning distinct though adjoining lots and buildings on the street of a city where it is proposed to build a street railroad, without authority from the city, which, when built, will obstruct the use of the properties, and cause a common injury to such proprietors, independent and different from what the general public suffers, may unite and maintain an action to restrain the threatened obstruction and nuisance. *Palmer v. Waddell*, 22 Kan. 352; *Atchison St. R. Co. v. Nave* (Kan.), 17 Pac. Rep. 587*.

Railroad in Park.—Where the title to a certain park is vested in a city for the use and benefit of the public, and the city grants to defendant a right of way for its track over a remote portion of it, which does not interfere with the free passage or use thereof in the customary manner, the right of way and track are not such a nuisance as would enable an individual to maintain an action in behalf of the public to abate and enjoin the same. *People v. Park etc. R. Co.* (Cal.), 18 Pac. Rep. 141.

Smoke from Chimney.—It appeared that the issuance of soot from defendant's smoke stack was a nuisance of a most disagreeable character to plaintiff and his family. It was not shown but that the smoke stack might have been easily used in such a way that soot would not have issued therefrom. *Held*, that this was not one of the inconveniences necessarily flowing from a concentration of population, which one impliedly consents to by living in a city, and that it was properly enjoined. *Sullivan v. Royer*, 72 Cal. 248.

Fireworks and Music.—The collection of a crowd of noisy and disorderly people, to the annoyance of the neighborhood, outside grounds in which entertainments with music and fireworks are being given for profit, is a nuisance for which the giver of the entertainments is liable to an injunction, even though he has excluded all improper characters from the grounds, and the amusements within the grounds have been conducted in an orderly way, to

the satisfaction of the police. *Semble*, that letting off rockets and establishing a powerful band of music which plays twice a week for several hours continuously within 100 yards of a dwelling house, are nuisances which this court will restrain. *Walker v. Brewster*, 5 Eq. 25.

Carriers of Merchandise.—Defendants, carriers of merchandise in the city of S, while not so employed, spent their time with their horses and wagons in the public street in front of complainant's dwelling, and to such an extent that unpleasant and noxious odors were created, which were at certain times carried into complainant's dwelling, making his home uncomfortable. *Held*, that this was unlawful use of a public street; and that complainant is entitled to an injunction because he suffered special injury; and that his motives in filing his bill or in prosecuting his suit cannot be enquired into. *Lippincott v. Lasher* (N. J.), 14 Atl. Rep. 103.

Hospitals Near Residences.—The use of a building, in a portion of a city entirely given up to residences, as a hospital for the care of sick infants, including any who may develop, after admission, contagious disease, is a nuisance which will be restrained by an injunction in a suit brought by an owner of a contiguous dwelling. *Gilford v. Babies' Hospital*, 1 N. Y. S. 448*.

Suit by Reversioner.—Where a public street was improperly used as a stable yard, *held* that the nuisance to the neighboring houses was not so permanent as to entitle a reversioner to an injunction. *Mott v. Shoolbred*, 20 Eq. 22.

Houses Calculated to Breed Disease.—In *Meeker v. Van Rensselaer*, 15 Wend. (N. Y.) 397, it was *held* that a dwelling house, cut up into small apartments inhabited by a crowd of poor people in a filthy condition and calculated to breed disease is a public nuisance and may be abated by individuals residing in the neighborhood by tearing it down, especially during the prevalence of a disease like the Asiatic cholera.

Cemetery.—Whenever it can be clearly proved that a burial place is so situated that interments there will endanger life or health by corrupting the surrounding atmosphere or the water of wells or springs, equity will relieve by injunction. *Clark v. Lawrence*, 6 Jones (N. Car.) Eq. 83. See also *Barnes v. Hathorn*, 54 Me. 124.

merely technical, is a nuisance, as the projection of an upper story of a building across the line over the land of the adjoining owner.¹

To maintain an action to abate a nuisance, since the remedy is by action and not by writ, the plaintiff must allege that he was the owner of the freehold affected by the nuisance at the time when the several acts complained of were committed; and the action must be against the owners in fee in case where it is brought to abate the nuisance.²

(m) *Purpresture*.—The jurisdiction of equity in cases of purpresture,³ as well as of public nuisance generally, is founded upon the necessity of preventing irreparable mischief and suppressing oppressive or vexatious litigation.⁴ And a court of equity will not only interfere to restrain acts prejudicial to the interests of the community upon the information of the attorney general,⁵ but also upon the application of private parties directly

Gambling on Fair Grounds.—An injunction will not lie at the suit of a stockholder in an incorporated fair association, restraining the company and its officers from permitting, for a pecuniary reward, gamblers to congregate and ply their vocation upon the grounds of the company during its annual exhibitions, where it does not appear, from the bill or otherwise, that the complainant or the company has thereby sustained some pecuniary injury or loss. *Cope v. Fair Assoc. of Flora*, 99 Ill. 489.

Jail.—An injunction will not issue to prevent the erection of a jail on the ground of nuisance. *Burwell v. Vance Co. Commrs.*, 93 N. Car. 73; s. c., 53 Am. Rep. 454.

1. In *Goodson v. Richardson*, L. R., 9 Ch. App. 221. The defendant laid water pipes in the highway in front of the plaintiff's premises, the plaintiff being the owner of the fee. A mandatory injunction was granted to remove the pipes. The court held that while the soil under the highway was of no value to the plaintiff, yet the defendant by laying the pipes had violated his rights, and while the present damages were nothing, still if the pipes were permitted to lie there without objection for the statutory period the defendant would thereby acquire the right of continuing so to use them. See also *Meyer v. Metzler*, 51 Cal. 142; *Codman v. Evans*, 5 Allen (Mass.) 308; *Skinner v. Wilder*, 38 Vt. 115; *Grove v. Ft. Wayne*, 45 Ind. 429; *Cherry v. Stein*, 11 Md. 1.

2. *Hutchins v. Smith*, 63 Barb. (N. Y.) 251.

3. A purpresture, as defined by Coke, is where one encroacheth or makes that several to himself which ought to be common to many. 2 Inst. 38. The word is now understood to mean an encroachment upon and application to the offending party's own use of the public in a thoroughfare—as a river, harbor, highway or street. *Atty. Gen. v. Utica Ins. Co.*, 2 Johns. (N. Y.) Ch. 371. The remedy at common law is either by information of intrusion or by suit in equity by the Attorney General. *Atty. Gen. v. Richards*, 2 Anst. 603. A purpresture may not be a nuisance—as where neither the public nor private persons are inconvenienced or injured; but *prima facie* the appropriation of a portion of a street, highway, river or harbor for the party's exclusive use, without lawful authority, is a nuisance, and places the burden of proof on the party claiming the right. *Hart v. Albany*, 3 Paige (N. Y.) Ch. 213. This decree was affirmed on appeal. *Hart v. Albany*, 9 Wend. (N. Y.) 571. The court held that the proof did not warrant an injunction.

4. *Atty. Gen. v. Johnson*, 2 Wils. Ch. 87; *Silliman v. Hudson River Bridge Co.*, 4 Blatchf. (U. S.) 74; *Columbus v. Jaques*, 30 Ga. 506; *People v. Third Ave. R. Co.*, 45 Barb. (N. Y.) 63; s. c., 30 How. (N. Y.) Pr. 121; *Atty. Gen. v. Cohoes Co.*, 6 Paige (N. Y.) 133; *Com. v. Rush*, 14 Pa. St. 186.

5. *Sparhawk v. Union Passenger R.*

affected by the nuisance, aside from and independent of the general injury to the public.¹ A purpresture, however, will not be enjoined at the suit of an individual, unless he clearly show a special damage to himself.²

(n) *A bridge across a navigable river*, if it does not stop navigation, is not at the present time necessarily to be enjoined as a nuisance. A court of equity in determining its character will consider the extent of its interference with navigation, and the relative importance of the traffic over the bridge—as railway bridge compared with that on the river—and adapt its decree to the facts found.³ Where

Co., 54 Pa. St. 401; Manhattan etc. Co. v. Barker, 7 Rob. (N. Y.) 523.

1. Frink v. Lawrence, 20 Conn. 117; Ewell v. Greenwood, 26 Iowa 377; Beveridge v. Lacey, 3 Rand. (Va.) 63; Williams v. Smith, 22 Wis. 594; Robinson v. Baugh, 31 Mich. 290; Philadelphia v. Passenger R. Co., 8 Phila. (Pa.) 648; Moyamensing v. Long, 1 Pars. (Pa.) 143; Philadelphia v. Crump, 1 Brewst. (Pa.) 320; s. c., 6 Phila. (Pa.) 275.

An injunction has been granted at the suit of an individual against an obstruction of the highway. Savannah etc. R. Co. v. Shiels, 33 Ga. 601; Trevor v. Jackson, 46 How. (N. Y.) Pr. 389. And against the obstruction of a navigable river. New York v. Baumberger, 7 Robt. (N. Y.) 219. So an injunction has been granted at the suit of an abutting house owner to enjoin a street railroad company from leaving the snow which it removes from its tracks heaped up between them and the plaintiff's premises for a longer period than was reasonably requisite for its removal. Prime v. Twenty-third St. R. Co., 1 Abb. N. Cas. (N. Y.) 63. See Johnston v. Christopher & Tenth St. R. Co., 1 Abb. N. Cas. (N. Y.) 75. But even in cases of unquestioned nuisance, if the party complaining shows no special injury to himself different from the common injury to the public, he is not entitled to an injunction. Hinchman v. Paterson etc. R. Co., 17 N. J. Eq. 75; Shed v. Hawthorne, 3 Neb. 179. So if the injury is doubtful and the evidence conflicting, it is not usual to grant the relief. Earl of Ripon v. Hobart, 3 Myl. & K. 169.

The remedy to prevent the erection of a purpresture and nuisance on a bay or navigable river, is by injunction at the suit of the Attorney General. People v. Vanerbilt, 26 N. Y. 287;

s. c., 28 N. Y. 396; 38 Barb. (N. Y.) 282.

2. Harrison v. Newton, 9 N. Y. Leg. Obs. 347; s. c., 1 Code R. N. S. (N. Y.) 207; Davis v. New York, 14 N. Y. 506; reversing s. c., 3 Duer (N. Y.) 119; Hinchman v. Paterson etc. R. Co., 17 N. J. Eq. 75; Shed v. Hawthorne, 3 Neb. 179.

3. Pennsylvania v. Wheeling etc. Bridge Co., 13 How. (U. S.) 518. In Ripon v. Hobart, 3 Myl. & K. 169. LORD BROUGHAM said in effect that the jurisdiction of courts of equity over nuisances by injunction was of recent origin and that it cannot be called an unwise discretion if the court should pause before interrupting men in improving their property in modes which are *prima facie* harmless and worthy of praise, beneficial to them and possibly without prejudice to anyone. But compare Miss. etc. R. Co. v. Ward, 2 Black (U. S.) 485; Hart v. Albany, 9 Wend. (N. Y.) 571; Georgetown v. Alexander etc. Co., 12 Pet. (U. S.) 91; Rex v. Russell, 6 B. & C. 566; Lansing v. Smith, 4 Wend. (N. Y.) 9; Dutton v. Strong, 1 Black. (U. S.) 23.

But if it obstructs navigation it may be enjoined by the municipal corporation, whose use of its wharves and docks is thereby damaged. New York v. Baumberger, 7 Rob. (N. Y.) 219. Or at the suit of a private party whose rights are interfered with. Hudson River Co. v. Loeb, 7 Rob. (N. Y.) 418; contra Manhattan Gas Light Co. v. Barker, 7 Rob. (N. Y.) 523; s. c., 36 How. (N. Y.) Pr. 233.

A stream or water course running into the Savannah river, from seventy-five to two hundred feet in width and fourteen feet in depth, at a point where a bridge was placed across it, and in which the tide rises and falls three and a half feet, and which is open so as to

the bridge is authorized by statute, it will not be a nuisance.¹

(o) *The erection of a mill dam* in such a manner as to unlawfully raise the water over the plaintiff's land will be enjoined.²

(p) *The erection of an embankment* on one's own land, whereby the surface water on the adjoining land of another is prevented from flowing in its natural course, and caused to flow in a different direction over the land of the latter, is a nuisance, for which an action will lie without showing actual damages.³ In other words, that where the surface waters are collected and caused to flow in a body on the land of the adjoining proprietor, and not in a natural water course, the adjoining proprietor may maintain an action for such injury.⁴

allow free passage to all water craft running thereon, is a navigable stream, and the public have a right to free navigation thereon. If such a stream be obstructed, the obstruction is a nuisance, and may be abated at the instance of any person applying therefor. *Charleston etc. R. Co. v. Johnson*, 73 Ga. 306.

1. *Hinchman v. Paterson etc. R. Co.*, 2 C. E. Green (N. J.) 75; *McFarland v. Orange etc.*, 2 Beas. (N. J.) 17; *Rex v. Pease*, 4 B. & A. 30. But compare *Le Clercq v. Trustees*, 7 Ohio 218.

2. *White v. Forbes*, 1 Walk. (Mich.) 112; *Whitfield v. Rogers*, 26 Miss. 84. In many of the states the statute provides for the condemnation of the land to be overflowed for the use of mills. If the damages so awarded are not paid or there is an attempt to overflow land without complying with the statutory conditions, an injunction will be granted.

A court of equity has power to restrain one from increasing the height of his mill dam, if such increase of height would be productive of loss of health in the family of another residing in the neighborhood of the mill; nor does it matter whether the mill is in the town or the country. *Minor v. De Vaughn*, 72 Ga. 208; *Att. Gen. v. Eau Claire*, 37 Wis. 400; *Robinson v. Byron*, 1 Bro. C. C. 588; *Bemis v. Upham*, 13 Pick. (Mass.) 169, was an application to the court for an injunction to restrain defendants from keeping up a mill dam, to the nuisance of the plaintiff's mill privilege higher up the stream; it was held that the case was within the equity jurisdiction of the court. But in *Outcalt v. Helme Co.*, 42 N. J. Eq. 665, the bill averred that the defendant illegally maintained a dam, by means of which backwater was thrown upon

the complainant's mill wheel above, and prayed an injunction against such maintenance. The answer set up a prescriptive right to maintain the dam as it was, and denied that the dam was the cause of the interference with complainant's wheel. Held, that the issues thus presented were not within the jurisdiction of the court of chancery.

An action in equity was brought to have enjoined as a nuisance dangerous to public health, a dam which had been in existence for over forty years upon the property of the defendant, who also held deeds for the land overflowed by the mill pond. The only evidence returned to the appellate court in proof of the dam being a nuisance was an indictment and conviction of defendant's grantors for the maintenance of said dam, had nearly thirty years previous. Held, that the defendant was entitled to a jury trial. *SHERWOOD, J.*, dissenting. *Ronayne v. Loranger* (Mich.), 33 N. W. Rep. 840.

3. *Tootle v. Clifton*, 22 Ohio St. 247; *Stewart v. Schneider*, 22 Neb. 286. In *Bowsby v. Speer*, 2 Vroom (N. J.) 351, the court held that surface water diverted from its natural channel by the erection of a building, and the water thus caused to flow on the land of another, no cause of action thereby accrued.

4. *Kauffman v. Griesemier*, 26 Pa. St. 407.

Other Injuries Caused by Embankment.—Complainant purchased a lot of ground embraced in a plot which his grantor had mapped and laid out into blocks, lots and streets, which were dedicated and accepted to the public use by the city of Jersey City, which subsequently, under its charter, vacated a portion of the streets adjacent to the complainant's lot to the defendant, who

(*q*) *Fouling Streams*.—Every owner of land through which a stream of water flows is entitled to the use and enjoyment of the water, and to have the same flow in its natural and accustomed course without obstruction, diversion or pollution. The right extends to the quality as well as the quantity of water. If, therefore, an adjoining proprietor corrupts the water, an action will lie against him.¹

The reasonableness of the use is said to be the criterion which

commenced to construct an embankment thereon for the purpose of straightening its main track, which by its weight caused the upheaval of the surface of complainant's lot, and the destruction of the buildings thereon. Held, that an injunction to compel the removal of the embankment, or to restrain its completion, would not lie, it not appearing with any certainty that further injury would result to complainant, nor that an action to recover damages would lead to an interminable litigation, and complainant's rights to the steets vacated being doubtful. *Herbert v. Pennsylvania R. Co.*, 43 N. J. Eq. 21.

1. *Holsman v. Boiling Spring etc. Co.*, 14 N. J. Eq. 335; *Alfred's Case*, 9 Co. 59; *Richmond etc. Co. v. Atlantic etc. Co.*, 10 R. I. 106; *Gardner v. Newburg*, 2 Johns. (N. Y.) Ch. 162; *Webb v. Portland Mfg. Co.*, 3 Sumn. (U. S.) 189; *Bealey v. Shaw*, 6 East 208; *Mason v. Hill*, 5 B. & A. 1.

The mayor and city council of Baltimore, under an authority conferred by statute, purchased certain lands adjacent to and including a portion of the bed of the Gunpowder river, and constructed a dam across said stream, thereby forming a lake, the water from which was conducted into the city of Baltimore, and distributed to various points therein, in order to supply the inhabitants with pure water for drinking and other necessary purposes. A bill was filed by the mayor and city council of Baltimore for an injunction against the defendants to restrain them from polluting said river, and charged that the defendants, a body corporate, owned and conducted a certain cotton factory, "situate near the Gunpowder river, or one of the tributaries thereof, above the said lake and dam, and that they discharge, or knowingly suffer and permit to be discharged into the said stream, whence the same necessarily flows into the said lake, refuse water from the said factory, impregnated

with divers injurious ingredients and substances, put into the same by the defendants at said factory, whereby the water of the said natural stream is rendered less pure and less fit for use by man as drinking water." And as a distinct cause of defilement or pollution of the stream, it was charged that the defendants "have erected and do keep, maintain and use, divers large privies and hog pens at or near said factory, the excrement and filth whereof the defendants cause or wilfully suffer and permit to be discharged into the waters of the said Gunpowder river, above the said dam and lake, whereby the water of the stream so flowing into and received by the said lake is greatly polluted." *Baltimore v. Warren Mfg. Co.*, 59 Md. 96, 110.

In this case the court said: "Now, with respect to the legal principles upon which the present application is based, we think there can be no doubt or controversy whatever. Before the time of Lord Coke, the principle involved in this case would appear to have been well settled, for in *Aldred's Case*, 9 Co. 58, 59a, we find it laid down by the court as established law, that "if a man has a water course running in a ditch from the river to his house, for his necessary use, and a Glover sets up a lime pit for calfskins and sheepskins so near the said water course that the corruption of the lime pit has corrupted it, for which cause his tenants leave the said house, an action on the case lies for it, as it is adjudged in 13 H. 7, 26; and this stands with the rule of law and reason, etc., *Prohibetur ne quis faciat in suo quod nocere possit alieno; et sic utere tuo ut alienum non laedas*." And, in more recent times, all common law authorities agree that a riparian owner has the right to the natural stream of water flowing by or through his land, in its ordinary natural state, both as to its quantity and quality, as incident to the right to the land on or through which the water course runs; and that

right continues, except so far as it may have been derogated from by user or by grant. *Gladfelter v. Walker*, 40 Md. 1; *Mason v. Hill*, 5 B. & Ad. 1; *Wood v. Wand*, 3 Exch. 748; *Stockport etc. Co. v. Potter*, 7 H. & N. 160. And no user short of the period of legal prescription will, without consent or grant, confer any exclusive right, as between different riparian owners, to the use of the water of a running stream. If, however, the prior occupant has enjoyed the use of the water in any particular mode, or for carrying on any particular trade or manufacture, for twenty years, so as to have acquired a right of user by prescription, he is, in that case, entitled to remain undisturbed in such user, in the mode and to the extent defined by the actual enjoyment of the use. 3 Kent Com. 446. Or, as stated by LORD ELLENBOROUGH, in the case of *Bealey v. Shaw*, 6 East 208, "independent of any particular enjoyment used to be had by another, every man has a right to have the advantage of a flow of water in his own land, without diminution or alteration. But an adverse right may exist, founded on the occupation of another; and though the stream be either diminished in quantity, or even corrupted in quality, as by means of the exercise of certain trades, yet if the occupation of the party so taking or using it have existed for so long a time as may raise the presumption of a grant, the other party whose land is below must take the stream subject to such adverse right." And so hold all the authorities.

If, therefore, the defendants, being upper riparian proprietors, and as such entitled to the ordinary use of the water, including the right to apply it in a reasonable way to purposes of trade and manufacture, are using the water of the stream in an unreasonable manner, and have defiled the same in such manner and to such an extent as to operate an actual invasion of the rights of the complainants, the latter are clearly entitled to redress by action at law, and, in case the nuisance be continued, to summary relief by injunction. This is clearly settled by a great number of decided cases, both English and American. *Swindon Waterworks Co. v. Wilts etc. Canal Co.*, L. R., 7 H. L. 697; *Clowes v. Staffordshire Co.*, L. R., 8 Ch. App. 125; *Pennington v. Brinsop Hall Coal Co.*, 5 Ch. Div. 769; *Sanderson v. Penn. Coal Co.*, 86 Pa. St. 401; *Chipman v. Palmer*, 77 N.

Y. 51; and this court has but recently held, in the case of *Woodyear v. Schaefer*, 57 Md. 1, that an injunction should be granted to prevent the fouling and improper use of the water of a running stream, when prejudicial to the rights of others interested in having the water descend to them in its ordinary natural state of purity. Among the more recent leading cases upon this subject are those of *Goldsmid v. Tunbridge Wells Co.*, L. R., 1 Ch. App. 349; and *Baxendale v. McMurray*, L. R., 2 Ch. App. 740, in which will be found fully discussed the principles and grounds upon which the court proceeds in such cases.

What nature and extent of pollution of the stream will call for the active interference of the court, is not in all cases easy to define. It is not every impurity imparted to the water, however small in degree, that will be the subject of an injunction. All running streams are, to a certain extent, polluted; and especially are they so when they flow through populous regions of country, and the waters are utilized for mechanical and manufacturing purposes. The washings of the manured and cultivated fields, and the natural drainage of the country, of necessity bring many impurities to the stream; but these and the like sources of pollution cannot, ordinarily, be restrained by the court. *Wood v. Sutcliffe*, 2 Sim. (N. S.) 163. Therefore, when we speak of the right of each riparian proprietor to have the water of a natural stream flow through his land in its natural purity, those descriptive terms must be understood in a comparative sense; as no proprietor does receive, nor can he reasonably expect to receive, the water in a state of entire purity. But any use that materially fouls and adulterates the water, or the deposit or discharge therein of any filthy or noxious substance, that so far affects the water as to impair its value for the ordinary purposes of life, will be deemed a violation of the rights of the lower riparian proprietor, and for which he will be entitled to redress. Anything that renders the water less wholesome than when in its ordinary natural state, or which renders it offensive to taste or smell, or that is naturally calculated to excite disgust in those using the water for the ordinary purposes of life, will constitute a nuisance, and for the restraint of which a court of equity will interpose.

must determine the right, and this must depend upon the extent of detriment to the riparian proprietors below.¹

The fouling or pollution of water in a stream by the flow of sewage constitutes a nuisance, and affords sufficient ground for relief by injunction.²

1. *Snow v. Parsons*, 28 Vt. 459. *Bellows, J.*, in *Hayes v. Waldron*, 44 N. H. 580; *Merrifield v. Worcester*, 110 Mass. 216. In *Lockwood Co. v. Lawrence*, 77 Me. 297, where several respondents acting independently of each other deposit the refuse matter and debris from their mills in the same stream and fouled the same, it was held that all of the defendants may be joined in an action to restrain the nuisance, the wrong being joint.

2. *Holt v. Rochdale, L. R.*, 10 Eq. 354; *Atty. Gen. v. Birmingham*, 4 Kay & J. 528; *Atty. Gen. v. Bradford Canal, L. R.*, 2 Eq. 71; *Oldaker v. Hunt*, 6 De Gex M. & G. 376; affirming s. c., 19 Beav. 485; *Goldsmid v. Tunbridge etc. Commrs.*, L. R., 1 Ch. 349; affirming s. c., L. R., 1 Eq. 161; *Lingwood v. Stowmarket Co., L. R.*, 1 Eq. 77; *Atty. Gen. v. Colney etc. Asylum, L. R.*, 4 Ch. 146; *Atty. Gen. v. Leeds Corporation, L. R.*, 5 Ch. 583.

Prescription.—Where a prescriptive right to foul a stream has been acquired, the fouling must not be considerably enlarged to the prejudice of other people. The fact that the stream is fouled by others is not a defence to a suit to restrain the fouling by one. The mere suspension of the exercise of a prescriptive right is not sufficient to destroy the right, without some evidence of an intention to abandon it; but where dye works had not been used for more than twenty years, and had been allowed to go to ruin, held, that any right of fouling a stream attached to them was lost. The owner of land on the banks of a river can maintain a suit to restrain the fouling of the water of the river, without showing that the fouling is actually injurious to him. C, wishing to prevent the water of a river from being fouled by some dye works, purchased from the owners of the dye works a piece of land on the banks of the river, without communicating to them his object. Held, that in the absence of any express reservation by the owners of the dye works of the right of fouling, C could maintain a suit to restrain it. *Crossley & Sons v. Lightowler*, 3 Eq. 279; 2 Ch. 478.

The sewage of a town had for many years been drained by commissioners acting under a local act of parliament into a stream passing through the plaintiff's land, which was beyond their district, without perceptibly polluting it. But for some years before the filing of the bill, in consequence of the increase of the town, the stream became perceptibly polluted, and continued to increase in impurity. Decree of the master of the rolls restraining the commissioners from draining the town into the stream so as to pollute the water to the injury of the plaintiff affirmed. Assuming that a prescriptive right could be acquired of draining the sewage into the stream to the injury of the plaintiff, it could only be acquired by the continuance of a perceptible amount of injury for twenty years. Although the fact of prospective nuisance is not in itself a ground for the interference of the court, yet if some degree of present nuisance exists, the court will take into account its probable continuance and increase. Observations on the weight to be attached to the conclusions of scientific witnesses. *Goldsmid v. Tunbridge etc. Commrs.*, 1 Eq. 161; 1 Ch. 349.

Trifling Nuisance.—Bill and information filed to restrain the local board of health of a town from discharging sewage into the river dismissed with costs on the ground that the injury proved was trifling. Consideration of the circumstances under which the court will interfere. *Atty. Gen. v. Gee*, 10 Eq. 131.

Practice.—In an order for an injunction to restrain defendants from polluting a stream, it is proper to insert the words "to the injury of the plaintiff," in order to establish a ground for the interference of the court, and prevent its authority being invoked for trivial purposes. The order was finally drawn up in the following form: "This court doth order that a perpetual injunction be awarded against the defendants, the *Stowmarket Company*, to restrain the said defendants, their servants, agents and workmen, from discharging from their works in the plaintiff's bill men-

19. Easements.—An injunction will be granted to restrain the doing of that which would destroy or injure an easement.¹ See *infra* ANCIENT LIGHTS; PARTY WALLS; LATERAL SUPPORT; RAILWAYS; HIGHWAYS; MILLS.

20. Ancient Lights.—In England, the quiet, uninterrupted enjoyment and possession of window lights for twenty years is sufficient to justify a jury in finding a covenant to that effect, provided the evidence shows that the owner of the adjoining land during that period had knowledge of the fact—the knowledge of the tenant alone not being sufficient.² The English

tioned, into the river or stream in the said bill also mentioned, so as to cause it to flow to the plaintiff's land, messuage and mills, therein also mentioned, in a state less pure than that in which it flowed there previously to the establishment of the said works, to the injury of the plaintiff, any such refuse or other matter as was discharged by the defendants from the same works into the said river or stream previously to the filing of the said bill, or any noxious fluids or other foul matters whatsoever." *Lingwood v. Stowmarket Co.*, 1 Eq 77, 336.

1. *Schwoever v. Boylston*, 99 Mass. 298; *Schermerhorn v. New York*, 3 Edw. (N. Y.) Ch. 119; *Wheeler v. Gilsey*, 35 How. (N. Y.) Pr. 147; *Seymour v. McDonald*, 4 Sandf. (N. Y.) Ch. 508; *Lawrence v. New York*, 2 Barb. (N. Y.) 581; *Whitney v. Union R. Co.*, 11 Gray (Mass.) 365; *Jacksonville v. Jacksonville etc. R. Co.*, 67 Ill. 544.

The grantee of an easement is entitled to an injunction to restrain the erection of buildings on the servient tenement in violation of a covenant not to do so. *Watertown v. Cowen*, 4 Paige (N. Y.) Ch. 510; s. c., 27 Am. Dec. 80.

The occupant of a store may enjoin the occupant of an adjoining store from obstructing light and view and thereby exclude customers and injuring his business. *Hallock v. Scheyer*, 33 Hun (N. Y.) 111. The disturbance of a perpetual water right may be enjoined. *Bitting's Appeal*, 105 Pa. St. 517.

Jurisdiction.—Courts of equity do not usually exercise jurisdiction in cases of disturbances of easements until the right has been established at law. *Rhea v. Forsyth*, 37 Pa. St. 503; *King v. McCully*, 38 Pa. St. 76; *Hieskill v. Gross*, 3 Brewst. (Pa.) 430; s. c., 7 Phila. (Pa.) 317.

2. *Cross v. Lewis*, 2 B. & C. 686;

Straight v. Burn, L. R., 5 Ch. 163; *Theed v. Debenham*, 2 Ch. D. 165; *Potts v. Levy*, 2 Drew 272; *Simper v. Foley*, 2 John. & H. 555; *Gale v. Abbot*, 8 Jur. N. S. 987; *Maguire v. Grattan*, I. R. 2 Eq. 246; *Kelk v. Pearson*, L. R., 6 Ch. 809; *Beadel v. Perry*, L. R., 3 Eq. 465; *Martin v. Headon*, L. R., 2 Eq. 425; *Dent v. Auction Mart Co.*, L. R., 2 Eq. 238; *Daniel v. North*, 11 East 372. To authorize an injunction there must be some material injury to the comfort of those dwelling in the house about to be darkened. *Attorney General v. Nichol*, 16 Ves. 338. "The question," said LORD ELDON, "is whether the effect is such an obstruction as the party has no right to erect, and cannot erect without those mischievous consequences which upon equitable principles should be not only compensated in damages but prevented by injunction." See also *Back v. Stacey*, 2 Car. & P. 465; *Weston v. Arnold*, L. R., 3 Ch. 1084; *Dyer's Company v. King*, L. R., 9 Eq. 438; *Leecher v. Schueder*, L. R., 9 Ch. 463.

In England the right to equitable relief for the protection of ancient lights is to a considerable extent dependent upon the statute 2 and 3 Wm. 4, ch. 72, § 3, which provides as follows: "And be it further enacted that where the access and use of light to and for any dwelling house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing." As to the right of relief under a statute authorizing an injunction against the malicious erection by an owner or lessee of land of any structure thereon

doctrine of a right to ancient lights, from a user for twenty years, does not prevail in this country, and mere use will not justify an injunction to restrain the closing of the same.¹

intended to annoy or injure any proprietor of adjacent land in respect to his use or disposition of the same. *Harbison v. White*, 46 Conn. 106.

In a suit to restrain the defendant from building so as to obstruct the plaintiff's ancient lights, it was proved that for a period of more than twenty years, extending to within a very short time before the bill was filed, there had been unity of possession of the properties of the plaintiff and the defendant, but there was no evidence of there ever having been any unity of title; and it was proved that before the unity of possession commenced the access of light to the windows had been enjoyed as far back as living memory went. *Held* (affirming the decision of the master of the rolls), that the plaintiff established his title to the access of light by proof of enjoyment from time immemorial, independently of the statute 2 and 3 Will. 4, ch. 71; for that the statute does not take away any of the modes of claiming easements which existed before its passing. *Held*, also, that the fact that some of the windows had been considerably enlarged did not take away the right to an injunction; and that the plaintiff ought not to be put upon the terms of restoring the windows to their former size. *Aynsley v. Glover*, 10 Ch. 283.

A building containing ancient lights was pulled down and replaced by another, in which the front was set back and a dormer window converted into a skylight. *Held*, that the right to access of light was not lost. Per *Jessel*, M. R. (on motion for injunction): Any substantial alteration in the plane of the windows destroys the right. Per *Fry*, J.: The right remains where any portion of the light which would have passed over the servient tenement through the old windows passes also through the new windows. *National Provincial Plate Glass Ins. Co. v. Prudential Assurance Co.*, 6 Ch. D. 757.

The court will not grant an injunction to restrain the erection of a building on account of its obstructing the plaintiff's light, unless the plaintiff can show that he will sustain substantial damage. If he cannot do this, his ground of application to the court fails,

and no enquiry will be granted as to damages, and the bill will be altogether dismissed; but without prejudice to an action at law. *Decree of Kindersley*, V. C., reversed. *Clarke v. Clarke* (Law Rep. 1 Ch. 16) followed. *Robson v. Whittingham*, 1 Ch. 442; *Dent v. Auction Mart Co.*; *Pilgrim v. Same*; *Mercers' Co. v. Same*, 2 Eq. 238; *Martin v. Headon*, 2 Eq. 425; *Smith v. Smith*, 20 Eq. 500.

1. *King v. Miller*, 4 Hals. (N. J.) 559; *Cherry v. Stern*, 11 Md. 1; *Mullen v. Stricker*, 19 Ohio St. 135; *Parker v. Foote*, 19 Wend. (N. Y.) 309. But compare *Robinson v. Pittenger*, 1 Green (N. J.) Ch. 57. In *Parker v. Foote*, 19 Wend. (N. Y.) 309, *BRONSON*, J., in discussing the question, says (pp. 37-8): "By the exercise of a lawful right on his own land for twenty years he acquires a beneficial interest in the land of his neighbor. The original proprietor is still seized of the fee with the privilege of paying taxes and assessments; but the right to build on the land without which city and village lots are of little or no value, has been destroyed by a lawful window. How much land can thus be rendered useless to the owner remains to be settled. 2 Barn. & Cress. 686; 2 Car. & Payne 465; 5 Car. & Payne 436. Now, what is the acquiescence which concludes the owner? No one has trespassed upon his land or done him a legal injury of any kind. He has submitted to nothing but the exercise of a lawful right on the part of his neighbor."

The custom of London in regard to ancient lights is abolished by statute. *Trescott v. Merchant etc. Co.*, 36 Eng. L. & Eq. 467. A contract or covenant in a conveyance recognizing the erection or continuance of lights no doubt would be enforced. See *Shipman v. Beers*, 2 Abb. New Cas. (N. Y.) 435; *King v. Miller*, 4 Hals. (N. J.) 559, was a bill for an injunction to restrain defendant from so building as to close up complainant's window in the gable end of his house, which he claimed was an ancient window. Complainant's house stood on the line of his lot. The injunction was denied, *HALSTEAD*, CH., saying: "The owner of a lot has the elec-

21. Lateral Support.—The owner of the surface of land is entitled, of common right, to support for his land in its natural state. This right is not like the support of one building upon another supposed to be gained by grant, but is a right of property passing with the soil.¹ The right is not absolute, but is

tion to build on it as he pleases. The owner of the adjoining lot has the same right. If the one who builds first chooses to build on the line, the adjoining owner has no means of preventing, and has no means of preventing the continuance of the building on the line.

Where one has a right to put on the spot where he erects it, and to continue it there, and the adjoining owner can do nothing to prevent its erection on that spot, and can do nothing to prevent its remaining there, it is simply absurd to say that the latter can by lapse of time lose his right to build up to his line. The loss of a right by lapse of time, from an act done and continued by another, can only be in cases where the party against whom the time is running has some means of preventing the act or its continuance. Where he has no such means, he is in no default and can therefore lose no right. And a person by doing and continuing an act on his property which he has a right to do, and which another has no means of preventing, can acquire no right injurious to the property of that other." *Cherry v. Stein*, 11 Md. 1, was a bill to restrain defendant from erecting a wall in such a manner as to darken and shut up the lights and windows upon one side of complainant's house, complainant relying on twenty years' user. *Eccleston, J.*, delivering the opinion of the court, denied the application of the English rule, saying: "Where A makes a window in his house, overlooking the open grounds of B, it is no infringement of the rights or encroachment upon the property of the latter.

And yet, under the English rule, if the window remains open and unobstructed for more than twenty years, B cannot afterwards erect a building on his land if it obstructs the light. To prevent such a consequence the rule does not give him any right of action or legal proceeding, but his only remedy is the seemingly ill-natured one of rendering the window of his neighbor useless by building a wall or other obstruction for that purpose alone, if at the time he has no wish to build a house on his own property. And if the window

be of considerable height, the expense of obstructing it might be equivalent, or nearly so, to the value of the unimproved or vacant land designed to be protected. The effects and legal consequences resulting from the user of a way and that of a light are so essentially different, we do not perceive the propriety of holding that the twenty years' rule, which is applicable to the former, should also be applied to the latter." And the court refused to sustain the injunction.

But the owner of land adjacent to a canal, which is a public highway, is entitled to receive from it light and air, and equity will restrain one holding under the canal company from erecting a building over the canal in such manner as to close up complainant's window and deprive him of the free enjoyment of the right. *Barnett v. Johnson*, 2 McCart. (N. J.) 481.

Where both plaintiff and defendant derive title to adjacent premises from a common source, and defendant is about to erect a building upon his vacant premises, which will have the effect of obstructing many of plaintiff's windows in a building constructed by the original grantor of both parties, equity will not interfere by injunction in the absence of any covenant in the grant under which plaintiff claims, indicating an intention on the part of the grantor to limit the use of the vacant lot so that it shall not impair plaintiff's light and air. *Shipman v. Beers*, 2 Abb. N. Cas. (N. Y.) 435.

1. *Humphries v. Brogden*, 12 Q. B. 739. This is recognized as the leading case. The right has sometimes been treated as an easement. *Wash on Eas.* 437; *Gale on Eas.* 365. The courts generally view it as a natural right, and the deprivation thereof is a nuisance. *Rowbotham v. Wilson*, 8 H. L. Cas. 348; *Brown v. Robins*, 4 H. & N. 186; *Backhouse v. Bononie*, 9 H. L. Cas. 503; *Stevenson v. Wallace*, 27 Gratt. (Va.) 77; *Farrand v. Marshall*, 19 Barb. (N. Y.) 380; *Guest v. Reynolds*, 68 Ill. 478; *Phillips v. Bordman*, 4 Allen (Mass.) 147.

The right to lateral support is an in-

limited to the support of the land in its natural state. If its adjoining proprietor's land is weighted with buildings, etc., he cannot require the soil of his neighbor on the adjoining lot to support his own soil in sustaining such increased weight.¹

Where the owner of property suffers damage from an adjoining proprietor by reason of being deprived of support to his land or building, he may bring an action for damages; he may, however, prevent the unlawful excavation by making the proper application to a court of equity for an injunction.²

22. Ancient Buildings.—A party may acquire, by prescription for the statutory period, a right to the lateral support of his land with the buildings thereon—a grant of the right of support being assumed.³

23. Subjacent Support.—Where one person owns the surface of real estate, and another owns the surface where minerals are found, or are supposed to exist, the owner of the surface, in the absence of any agreement in regard to the matter, is entitled to the support of both the land and the buildings erected thereon. The liability does not depend upon negligence, but upon the want of authority to remove such support.⁴

cident of the ownership of land, and its infringement is a nuisance against which equity will ordinarily enjoin. In these cases equity assumes jurisdiction on account of the nature of the injury rather than of the magnitude of the damage done. *Trowbridge v. True*, 52 Conn. 190; s. c., 52 Am. Rep. 579.

1. *Lasala v. Holbrook*, 4 Paige (N. Y.) Ch. 169. The injunction was dissolved from the failure to plead and prove certain essential facts. It is said (pp. 172-3): "From the recent English decisions it appears that the party who is about to endanger the building of his neighbor by the reasonable improvement on his own land, is bound to give the owner of the adjacent lot proper notice of the intended improvement, and to use ordinary skill in conducting the same: and that it is the duty of the latter to shroe or prop up his own building so as to render it secure in the meantime. See *Peyton v. The Mayor of London*, 9 Barn. & Cress. 725; 4 Mann & Ry. 625; s. c., *Walters v. Pfeil*, 1 Moody & Ma. 362; *Massey v. Gozden*, 4 Car. & Payne 161. See also *Quincy v. Jones*, 76 Ill. 231; *O'Connor v. Pittsburgh*, 18 Pa. St. 187; *McGuire v. Grant*, 25 N. J. L. 356; *Thurston v. Hancock*, 12 Mass. 220; *Wyatt v. Harrison*, 3 Barn. & Adol. 871; *Stevenson v. Wallace*, 27 Gratt. (Va.) 77; *Chalass v. Rankin*, 22 Mo. 566; *Bushy v. Holthaus*, 46

Mo. 161; *Mamer v. Lussen*, 65 Ill. 484.

2. *Farrand v. Marshall*, 19 Barb. (N. Y.) 380. But equity will not enjoin a land owner from making excavations on his land when no serious injury to the adjoining realty is imminent, and where there is nothing peculiar in the situation and circumstances of such realty. *McMaugh v. Burke*, 12 R. I. 499.

3. *Lasala v. Holbrook*, 4 Paige (N. Y.) 173; s. c., 25 Am. Dec. 524. "There is another class of cases, however, where the owner of a building on the adjacent lot is entitled to full protection against the consequences of any new excavation or alteration of the premises intended to be improved, by which he may be in any way prejudiced. These are ancient buildings, or those which have been erected upon ancient foundations." See also *Stevenson v. Wallace*, 27 Gratt. (Va.) 77; *Quincy v. Jones*, 76 Ill. 231; *Story v. Odin*, 12 Mass. 157; *Partridge v. Scott*, 3 Mec. & W. 220; *Brown v. Windsor*, 1 Crompt. & J. 20; *Hide v. Thornborough*, 2 Car. & Kir. 250.

4. *Humphries v. Bogden*, 12 Q. B. 739; *Brown v. Robins*, 4 H. & N. 185; *Rogers v. Taylor*, 2 H. & N. 828; *Horner v. Watson*, 79 Pa. St. 242.

Many of the cases turn upon the construction of the instruments conveying the right to mine. *Williams v. Baynall*,

24. Party Walls.—A common or party wall is a wall on the dividing line of estates, which each owner has a right to use as a portion of his building.¹ A party wall can only become such by agreement, statute or prescription.² The wall, in the absence of an agreement to the contrary, must be solid without openings, and if the wall has windows in it, a court of equity may grant an injunction.³ An injunction will be granted to restrain a grantee of one half of a party wall from using it for other purposes than as a support for his building to the prejudice of his co-owner.⁴ An injunction will be granted to restrain the owner of

12 Jur. (N. S.) 987; *Harris v. Ryding*, 5 Mee. & W. 60; *Swart v. Morton*, 5 E. & B. 30. Or upon statute. *Wiley* etc. v. *Bradley*, 7 East 368; *Stormbridge* etc. Co., v. *Dudley*, 4 H. & N. 242. In some of the cases it is held that the right of support applies only to the soil in its natural condition. *Rogers v. Taylor*, 1 Hurl. & N. 706. But the right to support buildings may be acquired by presentation or grant. *Rogers v. Taylor*, 4 H. & N. 242.

Where the defendant, by mining operations upon his own premises adjacent to those of plaintiff, has endangered the walls and lateral support of plaintiff's house, he may be enjoined from working under plaintiff's land, or within his own boundary in such manner as to occasion any subsidence or alteration of the surface of plaintiff's land. *Hunt v. Peake*, Johns. 705; *Wier's Appeal*, 74 Pa. St. 2130.

A piece of land on which a cotton mill was to be built was conveyed, the grantor reserving to himself a chief rent, and reserving all mines and minerals under the piece of land, and power to take the same at pleasure, making compensation for damages to be done to the cotton mill. *Held*, that the grantor would not be restrained from working and taking the minerals under the piece of land, though the buildings on the piece of land would necessarily be thereby injured. Decree of the master of the rolls affirmed. *Caledonian Railway Co. v. Sprot* (2 Macq. 449), distinguished; *Aspden v. Seddon*, 10 Ch. 394.

Implied Covenant on Sale of Land for Adjacent and Subjacent Support.—The vendor of land adjoining other land of his own, under which are mines and minerals, and who knows at the time of the sale that the vendee is about to

erect upon the land so purchased substantial buildings, impliedly covenants that he will not use or permit the adjoining land to be used in such a manner as to derogate from his grant. A sold land to B for the purpose of an iron foundry. Adjoining the land so sold to B, A had other land under which was coal. A afterwards leased the minerals to C, who commenced working the coal within such a distance from the land of B as to be reasonably calculated to endanger its stability. *Held*, ground for an injunction against A and C, although no actual damage had been sustained by B. *Siddons v. Short*, 2 C. P. D. 572.

1. *Matts v. Hawkins*, 5 Taunt. 20; *List v. Hornbrook*, 2 W. Va. 340.

2. *List v. Hornbrook*, 2 W. Va. 340; *Brooks v. Cartes*, 4 Lans. (N. Y.) 283.

3. In Pennsylvania a party wall must be a solid wall without openings of brick or stone or other incombustible material, and where the owner of a lot erected a party wall with windows in it such wall was held to be a nuisance and to be within the restraining powers of equity. *Vollmer's Appeal*, 61 Pa. St. 118. *REED, J.*, in delivering the opinion of the majority of the court, says: "The building acts in England were principally directed to the preservation of buildings from fire, and the main cause of them arose from the great fire of London in 1666. Two acts were passed reign of Charles the Second, and two in the reign of Queen Anne, 6 Anne, ch. 31, and 7 Anne, ch. 17, from which last act our provincial legislation of 1721 was partially drawn." To the same effect *Danenhauer v. Devine*, 51 Tex. 480; *Sullivan v. Graf-fort*, 35 Iowa 535. The code Napoleon contains similar provisions, 660-662. See *Hart v. Kucher*, 5 Serg. & R. (Pa.) 1.

4. *Ogden v. Jones*, 2 Bosw. (N. Y.) 685.

one half of an ancient, solid party wall, long used for the support of buildings on each side of it, from cutting away a portion of its face and erecting a new wall upon his own land at a distance of a few inches, but connected with the old wall by occasional projecting bricks and ties.¹

Where a party wall is built on the plaintiff's own land, but projects over the defendant's land, the court will not compel the latter to cease using the wall as a party wall.²

25. Water Privileges.—An injunction will be granted in a proper case for the protection of an easement or servitude in water, and an easement in water, acquired by prescription, is as absolute as any other right, and equity will restrain its violation when such violation is productive of serious injury.³

(a) *Drains.*—The owner of an upper parcel of land has a natural easement in the lower parcel to the extent of the natural flow of water from the upper parcel to and upon the lower. But the owner of the upper parcel may be enjoined from conducting, by artificial drains, surface water upon the lower parcel in such a manner as to injure the servient estate.⁴

(b) *Mills.*—The person owning an upper mill on a stream has a lawful right to use the water and apply it in order to work his mills to the best advantage subject to this limitation, that if, in the exercise of this right, or in consequence of it the mills lower down the stream are rendered useless and unproductive, the law

1. *Phillips v. Bordman*, 4 Allen (Mass.) 147.

When several houses belonging to the same owner are built together, so that each requires the mutual support of the other, and the owner parts with one of the houses, the right to such mutual support is not thereby lost, but may be enforced by an injunction restraining any act in any way interfering with or impairing such support. *Ogden v. Jones*, 2 Bosw. (N. Y.) 685; *Partridge v. Gilbert*, 3 Duer (N. Y.) 184; s. c., affirmed, 15 N. Y. (1 Smith) 601.

2. *Guttenberger v. Woods*, 51 Cal. 523; *Mayers' Appeal*, 73 Pa. St. 164.

3. *Hulme v. Shreve*, 3 Green (N. J.) Ch. 116; *Rupley v. Welch*, 23 Cal. 452; *Phoenix etc. Co. v. Fletcher*, 23 Cal. 481; *Natonia etc. Co. v. McCoy*, 23 Cal. 490; *Sheboygan v. Sheboygan etc. R. Co.*, 21 Wis. 667; *Owen v. Field*, 12 Allen (Mass.) 457; *Wilcox v. Wheeler*, 47 N. H. 488.

The court will not exercise this summary authority where the right is doubtful or the fact not definitely ascertained. *Roath v. Driscoll*, 20 Conn. 533.

In all cases where a complainant asks a court of equity to restrain by injunction a threatened invasion of his rights he must show a strong *prima facie* case in support of the title which he asserts, and that he has been guilty of no improper delay in applying for the interposition of the court. Thus one riparian proprietor seeking to restrain another from using the water of a stream, must first have established his rights to be as certain and undoubted as if ascertained by the verdict of a jury. *Bliss v. Kennedy*, 43 Ill. 67; *Woodruff v. Lockerby*, 8 Wis. 369.

A bill in chancery will not be sustained to settle the legal right to a water course, nor to enjoin its use while the legal right remains unsettled. *Prentiss v. Larnard*, 11 Vt. 135.

Acquiescence in the use of water in a particular manner will be estopped from afterwards enjoining its use in that manner. *Heilman v. Union Canal Co.*, 37 Pa. St. 100; *Jacox v. Clark*, Walk. (Mich.) 249.

4. *Butler v. Peck*, Ohio St. 335; *Laumier v. Francis*, 23 Mo. 181; *Livingston v. McDonald*, 21 Iowa 160.

By the common law no action can be

will interpose and limit this common right, so that the owners of the lower mills shall enjoy a fair participation.¹

maintained for changing the course or obstructing the flow of mere surface water by erections on adjoining land. *Dickinson v. Worcester*, 7 Allen (Mass.) 22; *Parks v. Newburyport*, 10 Gray (Mass.) 28; *Flagg v. Worcester*, 13 Gray (Mass.) 601; *Chatfield v. Wilson*, 28 Vt. 49; *Greeley v. Maine etc. R. Co.*, 53 Me. 200; *Bowlsby v. Spear*, 13 N. J. L. 351.

It makes no difference in the application of this rule that land is naturally wet and swampy. A conterminous proprietor may change the situation or surface of his land by raising or filling it to a higher grade by the construction of dikes, the erection of structures, or by other improvements which cause water to accumulate from natural causes on adjacent land and prevent it from passing off over the surface. Such consequences are the necessary result of the lawful appropriation of land, whatever may be its nature, and although they may cause detriment or loss to others, it is *damnum absque injuria*, and affords no ground for an injunction. *Dickinson v. Worcester*, 7 Allen (Mass.) 22; *Swett v. Cutts*, 50 N. H. 439; s. c., 9 Am. Rep. 276.

But the owner of land on which there is a pond or reservoir of surface water may be restrained from discharging it through an artificial channel directly upon the land of another, greatly to his injury. *Pettigrew v. Evansville*, 25 Wis. 223; *Miller v. Laubach*, 47 Pa. St. 154; *Curtiss v. Ayrault*, 47 N. Y. (2 Sick.) 73; *Smith v. Fletcher*, L. R., 7 Exch. 305; s. c., 3 Eng. R. 305; *Ellis v. Duncan*, cited in *Goodale v. Tuttle*, 29 N. Y. 466; *Buffum v. Harris*, 5 R. I. 243; *Rawstron v. Taylor*, 11 Exch. 369; *Broadbent v. Ramsbotham*, 11 Exch. 662; *Wheatley v. Baugh*, 25 Pa. St. 528.

A municipal corporation has no greater power than natural persons in this respect, except through an exercise of the right of eminent domain. Where the injury from such discharge would be permanent it will be restrained by injunction. *Pettigrew v. Evansville*, 25 Wis. 223; s. c., 3 Am. Rep. 50.

Mining Ditch.—If a plaintiff owns a ditch and a right of way for the same, by priority of location, a court of equity has no power by its judgment to allow the same to be

washed away for mining purposes, provided an aqueduct of sufficient capacity to carry the water is previously built in its place. *Gregory v. Nelson*, 41 Cal. 278.

Diverting Water by Ditch.—If a continued and permanent diversion of the waters of a stream running through complainant's land has been made by means of ditch opened by the defendants, depriving him of its use for agricultural and mining purposes, there being valuable gold mines on the premises, which he is unable to work or otherwise utilize for the want of the water thus diverted, and if defendants are insolvent or rapidly becoming so, equity will interpose and grant relief by injunction. *Graham v. Dahlonega Gold Mining Co.*, 71 Ga. 296.

Draining a navigable river to such an extent as to interfere with and impede navigation affords no ground for an injunction. *Atty. Gen. v. Great Eastern R. Co.*, L. R., 6 Ch. 572.

Drain commissioners who exceed their authority and injure other persons may be enjoined. *Belnap v. Belnap*, 2 Johns. (N. Y.) Ch. 463.

Commissioners of highways had kept open a ditch in a public highway which had been in existence for sixteen years. The owner and occupant of premises adjoining the public highway had been paid from public funds for improving it under a contract with the commissioners. It was held that a bill to enjoin the owner of the premises from filling up the ditch would not lie unless the public has by deed, prescription or condemnation, acquired a right to the use of such ditch as an easement. *Simpson v. Wright*, 21 Ill. App. 67.

1. *Merritt v. Brinkerhoff*, 17 Johns. (N. Y.) 306; *Mabie v. Matteson*, 17 Wis. 1; *Merritt v. Parker*, Cox 460. The reasonableness of the detention is a question of fact which depends upon the circumstances of each case—such as the size of the stream, number of mills, etc. *Hetrich v. Deachler*, 6 Pa. St. 32; *Casebeer v. Mowry*, 55 Pa. St. 423; *Ferrea v. Kinpe*, 28 Cal. 343; *Springfield v. Harris*, 4 Allen (Mass.) 496; *Davis v. Getchell*, 50 Me. 604; 3 Kent's Com. 440, note a; *Tyler v. Wilkinson*, 4 Mason (U. S.) 401; *Blanchard v. Baker*, 8 Greenl. (Me.) 253; s. c., 23 Am. Dec. 504; *Palmer v. Mulligan*, 3

(c) *Where mills are erected on both banks of a stream, if there is not sufficient water to afford a full supply for all, the owner on each side is entitled to an equal share of the water, or so much thereof as is necessary for his mills, if less than a moiety is sufficient; and if one mill owner should attempt to deprive the other of his share of the water he may be restrained by injunction.*¹

Cai. (N. Y.) 307; s. c., 2 Am. Dec. 270; Batavia Mfg. Co. v. Newton Wagon Co., 91 Ill. 245; Tucker v. Jewett, 11 Conn. 311, 317, 324; Ingraham v. Hutchinson, 2 Conn. 584; Mason v. Hill, 5 Barn. & Adol. 1; Bealey v. Shaw, 6 East 208; Brown v. Best, 1 Wils. 174; Saunders v. Newman, 1 Barn. & Adol. 258, 262; Cary v. Daniels, 8 Met. (Mass.) 466, 478; Ortman v. Dixon, 13 Cal. 38; Wheatley v. Chrisman, 24 Pa. St. 298; Gillett v. Johnson, 30 Conn. 183; Pollitt v. Long, 58 Barb. (N. Y.) 20; Sackrider v. Beers, 10 Johns. (N. Y.) 241; Wentworth v. Poor, 38 Me. 243; Clark v. Rockland Water Power Co., 52 Me. 78; Dilling v. Murray, 6 Ind. 324; Shears v. Wood, 7 Moore 345; Chandler v. Howland, 7 Gray (Mass.) 348; Angell on Water Courses (3rd ed.), § 115; Hoxsie v. Hoxsie, 38 Mich. 77.

Two mill owners occupying on the same stream, one below the other, a short distance apart, the questions being as to the right of the upper owner to divert the stream, to store or pond the water; to discharge his sawdust and waste into it; and the power of the court of chancery to restrain by injunction; *held*, that he could divert it on his own land by an artificial channel, as the water was conducted back into its natural course with reasonable care and prudence before reaching the premises of the orator, and he having received no appreciable injury; that the maxim *sic utere tuo ut alienum non lædas* applies; and that, while the upper owner can use the water in a proper and reasonable manner, yet he must respect and regard the rights of riparian proprietors below him; and is limited in discharging into the stream his sawdust and refuse to what is *absolutely and indispensably necessary for the beneficial use of the water*; and that it is not a question of convenience or economy. Canfield v. Andrew, 54 Vt. 1; s. c., Am. Rep. 828.

In Keeney etc. Mfg. Co. v. Union Mfg. Co., 39 Conn. 576, it appeared that the owners of an upper mill, whose business required the running of their

mill only by day, detained the water of the stream during the night, such detention and the larger discharge during the day causing serious damage to the owners of the lower mill, whose business required the running of their mill both night and day. The lower privilege was occupied several years before the upper mill was built, the water was for several years allowed to flow during the night, and the lower mill had used it by night and by day. Upon a petition by the lower mill owners against the upper for an injunction against the detention of the water by night, it was *held* that all the petitioners were entitled to was a reasonable use of the stream against an unreasonable use or detention by the respondents; that the question was, whether the respondents had acted unreasonably in detaining the water; and that the burden of proof on this subject was on the petitioners. The right of the proprietor above to make the water useful to him by detaining it long enough to make it useful is of the same quality as the right of the proprietor below to take the constant course of the current for his use, where both parties are applying the water to the artificial use of propelling machinery. In deciding between these conflicting rights there are to be considered: (1) The custom of the country as to the running of mills; (2) the local custom, if there be one; (3) the general rule that will best secure the entire stream to useful purposes; (4) whether the detention of the water is necessarily an injury to the lower mill, and whether the apparent injury is not caused by the insufficiency of its own privilege. See Wheatley v. Baugh, 25 Pa. St. 535; Miller v. Miller, 9 Pa. St. 74; Hayes v. Waldron, 44 N. H. 580; Housee v. Hammond, 39 Barb. (N. Y.) 95; Snow v. Parsons, 28 Vt. 459; Holden v. Lake Co., 53 N. H. 552; Phillips v. Sherman, 64 Me. 171; Pollitt v. Long, 3 Thomp. & C. (N. Y.) 232.

1. Arthur v. Case, 1 Paige (N. Y.) 447; Case v. Haight, 3 Wend. (N. Y.) 632. The court say (p. 636): "It is not denied that the effect of the dam in-

(d) *Acquiescence* for a long period of the time during the erection or use of the works complained of may be a bar to relief;¹ and particularly would this be the case if the plaintiff, knowing that large sums of money were being invested in the improvements, had made no objection.²

question, when completed, will be to divert a large proportion of the water from the mills of the respondents; nor is it denied that it is the intention of the appellants, if not restrained, to complete the dam; it was therefore a case for a preliminary injunction, as the injury might be irreparable."

In *Bliss v. Kennedy*, 43 Ill. 67, it was held that the right must first be established at law. If there is no adequate remedy at law, an injunction will issue. *Patten v. Marden*, 14 Wis. 473. But if the evidence is insufficient, a perpetual injunction will be denied. *Woodruff v. Lockerly*, 8 Wis. 369.

An injunction will be granted to restrain a mill owner from opening his gates and allowing water to run to waste when the plaintiff on the other side of the stream, taking water from the same dam, has a right to all the water not required by the defendant's mill. *Fuller v. Daniels*, 63 N. H. 395.

Every mill owner must have his fair proportion of beneficial use of a current of running water as it flows through or along his own land for mill purposes. *Keeney etc. Mfg. Co. v. Union Mfg. Co.*, 39 Conn. 576; s. c., 13 Am. L. Reg. 92, and note; *Bradfield v. Dewell*, 48 Mich. 9.

1. *Wood v. Sutcliffe*, 2 Sim., N. S. 163; *Sheldon v. Rockwell*, 9 Wis. 168; *Cobb v. Smith*, 16 Wis. 61; *Crosby v. Smith*, 19 Wis. 472; *Pettibone v. La Crosse etc. R. Co.*, 14 Wis. 443.

Crosby v. Smith, 19 Wis. 472, was an action to abate a mill dam within the city of Janesville, where the complaint showed that the dam had been maintained for ten years, and did not show any excuse or justification for the acquiescence of plaintiffs during that time. Held, on demurrer, that the plaintiffs were not entitled to the relief sought. *Ruehe v. Voight*, 28 Wis. 153.

In *Sheldon v. Rockwell*, 9 Wis. 167, *Dixon, C. J.* said: "If in England two years' acquiescence defeats proceedings like the present, how much less delay ought to suffice for that purpose in a newly settled country like ours, where by the rapidity of our growth and enterprise a few months oftentimes deter-

mines the destinies of our cities, villages and places of business? The diligence required by the law ought to be measured by the mischief which would ensue from a want of it." See also *Bond v. Hopkins*, 1 Sch. & Lef. 413, 428; *Hovenden v. Lord Armsley*, 2 Sch. & Lef. 607, 630; *Stackhouse v. Bornston*, 10 Ves. 466; *Beckford v. Wade*, 17 Ves. 466, 467; *Chalmondeley v. Clinton*, 2 Jac. & Walk. 1, 138 to 152; *Postlock v. Gordon*, 1 Hare R. 594; *Vigors v. Pike*, 8 Clark & Fin. 650; *Decouche v. Savelier*, 3 John. 190; *Kane v. Bloodgood*, 7 John 93; *Dexter v. Arnold*, 3 Sumn. (U. S.) 152; *Platt v. Vattier*, 9 Pet. (U. S.) 405, 416, 417; *Sherwood v. Sutton*, 5 Mas. (U. S.) 143, 146; *Bowman v. Wathen*, 1 Howe (U. S.) 189; *Gould v. Gould*, 3 Story (U. S.) 516; *Weller v. Smeaton*, 1 Cox Ch. 102.

2. *Williams v. Jersey*, 1 Cr. & Ph. 91; *Seeley v. Bridges*, 13 Neb. 547. In the latter case Seeley had commenced the erection of a mill on a stream when the defendant's mill was built and above that of the defendant. About six months after he commenced the erection of his dam and mill the defendant sought to raise his dam ten inches, which would thereby greatly impair the value of the mill site of S. It was held that he could not be permitted to raise the dam. Practically, he had acquiesced in the right of S. to build. See also *Nosser v. Seeley*, 10 Neb. 460; *Payne v. Paddock*, Walk. (Mich.) 487; *Water Lot Co. v. Bucks*, 5 Ga. 315; *Heilman v. Union Canal Co.*, 37 Pa. St. 100; *Blanchard v. Doering*, 23 Wis. 200.

Where the lands of C were flowed by reason of a dam erected across a stream, in a case where the rights and remedies of the parties remained as at common law, and he suffered the owners of the dam to build, maintain and repair it from time to time for a period of more than ten years, during which time they made valuable improvements in mills, etc., and drew water from the dam to propel them; held, that by such acquiescence in the claim asserted by them he would be precluded from maintaining at an

(e) *Subterranean Streams*.—A stream of water, flowing under ground, having a known channel and outlet, is subject to the same rules and restrictions as streams flowing on the surface of the earth.¹ If, however, the owner of land, in making an excavation thereon, cuts off a stream or spring whose existence was previously unknown, it is *damnum absque injuria*.²

action to abate the dam as a nuisance, and for an injunction to restrain them from rebuilding and maintaining it when it had been partially destroyed by a flood and that he must resort to his common law action. *Cobb v. Smith*, 16 Wis. 661; *Pettibone v. La Crosse etc. R. Co.*, 14 Wis. 443.

In *Steele*, 1 R. I. 247, the plaintiff based his claim for relief by injunction upon the language of a deed which he himself had made, and which clearly sustained his claim. It was a bill in equity to compel the defendant to lower his mill dam, and to restrict the flowage of the plaintiff's land to the limits expressed in the grant. The plaintiff had granted the mill site and water privilege, with power to flow his lands within certain limits, which limits had been exceeded and his lands beyond flowed. This had been done with his knowledge and without any objection on his part until after the dam, mill and machinery had been erected and put in operation. The period of time, however, during which his land had been flowed, was not very long. It was not more than four or five years. The court dismissed the bill and turned the plaintiff over to his remedy at law on the ground of acquiescence. *Story's Eq. Jur.* 959a, is cited by the court, where it is said that no injunction will be granted to restrain a nuisance by the erection of a building where the erection has been acquiesced in or encouraged by the party seeking the relief; nor will it be granted in cases of gross laches by the party seeking the relief to enforce his rights.

And a case is also cited from 2 Cases in Equity Abridged, 522, 523, which is reported in that book as follows: "A diverted a water course, which put B to great expenses in laying of pipes, etc., and the diversion being a nuisance to B, he brought his action, but an injunction was denied upon a bill exhibited for that purpose, it being proved that B did see the work when it was carrying on and connived at it without showing the least disagreement, but rather the contrary."

1. *Halderman v. Bruckhart*, 45 Pa. St. 514; *Smith v. Adams*, 6 Paige 435; *Wheatley v. Baugh*, 25 Pa. St. 528; *Whetstone v. Bowser*, 29 Pa. St. 59. The party claiming the right to the stream must assume the burden of proof. *Hanson v. McCue*, 42 Cal. 303; *Mosier v. Caldwell*, 7 Nev. 363. In *Cole Silver Mining Co. v. Virginia etc. Water Co.*, 1 Sawy. (U. S.) 470. The plaintiffs, a mining company, in developing their mine, excavated a tunnel into the side of a mountain. In so doing, they struck a large and valuable stream of water, which was a source of great revenue to them. The defendants also excavated a tunnel from a point some distance to a point directly under the stream of water, and the result was that the whole stream of water was diverted into the defendant's tunnel and by them appropriated to their own use. This was held to be an unlawful diversion by the defendant, which entitled the plaintiffs to an injunction; and it was also held in the case that the preliminary injunction might be granted, although the diversion sought to be restrained had already been effected, and although obedience to the injunction should render necessary the erection by defendants of a bulkhead or a dam across the tunnel. *Halderman v. Bruckhart*, 45 Pa. St. 514.

An injunction may be had to restrain a land owner from negligently and maliciously cutting off or diverting the supply of a neighbor's spring or well without any purpose or usefulness to himself. *Swett v. Cutts*, 50 N. H. 439, 447; s. c., 9 Am. Rep. 276; *Wheatley v. Baugh*, 25 Pa. St. 528; *Roath v. Driscoll*, 20 Conn. 533. But see *Chatfield v. Wilson*, 28 Vt. 49.

2. *Frazier v. Brown*, 12 Ohio St. 294; *Brown's Legal Maxims* 261 (293); *Angell on Water Courses*, sections 109, 210; *Dickinson v. Grand Junction Canal Co.*, 9 E. L. & E. Rep. 520; *Acton v. Blundell*, 12 M. & W. 324; *Chatfield v. Wilson*, 1 Williams (Vt.) 670; *Panton v. Holland*, 17 Johns. (N. Y.) 92; *Callender v. Marsh*, 1 Pick. (Mass.)

26. Taxes.—(a) *The general doctrine* upon which courts of equity enjoin the collection of taxes alleged to be illegal is fraud, to prevent a multiplicity of suits, or to prevent irreparable injury, or a cloud on title to land.¹

(b) *Enjoining Taxes.*—A suit in equity will not be granted to restrain the collection of a tax upon the sole ground that the tax is illegal. There must be some special circumstances attending the sale which will distinguish it from a common trespass, and bring the case within some recognized head of equity jurisdiction before the preventive remedy of injunction may be invoked.²

434; *Lasala v. Holbrook*, 4 Paige (N. Y.) 169; *Wyatt v. Harrison*, 4 Barn. & Adol. 871; s. c., 23 E. C. L. 205; *Chasemore v. Richards*, 2 Hurl. & Nor. Rep. 158; *Rauston v. Taylor*, 11 Exch. Rep. 369; *Broadbent v. Ramsbotham*, 11 Exch. Rep. 602; *Balston v. Bensted*, 1 Camp. 463; *Guatrix v. Hayward*, 20 E. L. & E. 377. See also *Greenleaf v. Francis*, 18 Pick. (Mass.) 117; *Wheatley v. Baugh*, 25 Pa. St. 528; *Halderman v. Bruckhart*, 45 Pa. St. 514; *Bliss v. Greely*, 45 N. Y. 671; *Roath v. Driscoll*, 20 Conn. 533; *Chatfield v. Wilson*, 28 Vt. 49; *Clark v. Conree*, 38 Vt. 469; *Chase v. Silverstone*, 62 Me. 175; *Morrison v. Bucksport etc. Co.*, 67 Me. 353; *New Albany etc. R. Co. v. Peterson*, 14 Ind. 112. In some of the cases it is intimated that if the diversion is purely malicious, an action will lie. *Panton v. Holland*, 17 Johns. (N. Y.) 92; *Greenleaf v. Francis*, 18 Pick. (Mass.) 117; *Thurston v. Hancock*, 12 Mass. 221. In *Wheatley v. Baugh*, 25 Pa. St. 528. Ch. J. LEWIS, in speaking of subterranean streams says: "In limestone regions streams of great volume and power pursue their subterranean courses for great distances and then emerge from their caverns, furnishing for machinery of every description, or supplying towns and settlements with water for all the purposes of life."

1. *Schulenberg etc. Co. v. Hayward*, 20 Fed. Rep. 422; *Wells v. Dayton*, 11 Nev. 166. HAWLEY, Ch. J., in delivering the opinion of the court says: "It must, in the language of the authorities, appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or if the property is real estate, throw a cloud upon the title of the complainant, or there must be some allegation of fraud before the aid of the court of equity can be invoked." See also *Wabash etc. R. Co. v. Johnson*, 108 Ill. 11; *Porter v. Rockville etc. R. Co.*, 76 Ill. 564; *First*

Nat. Bank v. Cook, 77 Ill. 622; *Little Rock v. Prather*, 46 Ark. 471; *Maish v. Bird*, 22 Fed. Rep. 180; *Dundee Mortgage etc. Co. v. School District*, 19 Fed. Rep. 559; *Rome etc. R. Co. v. Smith*, 39 Hun (N. Y.) 332; *Delaware etc. R. Co. v. Broderick*, 5 Luz. L. Reg. (Pa.) 101; *Truesdell's Appeal*, 58 Pa. St. 148; *Swinney v. Beard*, 71 Ill. 27; *Leitch v. Wentworth*, 71 Ill. 146; *McConkey v. Smith*, 73 Ill. 313; *Greenup v. Franklin County*, 30 Ark. 101; *Munda v. Crystal Lake*, 79 Ill. 311; *Alexander v. Denison*, 2 McArthur (D. C.) 562; *Wells v. Dayton*, 11 Nev. 161; *Mann v. Board of Education*, 53 How. (N. Y.) Pr. 289. Compare *Nichols v. Jones*, 19 Fed. Rep. 855.

2. *Hannewinkle v. Georgetown*, 15 Wall. (U. S.) 547; *Alabama etc. Ins. Co. v. Lott*, 54 Ala. 499; *State Railroad Tax Cases*, 2 Otto (U. S.) 575; *Susquehanna Bank v. Broome Co.*, 25 N. Y. 312; *Burnes v. Atchison*, 2 Kan. 454; *Mutual Benefit Life Ins. Co. v. Supervisors of N. Y.*, 33 Barb. (N. Y.) 322; *Sayre v. Tompkins*, 23 Mo. 443; *Barrow v. Davis*, 46 Mo. 394; *Warden v. Supervisors*, 14 Wis. 672; *McPike v. Pew*, 48 Mo. 525; *Douglass v. Harrisville*, 9 W. Va. 162; *McClung v. Livesay*, 7 W. Va. 329; *Bogert v. Elizabeth*, 10 C. E. Green (N. J.) 427; *Wells v. Dayton*, 11 Nev. 161; *Western R. Co. v. Nolan*, 48 N. Y. 513; *Clark v. Gauz*, 21 Minn. 387; *Kellogg v. Oshkosh*, 14 Wis. 620; *Harkness v. Board of Public Works*, 1 McArthur (D. C.) 121. But see *contra Williams v. Peinny*, 25 Iowa 436; *Jeffersonville v. Patterson*, 32 Ind. 140; *Wood v. Draper*, 24 Barb. (N. Y.) 187; s. c., 4 Abb. (N. Y.) Pr. 322; *Dows v. Chicago*, 11 Wall 109. JUDGE FIELD, who delivered the opinion of the court, says (p. 110): "It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all o

them that the modes adopted to enforce the taxes should be interfered with as little as possible. No court of equity will therefore allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizens whose property is taxed, and he has no adequate remedy by the ordinary processes of the law."

For other authorities generally supporting the rule that the collection of taxes and assessments will not be enjoined unless some special reason is shown for equitable interference, see *Cooley on Taxation*, 536; *Elyton Land Co. v. Ayres*, 62 Ala. 413; *Tallassee Mfg. Co. v. Glenn*, 50 Ala. 489; *Clayton v. Lafargue*, 23 Ark. 137; *Floyd v. Gilbrath*, 27 Ark. 675; *Murphy v. Harrison*, 29 Ark. 340; *Oliver v. Memphis etc. R. Co.*, 30 Ark. 128; *De Witt v. Hays*, 2 Cal. 463; s. c., 56 Am. Dec. 352; *Minturn v. Hays*, 2 Cal. 590; s. c., 56 Am. Dec. 366; *Robinson v. Gaar*, 6 Cal. 273; *Merrill v. Gorham*, 6 Cal. 41; *Bucknall v. Story*, 36 Cal. 67; *Savings & Loan Asso. v. Austin*, 46 Cal. 415; *Houghton v. Austin*, 47 Cal. 646; *Central Pac. R. Co. v. Corcoran*, 48 Cal. 65; *Hollister v. Sherman*, 63 Cal. 38; *Dodd v. Hartford*, 25 Conn. 232; *Arnold v. Middleton*, 39 Conn. 401; *Rowland v. First School District*, 42 Conn. 30; *Waterbury Savings Bank v. Lawler*, 46 Conn. 243; *Frost v. Flick*, 1 Dakota 131; *Linton v. Athens*, 53 Ga. 588; *Decker v. McGoun*, 59 Ga. 805; *Georgia Loan Asso. v. McGowan*, 59 Ga. 811; *Wilkerson v. Watters*, 1 Idaho (N. S.) 564; *Burnes v. Mayor etc. of Atchison*, 2 Kan. 454; *Missouri River etc. R. R. v. Morris*, 7 Kan. 210, 231; *Freeland v. Hastings*, 10 Allen (Mass.) 570; *Brewer v. Springfield*, 97 Mass. 152; *Lord v. Charleston*, 99 Mass. 209; *Whiting v. Boston*, 106 Mass. 89; *Hunnewell v. Charleston*, 106 Mass. 350; *Pillsbury v. Humphrey*, 26 Mich. 245; *Corrothers v. Board of Education*, 16 W. Va. 527; *Christie v. Malden*, 23 W. Va. 667; *Warden v. Supervisors of Lafayette Co.*, 14 Wis. 672; *Miltimore v. Rock Co.*, 15 Wis. 9; *Ivinson v. Hance*, 1 Wyo. 270; *Scribner v. Allen*, 12 Minn. 148; *Coulson v. Harris*, 43 Miss. 728; *McDonald v. Murphree*, 45 Miss. 705; *Page v. St. Louis*, 20 Mo. 138; *Deane v. Todd*, 22 Mo. 90; *State v. Parkville etc. R. Co.*, 32 Mo. 496; *First Nat. Bank v. Meredith*, 44 Mo. 500; *Rockingham Savings Bank v. Portsmouth*, 52 N. H. 17; *Brown v. Concord*,

56 N. H. 375; *Hoagland v. Delaware*, 17 N. J. Eq. 107; *Liebstein v. Mayor etc. of Newark*, 24 N. J. Eq. 200; *Hoboken Land etc. Co. v. Hoboken*, 31 N. J. Eq. 461; *Dusenbury v. Mayor etc. of Newark*, 25 N. J. Eq. 295; *Bank of Utica v. Utica*, 4 Paige (N. Y.) 399; s. c., 27 Am. Dec. 72; *Wiggin v. New York*, 9 Paige (N. Y.) 16; *Van Doren v. New York*, 9 Paige (N. Y.) 388; *Heywood v. Buffalo*, 14 N. Y. 534; *Marsh v. Brooklyn*, 59 N. Y. 280; *Livingston v. Hollenback*, 4 Barb. (N. Y.) 9; *Van Rensselaer v. Kidd*, 4 Barb. (N. Y.) 17; *Messick v. Supervisors of Columbia Co.*, 50 Barb. (N. Y.) 190; *Thatcher v. Dusenbury*, 9 How. (N. Y.) Pr. 32; *Chemical Bank v. New York*, 12 How. Pr. (N. Y.) 476; s. c., 1 Abb. Pr. (N. Y.) 79; *Corwin v. Campbell*, 45 How. (N. Y.) Pr. 9; *Western Railroad Co. v. Nolan*, 48 N. Y. 513; *Pumpelly v. Oswego*, 45 How. Pr. (N. Y.) 219; *Hanlon v. Supervisors of Westchester*, 57 Barb. (N. Y.) 383; s. c., 8 Abb. Pr. (N. Y.) N. S. 261, overruling *Wood v. Draper*, 24 Barb. (N. Y.) 187; s. c., 4 Abb. Pr. (N. Y.) 322; see *Comin v. Supervisors of Jefferson*, 3 Thomp. & C. (N. Y.) 296; *Mann v. Board of Education*, 53 How. (N. Y.) Pr. 289; *Crever v. Mayor etc. of New York*, 12 Abb. Pr. N. S. (N. Y.) 340; *Broadnax v. Groom*, 64 N. Car. 244; *Burnet v. Cincinnati*, 3 Ohio 73; s. c., 17 Am. Dec. 582; *McCoy v. Chillicothe*, 3 Ohio 370; s. c., 17 Am. Dec. 607; *Mechanics' etc. Bank v. Debolt*, 1 Ohio St. 591; *Exchange Bank v. Hines*, 3 Ohio St. 1; *Hughes v. Kline*, 30 Pa. St. 227; *Wharton v. School Directors*, 42 Pa. St. 358; *Greene v. Mumford*, 5 R. I. 472; *Sherman v. Leonard*, 10 R. I. 469; *People's Sav. Bank v. Tripp*, 13 R. I. 621; *Red v. Johnson*, 53 Tex. 284; *Blanc v. Meyer*, 59 Tex. 89; *White Sulphur Springs Co. v. Robinson*, 3 W. Va. 542.

An injunction will not lie to restrain the levying and collection of a tax because of errors in a disbursement, which it is *held* to meet. *Truesdell's Appeal*, 58 Pa. St. 148; *St. Clair School Board's Appeal*, 74 Pa. St. 252.

School Tax.—In a suit to restrain the collection of school taxes, the court will not enquire into the validity of the appointment of the collector. *Locust Mt. etc. Co. v. Curren*, 31 Leg. Int. (Pa.) 334; s. c., 3 Luz. L. Reg. (Pa.) 193; *Tripp v. Scranton School District*, 6 Luz. L. Reg. (Pa.) 30.

The collection of a school tax will not be enjoined on the ground that it

There must be an allegation of fraud;¹ that the alleged tax creates a cloud upon the title;² that there is apprehension of a multiplicity of suits, or other cause presenting a case for

is in excess of the sum required; the directors are only responsible to the people for the exercise of the discretionary powers confided to them. *Wharton v. School Directors of Cass*, 42 Pa. St. 358. See *St. Clair School Board's Appeal*, 74 Pa. St. 252.

The collection of a tax should never be enjoined, except in cases where the tax is levied upon property exempt from taxation, or where it is doubly taxed, or the tax is levied without warrant of law, or by persons having no power to make the levy, or where a clear case of fraud in making the valuation is shown. In the latter case, the proof must be clear and irresistible, and the injury likely to result considerable. *Union Trust Co. et al. v. Weber et al.*, 96 Ill. 346; *Lemont v. Singer et c.* *Stone Co.*, 98 Ill. 94; *DuPage Co. v. Jenks*, 65 Ill. 277; *Munson v. Miller*, 66 Ill. 380; *Merritt v. Farris*, 22 Ill. 303; *Cook Co. v. Chicago et c.* *R. Co.*, 35 Ill. 460; *McBride v. Chicago*, 22 Ill. 574; *Metz v. Anderson*, 23 Ill. 463; *Swinney v. Beard*, 71 Ill. 31; *Chicago et c. R. Co. v. Cole*, 75 Ill. 591; *Chicago et c. R. Co. v. Frary*, 22 Ill. 34; *Ottawa Glass Co. v. McCaleb*, 81 Ill. 562; *Cooley on Taxation*, 536.

1. *Leitch v. Wentworth*, 71 Ill. 146. Where an assessor, having accepted without objection a list of taxable property, afterward and without notice arbitrarily increases the list, the tax payer having no knowledge of the matter until after the time for redress at law has expired by limitation, the collection of the tax may be enjoined. *First National Bank v. Cook*, 77 Ill. 622; *Cleghorn v. Postlewaite*, 43 Ill. 428.

Fraudulent Judgments.—If a bill to restrain town officers from the collection of a tax alleges fraud in the levy of the taxes to pay a judgment fraudulently recovered against the town, this will give the court jurisdiction to grant the relief prayed. *Leitch v. Wentworth*, 71 Ill. 146. But equity will not interpose to restrain the collection of a tax for the payment of judgments rendered against a municipal corporation, on the ground that the bonds on which the judgments were founded were without consideration and were obtained by fraud, where such defence might have

been pleaded to the action at law. Nor will the relief be allowed because the judgments are for an amount greater than that actually due, the mistake having occurred through complainant's own carelessness, and no application having been made to correct the judgment in the court in which it was obtained. *Muscatine v. Mississippi et c. R. Co.*, 1 Dill. (U. S.) 536.

Fraudulent Assessments.—And where the officers entrusted by law with the duty of making an assessment have fraudulently assessed property above its real value for the purpose of relieving resident tax payers from due proportion of the taxes, and have not exercised their judgment upon the valuation, but have arbitrarily made an excessive assessment, while it would seem to be proper to enjoin a sale of lands for the excess in such assessment, the injunction should not extend to the entire tax, and should only be allowed upon payment of the proportion which is justly due. *Merrill v. Humphrey*, 24 Mich. 170.

Fraudulent Combination at Tax Sale.—Where a combination is entered into by the collector and the principal bidders at a tax sale to prevent competition at the sale and that the lands should be struck off to one of the parties for the sums charged to the respective tracts and bidding was thus prevented, the court will enjoin the collector from making a deed to a party to the fraud. *Gage v. Graham*, 57 Ill. 144.

2. *Palmer v. Rich*, 12 Mich. 414; *Scofield v. Lansing*, 17 Mich. 437; *Seeley v. West Port*, 47 Conn. 294; *Minn. Linseed Oil Co. v. Palmer*, 20 Minn. 468; *Heywood v. Buffalo*, 14 N. Y. 534; *Mutual et c. Ins. Co. v. Supervisors of N. Y.*, 33 Barb. (N. Y.) 322; *Mitchell v. Milwaukee*, 18 Wis. 92; *Jersey City v. Morris Canal et c. Co.*, 12 N. J. Eq. (1 Beas.) 227; *Siegel v. Supervisors et c.*, 26 Wis. 70; *Marquette et c. R. Co. v. Marquette*, 35 Mich. 504; *Huntington v. Central Pac. R. Co.*, 2 Sawy. (U. S.) 503; *South Platte Land Co. v. Buffalo Co.*, 7 Neb. 253; *Wiley v. Flournoy*, 30 Ark. 609; *Greedup v. Franklin Co.*, 30 Ark. 101; *Mobile et c. R. Co. v. Peebles*, 47 Ala. 317; *Milwaukee Iron Co. v. Hubbard*,

equitable relief.¹ Mere errors or excess in valuation, or hardship or injustice of the law, or any grievance which can be

20) Wis. 51; Fowler v. St. Joseph, 37 Mo. 228; Johnson v. Milwaukee, 40 Wis. 315; McPike v. Pen, 51 Mo. 63; Johnson v. Hahn, 4 Neb. 39; Hollenbeck v. Hahn, 2 Neb. 377; Leslie v. St. Louis, 47 Mo. 474; Hanlon v. Westchester, 8 Abb. Pr. (N. Y.) N. S. 261; s. c., 57 Barb. (N. Y.) 383; Felton v. Oregon etc. R. Co., 3 Sawy. (U. S.) 22; Lockwood v. St. Louis, 24 Mo. 20; McCormick v. District of Columbia, 4 Mackey (D. C.) 396.

Where a city charter declares a tax a lien upon the premises on which it is assessed, the tax, if illegal, creates such a cloud upon the title as to warrant an injunction. Scofield v. Lansing, 17 Mich. 437. And the jurisdiction to thus interfere for the prevention of a cloud upon the title is regarded as pertaining to the well settled powers of equity, which will interfere to prevent such a cloud as tends to diminish the value of the property or cast a doubt upon the title. Bonton v. Brooklyn, 15 Barb. (N. Y.) 375; Dean v. Madison, 9 Wis. 402; Van Dorn v. New York, 9 Paige (N. Y.) 388; Wiggin v. New York, 9 Paige (N. Y.) 17; Curtis v. East Saginaw, 35 Mich. 508; Van Rensseler v. Kidd, 4 Barb. (N. Y.) 17; Harkness v. Board of Public Works, 1 McArthur (D. C.) 121.

Where an illegal tax is assessed upon lands and by statute he deed given on a sale of the land therefor would be *prima facie* evidence of regular proceedings in the assessment and subsequent steps to a sale, such sale would operate to create a cloud upon complainant's title, notwithstanding the illegality must appear on the face of the proceedings; and the owner may therefore maintain a bill in equity to stay the tax sale. Palmer v. Rich, 12 Mich. 414; Jenkins v. Rock County, 15 Wis. 12. But where property advertised for sale for the payment of taxes accrued thereon is so vaguely and definitely described in the notice of sale, that a purchaser thereof could take no perfect title, it does not constitute sufficient cause for enjoining the sale. Burlington etc. R. Co. v. Shearman, 12 Iowa 112. See Head v. James, 13 Wis. 641.

Where the record of the tax proceedings is *prima facie* valid, and extrinsic evidence is necessary to show

its validity, so that there is no full and adequate remedy at law to correct an abuse of the taxing power, equity may properly interfere by injunctions. Greedup v. Franklin Co., 30 Ark. 101. See Mobile etc. R. Co. v. Peebles, 47 Ala. 317; Johnson v. Milwaukee, 40 Wis. 315; Fowler v. St. Joseph, 37 Mo. 228.

Where a change was made in the valuation of complainant's property after the adjournment of such a board, and without authority of law, thereby largely increasing such valuation, an injunction was allowed to prevent the extending of the taxes upon the tax books, since the illegality of the assessment in such case would not necessarily appear upon the face of a tax deed, and the deed would therefore constitute a cloud upon the title to complainant's lands. Wiley v. Flournoy, 30 Ark. 609. See South Platte Land Co. v. Buffalo Co., 7 Neb. 253; Milwaukee Iron Co. v. Hubbard, 29 Wis. 51; Tainter v. Lucas, 29 Wis. 375.

When Taxes Should be Satisfied Out of Personalty.—An injunction will lie at the suit of the owner of land to prevent the county auditor from advertising it for sale and the county treasurer from selling it for the payment of delinquent taxes thereon, while said owner also owns leviable property within the county, sufficient to pay said taxes. Abbott v. Edgerton, 53 Ala. 196. See McPike v. Pen, 51 Mo. 63; Johnson v. Hahn, 4 Neb. 139; overruling Hollenbeck v. Hahn, 2 Neb. 377.

Injunction is the proper remedy to prevent the sale of real estate for taxes, the levying of which is prohibited by law. Mechanics' Bank v. Kansas, 73 Mo. 555.

1. Hannevinkle v. Georgetown, 15 Wall. (U. S.) 547; Cooley on Taxation, 542; 2 Dillon Mun. Corp., § 923; High on Injunction, § 524, *et seq.* In Southwestern R. Co. v. Wright, 68 Ga. 311, it was held that equity has jurisdiction to interfere in behalf of any person, natural or artificial, entitled to relief on the following grounds: (1) Where exactions are pressed in the form of annual taxes, inconsistent with and violative of legal rights. (2) Because the exactions might be repeated and wrongs multiplied. (3) When misled

by the act of the officer, which amounts to a legal fraud. (4) On the ground of mistake. (5) Because the numerous questions made as to different parts of the property assessed, and the liability of each portion dependent for adjudication on separate charters and amendments and other questions in respect to other items of property in and out of this state, and in what degree or how connected, and whether liable or not to be taxed, make a complicated case that properly calls for the exercise of the powers of a court of equity to ascertain, adjust and settle.

Irregularities in the Assessment of Taxes.—Equity will not interpose to restrain the execution of a deed of land sold for taxes on the ground that the tax proceedings were irregular or void, unless it also appears that the proceedings are inequitable and that it will be against conscience to let them go on. *Warden v. Fond du Lac Co.*, 14 Wis. 672. The property of a corporation was assessed and entered into on the assessor's books in the name of the "Potomac Bridge Company," whereas the true corporate name was The Virginia and Maryland Bridge Company at Shepherd's Town." The corporation had knowledge of the assessment, and no reason was assigned for their not going before the commissioners to have the error as to the name corrected.

Held, that in such a case equity cannot interfere in behalf of the corporation and relieve them from the payment of the taxes so assessed. *O'Neal v. Virginia etc. Co.*, 18 Md. 1; *Clinton etc. Appeal*, 56 Pa. St. 315; *Livingston v. Hollenbeck*, 4 Barb. (N. Y.) 9; *Center etc. Co. v. Black*, 32 Ind. 468; *Kellogg v. Oshkosh*, 14 Wis. 623; *Exchange Bank v. Hines*, 3 Ohio St. 1; *Gay v. Herbert*, 25 La. An. 196; *Iowa etc. Co. v. County of Sac*, 39 Iowa 124; *Iowa etc. Co. v. Carroll Co.*, 39 Iowa 151; *Hollenbeck v. Hahn*, 2 Neb. 377; *Albany etc. Co. v. Auditor General*, 37 Mich. 391; *Metz v. Anderson*, 23 Ill. 463; *Munson v. Minor*, 22 Ill. 595; *Merritt v. Farriss*, 22 Ill. 303; *Chicago, etc. R. Co. v. Frary*, 22 Ill. 34; *Schofield v. Watkins*, 22 Ill. 66; *Greene v. Mumford*, 5 R. I. 472; *Williams v. Mayor*, 2 Mich. 560; *Jackson v. Detroit*, 10 Mich. 248; *Challiss v. Commissioners of Atchison Co.*, 15 Kan. 49; *Stebbins v. Challiss*, 15 Kan. 55; *Du Page Co. v. Jenks*, 65 Ill. 275; *Swinney v. Beard*, 71 Ill. 27; *Delphi v. Bowen*, 61 Ind. 29; *Brown v. Herron*, 59 Ind. 61; *Whittaker v. Janes-*

ville, 33 Wis. 76; *Hall v. Houston etc. R. Co.*, 39 Tex. 286; *George v. Dean*, 47 Tex. 73; *Western R. Co. v. Nolan*, 48 N. Y. 513; *Parker v. Challis*, 9 Kan. 155; *Smith v. Commissioners of Leavenworth*, 9 Kan. 296; *City of Lawrence v. Killam*, 11 Kan. 499; *Coulson v. Harris*, 43 Miss. 728; *Rio Grande R. Co. v. Scanlan*, 44 Tex. 649; *Albany etc. Co. v. Auditor General*, 37 Mich. 391; *Adams v. Beman*, 10 Kan. 37; *Finnegan v. Fernandina*, 15 Fla. 379; *Huck v. Chicago etc. R. Co.*, 86 Ill. 352; *Chicago etc. R. Co. v. Siders*, 88 Ill. 320; *Murphy v. Harrison*, 29 Ark. 340; *Savings and Loan Society v. Austin*, 46 Cal. 415; *Cent. Pac. R. Co. v. Corcoran*, 48 Cal. 65; *Houghton v. Austin*, 47 Cal. 646; *Dean v. Davis*, 51 Cal. 406; *Rockingham Savings Bank v. Portsmouth*, 52 N. H. 17; *Brown v. Concord*, 56 N. H. 375; *Chicago etc. R. Co. v. Frary*, 22 Ill. 34; *Burt v. Auditor General*, 39 Mich. 126; *Hughes v. Kline*, 30 Pa. St. 227; *Dodd v. Hartford*, 25 Conn. 232; *Jones v. Summer*, 27 Ind. 510; *Ottawa v. Walker*, 21 Ill. 605; *Metz v. Anderson*, 23 Ill. 463; *State v. Bremond*, 36 Tex. 116; *Markot v. Davenport*, 17 Iowa 379; *West v. Whitaker*, 37 Iowa 598; *Mills v. Gleason*, 11 Wis. 470; *Mills v. Johnson*, 17 Wis. 598; *Lawrence v. Killam*, 11 Kan. 499; *Merrill v. Gorham*, 6 Cal. 41; *Savings and Loan Society v. Ordway*, 38 Cal. 679; *Hallenbeck v. Hahn*, 2 Neb. 377; *Iowa etc. Co. v. Sac Co.*, 39 Iowa 124; *Rockingham Savings Bank v. Portsmouth*, 52 N. H. 17; *Brown v. Concord*, 56 N. H. 379; *Floyd v. Gilbrath*, 37 Ark. 675; *Finnegan v. Fernandina*, 15 Fla. 379; *Western R. Co. v. Nolan*, 48 N. Y. 513; *Huck v. Chicago etc. R. Co.*, 86 Ill. 352; *Chicago etc. R. Co. v. Siders*, 88 Ill. 320; *Wood v. Helmer*, 10 Neb. 65; *Burlington etc. R. Co. v. Seward Co.*, 10 Neb. 211; *Powers v. Bowman*, 53 Iowa 359; *Burlington etc. R. Co. v. Saline Co. (Neb.)*, 7 Am. & Eng. R. R. Cas. 347; *Archer v. Terre Haute etc. R. Co.*, 102 Ill. 394; s. c., 7 Am. & Eng. R. R. Cas. 249; *Ryan v. Board of Comm. (Kan.)*, 3 Am. & Eng. Corp. Cas. 392.

Mistakes of Officers.—Equity will not enjoin a tax for errors in its assessment or levy, or proceedings to collect. *Chicago etc. R. Co. v. Frary*, 22 Ill. 36; *Merritt v. Farriss*, 22 Ill. 312; *Metz v. Anderson*, 23 Ill. 410; *Cook Co. v. Chicago etc. R. Co.*, 35 Ill. 465; *Vieley v. Thompson*, 44 Ill. 13; *Du Page Co. v. Jenks*, 65 Ill. 286; *Swinney v. Beard*, 71 Ill. 30; *Andrews v. Rumsey*, 75 Ill. 600;

Huck v. Chicago etc. R. Co., 86 Ill. 360; Town of Ottawa v. Walker, 21 Ill. 610; Munson v. Minor, 22 Ill. 602; Drake v. Phillips, 40 Ill. 393; Munson v. Miller, 66 Ill. 383; Nunda v. Crystal Lake, 79 Ill. 314; Evans v. Gage, 1 Bradw. (Ill.) 206. In *Le Roy v. New York*, 4 Johns. Ch. 352, a bill was brought for relief against an assessment made to defray the expense of constructing a common sewer in the city of New York, and to enjoin the commissioners from collecting the assessment on the ground that it did not include all property holders benefited by the improvement. KENT, Ch., says: "I cannot find that the court interferes in cases of this kind, where the act complained of was done fairly and impartially according to the best judgment and discretion of the assessors, and a precedent once set would become very embarrassing and extensive in its consequences. If the power under this statute had been exercised in bad faith and against conscience, I might have attempted to control it; but a mere mistake of judgment in a case depending so much upon sound discretion cannot properly be brought into review under the ordinary powers of this court. There must have been a thousand occasions and opportunities for the exercise of such an appellate jurisdiction in the history of the jurisprudence and practice of the English Court of Chancery, if such a jurisdiction existed, and yet we find no precedents to direct us. A mistake of judgment in the assessors upon the matter of fact what portion or district of the city was intended to be and actually was benefited by the common sewer can hardly be brought within the reach of that head of equity jurisdiction which relates to breaches of trust. Here is not strictly speaking a violation of duty. No bad faith or partiality in the assessors is pretended. The aid of this court might as well be asked to review every assessment of a land tax or a poor rate. I apprehend it would require a special provision by statute to authorize chancery to interfere with these assessments." See *Atty. Gen. v. Foundling Hospital*, 4 Bro. C. C. 165; *Haight v. Day*, 1 Johns (N. Y.) Ch. 18.

Boards of Equalization.—Where a particular manner is provided by law or a particular tribunal designated for the settlement and decisions of all errors or inequalities on behalf of persons dissatisfied with a tax, they must avail themselves of the legal remedy

thus prescribed, and will not be allowed to waive such relief and seek in equity to enjoin the collection of the tax. And this upon the ground that where one has a complete and ample remedy and slumbers upon his rights he is estopped from invoking the aid of equity. 1 High on Executions, § 493; *Hughes v. Kline*, 30 Pa. St. 227; *Macklot v. Davenport*, 27 Iowa 379; *Merrill v. Gorham*, 6 Cal. 41; *Peoria v. Kidder*, 26 Ill. 351. And where a state board for the equalization of taxes, acting under the law and within the scope of their authority, have fixed the value of the capital stock and franchises of a corporation for purposes of taxation, although they must have erred in judgment, their action cannot be impeached except for fraud, and equity will not enjoin proceedings for the enforcement of the tax because of errors in judgment upon the part of such board. *Porter v. Rockford etc. R. Co.*, 76 Ill. 561; *Ottawa Glass Co. v. McCaleb*, 81 Ill. 556. See *Pacific Hotel Co. v. Leib*, 83 Ill. 602. It is held by a number of decisions that where a state board for the equalization of taxes undertakes to fix valuations upon taxable property through prejudice or a reckless disregard of duty and makes a grossly arbitrary and unreasonable valuation, an injunction is regarded as the appropriate remedy. In *Chicago etc. R. Co. v. Cole*, 75 Ill. 591, SCHOFIELD said: "If, as it must be to be sustained, the rule adopted by the board of equalization by which to be governed in making this class of assessments may be regarded as the honest expression of judgment of a majority of the board, then it is plain that this assessment, because in violation of that rule and consistent with no other reasonable theory of valuation, cannot be the honest judgment of a majority of that board. It is an arbitrary and unreasonable valuation. Because the law has devolved on the board of equalization, and not on the courts' duty of making such valuations, we hold it is not the duty of the courts to exercise any supervisory care over its valuations so long as it acts within the scope of the powers with which it is invested, and in obedience to what might reasonably be presumed to be an honest judgment, however much we may disagree with it. But whenever the board undertakes to go beyond its jurisdiction, or to fix valuations through prejudice or a reckless disregard of duty, in opposition to what

remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax.¹

(c) *Tax Partly Legal and Partly Illegal*.—A party seeking the aid of the court of equity to enjoin the collection of a tax must pay what is conceded to be due. Or if nothing is ceded to be due, then the amount which, from the face of the bill and affidavits for an injunction, it is apparent is due on the property in controversy. The state, or any subdivision thereof, is not to be tied up as to that portion of the tax over which there is no controversy by joining it with that which is really contested. If the proper officer refuses to receive a part of the tax, it must be

must necessarily be the judgment of all persons of reflection, it is the duty of the courts to interfere to protect tax payers against the consequences of its acts. Where its jurisdiction is conceded, no mere difference of opinion as to the reasonableness of its valuations will justify equitable interference, but its valuations must be the result of honest judgment and not of mere will." See *Dean v. Davis*, 51 Cal. 407.

1. *Mutual etc. Ins. Co. v. Supervisors of N. Y.*, 3 Keyes (N. Y.) 182; s. c., 3 Abb. (N. Y.) Dec. 344; 33 Barb. (N. Y.) 322; 8 Bosw. (N. Y.) 683; *Hasbrouck v. Kingston Board of Health*, 3 Keyes (N. Y.) 480; s. c., 2 Abb. Dec. (N. Y.) 380; *Kilbourne v. Allyn*, 7 Lans. (N. Y.) 352; *State Railroad Tax Cases*, 92 U. S. 575.

An injunction will not lie to restrain the collection of a tax levied by supervisors in the exercise of their official powers; the remedy for an abuse of their power is exclusively at law. *Van Ren Rensselaer v. Kidd*, 4 Barb. (N. Y.) 17; *Wilson v. New York*, 4 E. D. Smith (N. Y.) 675; s. c., 1 Abb. (N. Y.) Pr. 4; *Mooers v. Smedley*, 6 Johns. (N. Y.) Ch. 28; *Messeck v. Supervisors of Columbia*, 50 Barb. (N. Y.) 190.

An injunction ought not to be granted to restrain the enforcement of a municipal assessment where there is a remedy by *certiorari*. *Betts v. Williamsburgh*, 15 Barb. (N. Y.) 255; *Bouton v. Brooklyn*, 15 Barb. (N. Y.) 375; s. c. 7 How. (N. Y.) Pr. 198.

Alabama.—Where the judgment of the commissioners' court rendered on the application of a tax payer for the correction of an alleged erroneous assessment against him, is removed by *certiorari* into the circuit court and there affirmed, he cannot obtain relief

against it in equity on grounds which were available in the legal forum without showing that he was prevented from obtaining relief at law by fraud, accident or the act of the opposite party unmixed with fault or negligence on his own part. *Weaver v. State*, 39 Ala. 535; *Alabama etc. Ins. Co. v. Lott*, 54 Ala. 499; *Eaton Land Co. v. Ayres*, 62 Ala. 413; *Tallassee Mfg. Co. v. Glenn*, 50 Ala. 489.

A merely illegal and void assessment sought to be enforced against personalty presents no ground for equitable interference. *Mobile v. Baldwin*, 57 Ala. 62; *Selma Building etc. Assoc. v. Morgan*, 57 Ala. 33.

A bill to enjoin certain taxes as illegal is bad if it fails to allege what taxes are legal and what illegal, and contain an offer to pay the taxes lawfully levied. *Montgomery v. Sayre*, 65 Ala. 564.

Equity will not enjoin a threatened illegal seizure by a tax collector, there being an adequate remedy at law. *Baldwin v. Tucker*, 16 Fla. 258.

Arkansas.—In Arkansas it was held that proceedings must be had to correct an erroneous assessment by proceedings in the circuit court, but where the error or illegality exists *de hors* the record, as where the levy on the face of the proceedings is a valid lien on land and extrinsic evidence is required to show such invalidity, a court of equity will interfere to prevent a multiplicity of suits, irreparable injury or a cloud upon title to real estate. *Floyd v. Gilbrath*, 27 Ark. 675; *Hare v. Carnall*, 39 Ark. 196; *Waters Pierce Oil Co. v. Little Rock*, 39 Ark. 412.

Where a county court contracts for the building of a jail and for that purpose levies a tax for county buildings, and after the tax book has gone

into the hands of the collector the contract is rescinded, it is the duty of court to set aside the levy and stop the collection of the building tax, and if it fails to do it, any taxpayer may enjoin its collection. *Worthen v. Badgett*, 32 Ark. 496; *Worthen v. Faust*, 32 Ark. 496.

The collection of taxes will not be enjoined unless some special reason is shown for equitable interference. *Clayton v. Lafargue*, 23 Ark. 137; *Floyd v. Gilbrath*, 27 Ark. 675; *Murphy v. Harrison*, 29 Ark. 340; *Oliver v. Memphis etc. R. R.*, 30 Ark. 128; *Blake v. Jordan*, 45 Ark. 265; *Little Rock v. Barton*, 33 Ark. 436.

California.—A court of equity will not interfere by injunction to restrain the sale of property for delinquent taxes unless it appears that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate and the sale casts a cloud on the title of the complainant. *Savings etc. Society v. Austin*, 46 Cal. 415; *Ritter Patch*, 12 Cal. 298.

In all cases involving simply the question of taxation, the issue is strictly one at common law, and courts of equity can take no cognizance thereof; and in such case to grant an injunction is error. *Minturn v. Hays*, 2 Cal. 590; *Peralta v. Adams*, 2 Cal. 594.

Illegal Taxes.—A bill in equity will lie to restrain a sale of property for illegal taxes, since a tax deed is made *prima facie* evidence of title. *Palmer v. Boling*, 8 Cal. 388; *Fremont v. Boling*, 11 Cal. 387; *overruling De Witt v. Hays*, 2 Cal. 463. *And Robinson v. Gaar*, 6 Cal. 275. See *Saving etc. Soc. v. Austin*, 46 Cal. 415.

A party seeking to enjoin the collection of tax assessed upon his property, upon the ground that the law provides for the meeting of the board of equalization for the correction of the tax list, and that the board did not meet as required, must show in his bill that there was error to be corrected in his list. *Cowell v. Doub*, 12 Cal. 273.

Where land is clearly exempt from taxation (as, in California, is all property administered by the regents of the State University) an injunction will not be granted to restrain its sale for taxes. A sale would cast no cloud on the title. *Hollister v. Sherman*, 63 Cal. 38.

Colorado.—In Colorado, where there is a plain adequate remedy for the correction of any errors in assessments, an

injunction will not be granted. *Breeze v. Haley*, 10 Colo. 5; *Gillette v. Denver*, 21 Fed. Rep. 822.

Connecticut.—Where a municipal corporation makes an illegal appropriation of its funds an injunction will lie in favor of any tax payer. The legal remedy by suit to recover back taxes is inadequate. *Webster v. Harwinton*, 32 Conn. 131.

A municipal corporation will not be enjoined against enforcing void warrants for the collection of illegal and void assessments against personal estate, the remedy at law being adequate. *Dodd v. Hartford*, 25 Conn. 238.

An injunction will issue to restrain the collection of a real tax where mistake is made as to the property taxed and the person to whom it belongs. *Seeley v. Westport*, 47 Conn. 294, s. c., 36 Am. Rep. 70.

An injunction will not be granted to restrain the collection of public taxes, though the applicant is not the tax payer, but a person whose property is levied on for the taxes of another. *Waterbury Savings Bank v. Lawler*, 46 Conn. 243.

Dakota.—In no case will a court of equity enjoin the collection of taxes on the ground of irregularities in the assessment; where, however, the tax is illegal or unauthorized, or the property not subject to taxation, or a fraud has been practiced by the taxing officers and the injury resulting from the enforcement of the tax would be irreparable, an injunction may be granted. *Frost v. Flick*, 1 Dakota 132.

Persons having no common right or common interest in the property taxed to pay county warrants cannot join in an action to restrain the levy. *Wood v. Bangs*, 1 Dak. Ter. 179.

Delaware.—Where the parties by stipulation agree upon certain facts, showing that a multiplicity of suits would be avoided in case the complaint for an injunction is entertained, the court will acquire jurisdiction, although the pleadings fail to make out a case for equitable relief. *Phila. etc. R. Co. v. Neary* (Del.), 8 Atl. Rep. 365.

Florida.—A court of equity will not enjoin the sale of property for taxes on account of irregularities in the manner of notice and time and place of sale. "If the tax is due, and that is not denied, the party should pay it. A court of equity will not aid him in resisting the just and legal demands of the government." *Finnegan v. Fernandina*, 15

Fla. 379-383; *Cheney v. Jones*, 14 Fla. 587.

Georgia.—In Georgia the courts are prohibited under the tax act of 1804 from enjoining the collection of taxes. It is said (p. 59): "Far better is it. I think, to let the individual pay to the government what it demands of him at the time of the demand, as he will be certain of getting it back with interest after more or less delay if it was not due." *Eve v. State*, 21 Ga. 50; *Cody v. Lennard*, 45 Ga. 85; *Scofield v. Perkerson*, 46 Ga. 350; *Linton v. Athens*, 53 Ga. 588; *Decker v. McGown*, 59 Ga. 805; *Georgia Mutual Loan Assoc. v. McGown*, 59 Ga. 811. See *Southwestern R. Co. v. Wright*, 68 Ga. 311.

Idaho.—While courts of equity will often interfere to prevent the collection of a void tax, they will only do so where the parties have had no remedy in due course of law. If there has been a plain and speedy remedy at law lost by negligence, the aid of a court of equity cannot be invoked. (NOGGLE, C. J., dissenting.) *Wilkerson v. Walters*, 1 Idaho N. S. 564.

A railway company, claiming exemption from taxation, must set up its exemption by way of defence to an action brought to recover a tax assessed. If it fails to do so, it cannot subsequently enjoin the collection of the tax. *Utah etc. R. Co. v. Crawford*, 1 Idaho, N. S. 770.

Illinois.—While it may be considered settled that the court of equity will never entertain a bill to restrain the collection of a tax excepting in cases where the tax is unauthorized by law, or where it is assessed upon property not subject to taxation, yet even in the excepted cases it is questionable whether the court would entertain jurisdiction without special circumstances showing that the collection of the tax would be likely to produce irreparable injury or cause a multiplicity of suits. *Cook Co. v. Chicago etc. R. Co.*, 35 Ill. 400; *Swinney v. Board*, 71 Ill. 27; *Town of Ottawa v. Walker*, 21 Ill. 605; *McBride v. City of Chicago*, 22 Ill. 574; *Drake v. Phillips*, 40 Ill. 388; *Dupage Co. v. Jenks*, 65 Ill. 275, 287; *Cleghorn v. Postlewaite*, 43 Ill. 428; *Vieley v. Thompson*, 44 Ill. 9; *Darling v. Gunn*, 50 Ill. 424; *Deming v. James*, 72 Ill. 78; *McConkey v. Smith*, 73 Ill. 313; *Chicago etc. R. Co. v. Cole*, 75 Ill. 591; *Kimball v. Merchants' etc. Co.*, 89 Ill. 611; *Gage v. Evans*, 90 Ill. 569; *Lamont v. Singer*

etc. Stone Co., 98 Ill. 94; *Searing v. Heavysides*, 106 Ill. 85; *Munson v. Miller*, 66 Ill. 380; *Dunham v. Miller*, 75 Ill. 379; *Porter v. Rockford etc. R. Co.*, 76 Ill. 561; *Munda v. Crystal Lake*, 79 Ill. 311; *Pacific Hotel Co. v. Lieb*, 83 Ill. 602; *Chicago etc. R. Co. v. Siders*, 88 Ill. 320; *Union Trust Co. v. Weber*, 96 Ill. 346; *Evans v. Gage*, 1 Ill. App. 202; *Traders' Ins. Co. v. Farwell*, 102 Ill. 413; *Archer v. Terre Haute etc. R. Co.*, 102 Ill. 493; *Johnson v. Roberts*, 102 Ill. 655; *Moore v. Wayman*, 107 Ill. 192.

Where the tax sale was admitted to be illegal, though the taxes themselves were valid, it was held that the execution of the deed could be enjoined only upon payment to the holders of the amount due on the certificates. *Alexander v. Merrick*, 121 Ill. 606.

A tax sale will not be enjoined at the suit of partners, because some of the property is the separate property of one of them, and has been assessed to the firm. *Lyle v. Jaques*, 101 Ill. 644.

Indiana.—An injunction will be granted to prevent the sale of real estate for the collection of a special assessment thereon under a void precept. *Jeffersonville v. Patterson*, 32 Ind. 140. But an injunction to restrain a sale of land for taxes will not be granted where the complaint fails to show threatened acts on the part of the authorities which would amount to more than a mere trespass. *Anthony v. Sturgis*, 86 Ind. 479.

Injunctions are granted to restrain the collection of merely unauthorized and illegal taxes. *Toledo etc. R. Co. v. Lafayette*, 22 Ind. 262; *Shoemaker v. Grant Co.*, 36 Ind. 175; *Riley v. Western Union Tel. Co.*, 47 Ind. 511; *Delphi v. Bowen*, 61 Ind. 29, 37; *Columbus etc. R. Co. v. Grant Co.*, 65 Ind. 427; *Indianapolis etc. R. Co. v. Tipton Co.*, 70 Ind. 385.

An injunction will not be granted at the suit of a tax payer because of irregularities in the proceedings of the county officers where there was authority to levy the tax. *Ricketts v. Spraker*, 77 Ind. 371.

Tax payer may obtain injunction to restrain city from entering into *ultra vires* contract. *Valparaiso v. Gardner*, 97 Ind. 1; s.c., 7 Am. & Eng. Corp. Cas. 626.

Iowa.—A tax payer of a township where an unauthorized tax has been levied for school purposes may enjoin the collection thereof. *Williams v.*

Pinny, 25 Iowa 436. WRIGHT, J., in delivering the opinion of the court, p. 437-8, says: "The objections that the plaintiffs are not proper parties, and that there is a plain and adequate remedy at law, are without force. As tax payers and residents of said district they would have a right to ask the courts to restrain a tax levied without authority of law."

The rule is well settled that a court of equity will interpose by injunction the collection of an illegal tax. *Yorger v. Township of Rapids*, 36 Iowa 176; *Litchfield v. Polk Co.*, 18 Iowa 70; *Hubbard v. Johnson Co.*, 23 Iowa 130; *Rood v. Mitchell Co.*, 39 Iowa 444; *Cattell v. Lowry*, 45 Iowa 478; *Brandriff v. Harrison Co.*, 50 Iowa 164; *Curry v. Decatur Co.*, 61 Iowa 71.

Kansas.—Where the remedy at law is clear and undoubted an injunction will not be granted to restrain the sale of real estate for taxes alleged to be illegal. *Barnes v. Atchison*, 2 Kan. 455; *Kansas etc. Ry. v. Russell*, 8 Kan. 558.

Where the property assessed is subject to taxation, and the taxes are not illegal, an injunction will not be granted to restrain the collection of the taxes upon the ground that the assessment was irregularly made. *Ryan v. Leavenworth Co.*, 30 Kan. 185; *Lawrence v. Kellam*, 11 Kan. 499, 508; *Johnson v. Ogg*, 13 Kan. 206; *Challiss v. Kekelukaemper*, 14 Kan. 477; *Hagaman v. Cloud Co.*, 19 Kan. 394.

Where personal property is subject to assessment and taxation, and the taxing officers have jurisdiction over it, but the assessment thereof is excessive, no injunction will lie until the amount of taxes, upon a reasonable and fair valuation of the property, is paid or tendered. *Wilson Treas. v. Longendyke*, 32 Kan. 267. *Ottawa v. Barney*, 10 Kan. 270; *Mo. River etc. R. Co. v. Morris*, 7 Kan. 210, 231; *Leavenworth Co. v. Lang*, 8 Kan. 284. See *Miller v. Madden*, 35 Kan. 455.

Where a tax considered in the abstract is legal and valid, but when applied to the separate property of two or more particular persons, becomes, as to such property, invalid, such persons have no joint action to restrain the collection of such tax. *Hudson v. Atchison*, 12 Kan. 140. Any one or more of a number of persons whose property is affected by an illegal tax or assessment may maintain an action to enjoin the collection of such tax or

assessment, so far as the same affects his or their property without joining others as plaintiffs whose property may also be affected by the said illegal tax or assessment. *Gilmore v. Norton*, 10 Kan. 491; *Gilmore v. Fox*, 10 Kan. 509; *Wyandotte & K. C. Bridge Co. v. Wyandotte Co.*, 10 Kan. 326.

Kentucky.—Where the county judge is proceeding to assess property not liable to taxation he may be restrained by injunction. Where, however, the assessment is made by the ordinary taxing officer from whom an appeal may be taken, an injunction will not be granted. *Baldwin v. Shine (Ky.)*, 2 S. W. Rep. 164.

A court of equity has power to restrain the collection of an illegal tax. *Gates v. Barrett*, 79 Ky. 295.

Louisiana.—The tax collector is incapable of standing in judgment alone in a suit by a tax payer to enjoin the collection of a tax levied to pay a judgment. The judgment creditor, for whose benefit the tax was laid, must be made a party to the suit. *Shields v. Pipes*, 31 La. An. 765.

A summary sale by a tax collector, if contested, will be enjoined, unless he specifically shows on what property he claims taxes, the cash, value and the percentage. *Clinton etc. R. Co. v. Tax Collector*, 30 La. An., pt. 1, 626.

Injunction will be granted on application of tax payer to restrain appropriation by city councils of funds to pay expenses of returning Liberty Bell exhibited at Exposition. *Bayle v. New Orleans (La.)*, 8 Am. & Eng. Corp. Cas. 329.

Maine.—Where an entire school district tax was assessed without authority of law, *held*, that equity would take jurisdiction of a bill to enjoin its collection brought by all the tax payers or by any number, on behalf of themselves and the others, on the ground of preventing a multiplicity of suits. *Carlton v. Newman*, 77 Me. 408.

Maryland.—If the property owner omits to pursue the relief offered by the tax laws against the improper exercise of the taxing power, he cannot be relieved in equity, if at all, unless a strong case is presented. *O'Neal v. Virginia etc. Co.*, 18 Md. 1; *Stoddert v. Ward*, 31 Md. 562.

The collection of taxes will not be enjoined for irregularity merely, or because their collection will result in hardship. *Alleghany Co. Commrs. v. Union Mining Co.*, 61 Md. 545.

Massachusetts.—A court of equity has no jurisdiction to enjoin a city or its collector against collecting a tax which a complainant alleges has been illegally assessed upon him by the board of assessors. *Brewer v. Springfield*, 97 Mass. 152; *Loud v. Charleston*, 99 Mass. 208; *Whiting v. Boston*, 106 Mass. 89.

A court of equity has no jurisdiction to restrain a city from selling land to pay a betterment illegally assessed thereon; for the land owner has an adequate remedy at law. *Hunnewell v. Charleston*, 106 Mass. 350; *Norton v. Boston*, 119 Mass. 194.

A court of equity will not interfere to restrain the assessment and collection of illegal taxes where an adequate remedy exists at law. *Loud v. Charleston*, 99 Mass. 208.

Michigan.—Where a bank is not liable to taxation on its personal property, and a tax is assessed and levied in such a way as to directly interfere with its business, an injunction will be granted to restrain the collection of the tax. *Lenawee etc. Bank v. Adrian* (Mich.), 33 N. W. Rep. 304.

The collection of a tax will not be restrained when complainant has an adequate remedy at law. *Henry v. Gregory*, 29 Mich. 68; *Youngblood v. Sexton*, 32 Mich. 407; *Hazenbuch v. Howard*, 34 Mich. 1; *Mears v. Howard*, 34 Mich. 19. Nor on the ground of mere irregularity, where no inequality or injustice is shown. *Albany etc. Co. v. Auditor General*, 37 Mich. 391.

Assessment Must be Uniform.—If the supervisor of a township, in making the assessment of property for taxation shall fraudulently, and with a view to impose upon an individual more than his just proportion of the public burden of taxation, assess the property of such individual above its value, and relatively above the other assessments on his roll, the party aggrieved may have an injunction to restrain the collection of the excessive tax. *Merrill v. Humphrey*, 24 Mich. 169.

Injunction lies to restrain the sale for school taxes of lands unlawfully included within the taxing district. *Simpkins v. Ward*, 45 Mich. 559.

A tax on a business cannot be enjoined on the ground of possible inability of the parties to pay it, whereby it may work irreparable injury by breaking up their business. *Youngblood v. Sexton*, 32 Mich. 406.

Minnesota.—An action will not lie by an individual to restrain the levy of an illegal tax, unless the levy will lead to irreparable injury or to a multiplicity of suits or create a cloud on the title to real estate, to establish the invalidity of which will require proof of extrinsic facts. *Scribner v. Allen*, 12 Minn. 148.

Injunction will not be granted at the suit of a private person to restrain the collection of a personal tax merely because it is illegal and void. *Clark v. Ganz*, 21 Minn. 387.

The publication of the delinquent tax list in a paper which has been designated by the county commissioners but which is not a newspaper within the meaning of the statute. *Sinclair v. Com. Winona Co.*, 23 Minn. 404.

On an application for an injunction the facts must be positively stated. *Warsop v. Hastings*, 22 Minn. 437.

Mississippi.—A bill to enjoin the collection of taxes "can be entertained only where the collection of the tax would be likely to produce irreparable injury or cause a multiplicity of suits." *McDonald v. Murphree*, 45 Miss. 711; *Coulson v. Harris*, 43 Miss. 728; *Richardson v. Scott*, 47 Miss. 236.

The collection of county taxes levied within the limits prescribed by law should not be enjoined on the allegation that the levy was excessive, because partly made to pay claims alleged to be invalid; for, if the injunction should be granted, the allegation might prove to be unfounded, and that at a time when it would be too late to collect the taxes for that year, whereby great confusion would arise in the administration of county finances. The remedy of the tax payer against the payment of such invalid claims is to enjoin the treasurer from paying them, or when their allowance by the board of supervisors appears upon the minutes of the board to be illegal, by notifying the treasurer of such illegality, who would then, if not without the actual notice, be bound to withhold payment. *Beck v. Allen*, 58 Miss. 143.

Missouri.—An injunction will not be granted to restrain the collection of a school tax the assessment of which is void. *Sayre v. Tompkins*, 23 Mo. 443; *Barrow v. Davis*, 46 Mo. 394; *McPike v. Pew*, 48 Mo. 525. Nor to restrain the collection of illegal and irregular taxes on a bank unless a sale will work irreparable mischief. *First etc. Bank v. Meredith*, 44 Mo. 500.

Injunction will not lie to prevent a mere formal wrong in the collection of a tax, where nothing substantial is involved in the case. *Deckhaus v. Olderheide*, 22 Mo. App. 76; *Meyer v. Rosenblatt*, 78 Mo. 495.

Injunction will lie to restrain the collection of a tax levied upon property not subject to taxation. *Valle v. Ziegler*, 84 Mo. 214; *Mechanics' Bank v. Kansas*, 73 Mo. 555.

The sale of land for an illegal tax may be enjoined. *North St. Louis Gymnastic Society v. Hudson*, 12 Mo. App. 342.

Nebraska.—A court of equity will enjoin the collection of an erroneous or illegal tax, when the enforcement of the assessment would lead to a multiplicity of suits, or produce irreparable injury, or cast a cloud on the title of real estate, or when the assessment on the face of the proceedings is valid and requires extrinsic evidence to show that it is invalid, or when the officers transcend their authority. *South Platte L. Co. v. Buffalo Co.*, 7 Neb. 253. If the tax is levied without authority of law and void, as it would be a cloud on real estate,* may be enjoined. If it is merely erroneous, an injunction will not be granted. *Burlington etc. R. Co. v. Saunders Co.*, 16 Neb. 123; *Burlington etc. R. Co. v. Cass Co.*, 16 Neb. 136; *Johnson v. Hahn*, 4 Neb. 139; *Bellinger v. White*, 5 Neb. 401; *Earl v. Duras*, 13 Neb. 235. See also *Union Pac. R. Co. v. Lincoln Co.*, 2 Dill. (U. S.) 279; *Burlington etc. R. Co. v. Saline Co.*, 12 Neb. 396.

A party cannot enjoin the collection of taxes upon his property for omissions of other taxable property from the assessment lists, though such omissions be purposely made under a misapprehension of the law, and in the conscious belief that the property is not taxable. *Burlington etc. R. Co. v. Seward Co. Comms.*, 10 Neb. 211.

New Jersey.—The supreme court will not consider the proceedings on a sale of land for taxes where no certificate or declaration of sale are set up. *State v. Galloway*, 42 N. J. L. 415.

New York.—The powers of a court of equity cannot be invoked to stay or prevent the assessment or collection of a tax. *Messeck v. Columbia Co.*, 50 Barb. (N. Y.) 190; *Heywood v. Buffalo*, 14 N. Y. 534; *Brooklyn v. Meserole*, 26 Wend. (N. Y.) 132; *Susquehanna Bank v. Broome Co.*, 25 N. Y. 312; *Wiggin v. Mayor*, 9 Paige (N.

Y.) 16; *Livingston v. Hollenbeck*, 4 Barb. (N. Y.) 10; *Blake v. Brooklyn*, 26 Barb. (N. Y.) 301; *Pa. Coal Co. v. Delaware Co.*, 31 N. Y. 91; *Albany City National Bank v. Maher*, 19 Blatchf. (U. S.) 175.

One showing no other right than as a tax payer cannot maintain an action in equity against the official custodian of the proceeds of a tax to restrain their application to the purposes for which the tax was raised. *Kilbourne v. St. John*, 59 N. Y. 21.

North Carolina.—The collection of a tax will be restrained when the purpose for which it is to be expended is unconstitutional. *Riggsbee v. Durham*, 94 N. Car. 800.

Oregon.—A person aggrieved by the wrongful action of an assessor in the violation of his property cannot enjoin a collection of any portion of such tax, unless he first seeks redress from the board of equalization. *Dundee etc. Co. v. Charlton*, 32 Fed. Rep. 192. If the board of equalization fails to correct the assessment the party aggrieved may take the case for review into the circuit court. *Rhea v. Umatilla*, 2 Oreg. 298.

Rhode Island.—The rule that the collection of a tax ought not to be enjoined for an improper assessment against one complainant does not apply where the validity of the whole tax and its assessments upon every person taxed is in issue. *Sherman v. Bedford*, 10 R. I. 559.

South Carolina.—S. Car. Gen. Stat. prohibits the courts from enjoining the collection of taxes. *Held*, that an assessment on townships to pay subscriptions in aid of a railroad is a tax within the terms of this statute. *Chamblee v. Trebble*, 23 S. Car. 70.

Texas.—An injunction will not issue to restrain a sale for taxes where the only damage to result will be a cloud upon the title of the petitioner. *Red v. Johnson*, 53 Tex. 284.

West Virginia.—A tax will not be enjoined upon the sole ground that it is illegal. There must in addition be such special circumstances as will bring the case within some recognized head of equity jurisprudence. Where, however, it is made to appear by the bill that the tax is illegal and it will lead to a multiplicity of suits, equity will entertain jurisdiction. *Corrothers v. Board, etc. Co.*, 16 W. Va. 527; *Douglas v. Harrisville*, 9 W. Va. 162. The general allegation of irreparable injury is

tendered without the condition annexed of a receipt in full for all the taxes assessed.¹

not sufficient without equitable circumstances be shown. *McClung v. Livesay*, 7 W. Va. 329.

Injunction will not lie to prevent the sale of personal property for taxes unless the property is of peculiar value to the owner, and damages at law would not be an adequate compensation. *White v. Stender*, 24 W. Va. 615; s. c., 49 Am. Rep. 283.

Wisconsin.—The execution of a deed of land sold for taxes will not be enjoined on the ground that the tax proceedings were irregular or void unless it also appears that the proceedings are inequitable and that it will be against conscience to let them go on. *Warden v. Supervisors etc.*, 14 Wis. 618; *Kellogg v. Oshkosh*, 14 Wis. 625; *Miltimore v. Rock Co.*, 15 Wis. 9; *Dean v. Gleason*, 16 Wis. 1; *Bond v. Kenosha*, 17 Wis. 284; *McIndoe v. Hazelton*, 19 Wis. 567. But where a tax was levied for an unauthorized purpose and the complainant is in danger of losing a substantial right, an injunction will be granted. *Warden v. Fond du Lac Co.*, 14 Wis. 618.

An injunction will not be granted to restrain the distress and sale of personal property for taxes on the ground that such taxes are illegal. *Quinney v. Stockbridge*, 33 Wis. 505; see *Whittaker v. Janesville*, 33 Wis. 77.

Wyoming Territory.—Equity will join a tax sale only to prevent a cloud on the title or some irreparable injury. *Ivinson v. Hance*, 1 Wyoming 270.

1. *State Railroad Tax Cases*, 92 U. S. 616 d. "Before complainants seek the aid of the court to be relieved of the excessive tax they should pay what is due. Before they ask equitable relief they should do that justice which is necessary to enable the court to hear them." See also *National Bank v. Kimball*, 103 U. S. 735; *Rowe v. Peabody*, 102 Ind. 198; *Huntington v. Palmer*, 7 Sawy. (U. S.) 355; *Connors v. Detroit*, 41 Mich. 128; *Hallenbeck v. Hahn*, 2 Neb. 377; *Burlington etc. R. Co. v. York Co.*, 7 Neb. 487; *Wood v. Helmer*, 10 Neb. 65; *Hunt v. Easterday*, 10 Neb. 165; *London v. Wilmington*, 78 N. Car. 109; *Rio Grande R. Co. v. Scanlan*, 44 Tex. 649; *George v. Dean*, 47 Tex. 73; *Blanc v. Meyer*, 59 Tex. 89.

A party seeking to enjoin illegal taxes must show in his bill that he has

tendered all of the levy except such unauthorized taxes and offered to pay all except that, under the principle, he who seeks equity must do equity. *Swinney v. Beard*, 71 Ill. 27; *Comms. of Osborne Co. v. Blake*, 19 Kan. 299; *National Bank v. Kimball*, 103 U. S. 732; *Huntington v. Palmer*, 7 Sawy. (U. S.) 355; *Mobile v. Waring*, 41 Ala. 139; *Tallasse Mfg. Co. v. Spigener*, 49 Ala. 262; *Alabama etc. Ins. Co. v. Lott*, 54 Ala. 499; *Worthen v. Badgett*, 32 Ark. 496; *Ottawa Glass Co. v. McCaleb*, 81 Ill. 556; *Johnson v. Roberts*, 102 Ill. 655; *Ewing v. Batzner*, 24 Ind. 409; *Roseberry v. Huff*, 27 Ind. 12; *Faris v. Reynolds*, 70 Ind. 359; *Mullicken v. Reeves*, 71 Ind. 281; *Rinard v. Nordyke*, 76 Ind. 130; *Morrison v. Hershire*, 32 Iowa 271; *City of Lawrence v. Killam*, 11 Kan. 409; *Hagaman v. Cloud Co.*, 19 Kan. 394; *Overall v. Ruenzi*, 67 Mo. 203; *Palmer v. Napoleon*, 16 Mich. 176; *Smith v. Auditor General*, 20 Mich. 398; *Merrill v. Humphrey*, 24 Mich. 170; *Pillsbury v. Humphrey*, 26 Mich. 245.

If a portion of tax is legal and a portion illegal, and the legal can be separated from the illegal an injunction will not be granted to restrain the collection of the entire tax. *Burlington etc. R. Co. v. York Co.*, 7 Neb. 487.

The bill should show to what extent the tax or assessment is illegal in order that the court may enjoin that portion. *Cheney v. Jones*, 14 Fla. 587; *Taylor v. Thompson*, 42 Ill. 9; *Wilson v. Weber*, 3 Ill. App. 125; *Conway v. Waverly*, 15 Mich. 257; *Merrill v. Humphrey*, 24 Mich. 170.

The bill in *Montgomery v. Sayre*, 65 Ala. 564, seeking to enjoin the collection of an alleged illegal municipal tax, was wanting in equity, because it showed that, after deducting the taxes alleged to be illegal, a balance remained of taxes legally due, which had not been paid nor tendered; nor was it shown that the complainants had made any effort to separate the legal from the illegal portion; nor did the bill contain any tender or offer to pay. Compare *Clement v. Everst*, 29 Mich. 19.

Alabama.—The complainant must pay or tender the amount really due, and in default of such tender and payment the bill should not be entertained. *Alabama etc. Co. v. Lott*, 54 Ala. 500;

Montgomery *v.* Sayre, 65 Ala. 564; Tallahassee etc. Co. *v.* Spigener, 49 Ala. 262.

Arkansas.—Twombly *v.* Kimbrough, 24 Ark. 460. The plaintiff in his bill must offer to pay the taxes lawfully due. Worten *v.* Badgett, 32 Ark. 497; Hare *v.* Carnall, 39 Ark. 196.

Connecticut.—Adams *v.* Castle, 30 Conn. 404. To be entitled to the aid of a court of equity, it is necessary that the plaintiffs should have offered to pay the tax and interest and applied to the purchaser for a reconveyance.

Florida.—Cheney *v.* Jones, 14 Fla. 587. Where a bill is filed to enjoin a tax on the ground that a part is illegal, the bill must show to what extent the tax is illegal.

Illinois.—O'Kane *v.* Treat, 25 Ill. 457. Where a portion of the tax is legally levied for authorized purposes, the complainant is bound before relief can be granted to show what part is illegal. Taylor *v.* Thompson, 42 Ill. 10; Briscoe *v.* Allison, 43 Ill. 291; Reed *v.* Tyler, 56 Ill. 288; Barnett *v.* Cline, 60 Ill. 205; Johnson *v.* Roberts, 102 Ill. 656. *Compare* Hesing *v.* Scott, 107 Ill. 600; Gage *v.* Nicholas, 112 Ill. 269.

Indiana.—Harrison *v.* Haas, 25 Ind. 281. A court of equity will not enjoin the execution of a tax deed until the amount of taxes has been paid or tendered to the purchases. Roseberry *v.* Huff, 27 Ind. 12; Montgomery Co. *v.* Elston, 32 Ind. 27; Cauldwell *v.* Curry, 93 Ill. 365. If the complainant fails to aver a tender and make an offer to pay, it is bad on demurrer. Rowe *v.* Peabody, 102 Ind. 198.

Iowa.—Morrison *v.* Hershire, 32 Iowa 271. A court of equity will not restrain the collection of a special assessment on real estate unless the party complaining pay or tender the portion legally due. Corbin *v.* Woodbine, 33 Iowa 297.

Equity will not interfere to restrain an excessive tax where complainant has not paid the tax justly due. Grinnell *v.* Des Moines, 57 Iowa 144.

Kansas.—Shelton *v.* Dunn, 6 Kan. 129. The plaintiff need not under the statute aver a tender, but if no tender was in fact made before the action was brought, the defendant may plead the omission in abatement of the action. In Miller *v.* Madden, 35 Kas. 455, it was held that before a party could enjoin the issuing of a tax deed he must pay or tender the full amount of taxes and charges with interest thereon at 24

per cent. Lawrence *v.* Killam, 11 Kan. 499; Challiss *v.* Hekelkaemper, 14 Kan. 475; Hagaman *v.* Cloud Co., 19 Kan. 394; Wilson *v.* Longendyke, 32 Kan. 267.

Maryland.—Taxes lawfully assessed must be paid or tendered unconditionally and the fact so averred in the bill for an injunction. A professed willingness to pay an uncertain sum is insufficient. Alleghany Co. Commrs. *v.* Union etc. Co., 61 Md. 547.

Michigan.—A bill to enjoin the collection of taxes on real estate upon the ground that a part of the taxes are illegal must furnish the court with information which will enable it to separate the legal from the illegal. Conway *v.* Waverly, 15 Mich. 257; Palmer *v.* Napoleon, 16 Mich. 176; Smith *v.* Auditor General, 20 Mich. 398; Merrill *v.* Humphrey, 24 Mich. 170; Pillsbury *v.* Humphrey, 26 Mich. 245; Albany etc. Co. *v.* Auditor General, 37 Mich. 391. Where the bill distinctly specifies the taxes claimed to be illegal, it will not be dismissed for the want of a found offer to pay the legal taxes. Clement *v.* Everest, 29 Mich. 19.

Mississippi.—Where a portion of a tax sought to be enjoined is legally due, an action to enjoin such taxes will not be entertained unless the portion properly collectible is paid or tendered. Mobile etc. R. Co. *v.* Mosely, 52 Miss. 127.

Missouri.—Where taxes are levied in excess of the legal limit, injunction is the proper remedy as to the excess, but the court, as a condition of relief, should require the plaintiff to pay so much of the tax as is confessedly due. Overall *v.* Rienzi, 67 Mo. 203; Parmley *v.* St. Louis etc. R. Co., 3 Dill. (U. S.) 26.

Nebraska.—Where the taxes are levied in excess of the limit allowed by law, a party praying for an injunction as to such excess must tender the amount of taxes justly due from him. B. & M. R. Co. *v.* York Co., 7 Neb. 487; Wood *v.* Helmer, 10 Neb. 65.

North Carolina.—An injunction will not be granted to restrain the collection of a tax, a portion of which is legal and a portion illegal, until the applicant has paid that which is legal, and the complaint must point out what part is valid and what invalid. Covington *v.* Rockingham, 93 N. Car. 135.

Ohio.—Where the tax imposed exceeds the rate allowed by law, the party seeking an injunction must, as a condition of obtaining relief, pay what is

(d) *Enforcement of Taxes Against Personalty.*—An injunction will not lie to prevent the sale of personal property of a third person, levied on by an officer for unpaid taxes, when the property is not of peculiar value to the owner, and it does not manifestly appear that great injury would result to the owner from consequential or collateral damages occasioned by such sale. In such case the owner has a complete and adequate remedy at law to which he may resort for redress.¹

justly due. *Frazier v. Seibern*, 16 Ohio St. 615.

Oregon.—Where a party controverts the legality of certain taxes, it is his duty, before bringing suit to enjoin the collection thereof, to tender the part admitted to be valid, otherwise the action will be dismissed. *Brown v. School District*, 12 Oreg. 345.

South Carolina.—In *State v. Hodges*, 14 Rich. (S. Car.) 256, where a tax execution did not specify for what it was issued, except for nonpayment of taxes, and it appeared that it was in fact issued for a double tax; *held*, that the court could not apportion the tax, but would restrain the collection under such execution, with leave to the tax collector to issue a new execution for the true amount.

Texas.—Where taxes are assessed in excess of those authorized by statute, it is the duty of the party seeking to enjoin the illegal tax to pay that which is lawfully due. *Rosenberg v. Weekes*, 67 Tex. 578; *Harrison v. Vines*, 46 Tex. 22.

Wisconsin.—Where it appears that there is any portion of the tax which the plaintiff in justice ought to pay he will be required to pay it as a condition of obtaining relief. *Myrick v. La Crosse*, 17 Wis. 456; *Mills v. Charleton*, 29 Wis. 402; *Dean v. Borchsenius*, 30 Wis. 238; *Kaehler v. Dobberpuhl*, 56 Wis. 483; *Mills v. Gleason*, 11 Wis. 470; *Hart v. Smith*, 44 Wis. 213; *Fifield v. Marinetta Co.*, 62 Wis. 532.

Wyoming.—A party seeking relief by injunction from an unjust assessment should pay what is rightfully due. *N. P. R. Co. v. Ryan*, 2 Wyo. 408.

1. *White v. Stender*, 24 W. Va. 615; s. c., 49 Am. Rep. 283; *Cooley on Taxation* 538; 2 *Dillon on Mun. Corp.*, § 924; *High on Inj.*, § 505; *Selma Building etc. Assoc. v. Morgan*, 57 Ala. 33; *Mobile v. Baldwin*, 57 Ala. 61; *Ritter v. Patch*, 12 Cal. 208; *Berri v. Patch*, 12 Cal. 299; *Henry v. Gregory*, 29 Mich. 68; *Baldwin v. Tucker*, 16 Fla.

258; *Youngblood v. Sexton*, 32 Mich. 406; s. c., 20 Am. Rep. 654; *Hagenbuch v. Howard*, 34 Mich. 1; *Clarke v. Ganz*, 21 Minn. 387; *Wells v. Dayton*, 18 Nev. 161; *New York L. Ins. Co. v. New York*, 4 Duer (N. Y.) 192; s. c., 1 Abb. Pr. (N. Y.) 250; *Wilson v. Mayor etc. of New York*, 4 E. D. Smith (N. Y.) 675; s. c., 1 Abb. (N. Y.) Pr. 4; *Mutual Benefit L. Ins. Co. v. Supervisors of New York*, 8 Bosw. (N. Y.) 683; s. c., 33 Barb. (N. Y.) 322; 3 Abb. App. Dec. (N. Y.) 344; *Pac. Mail etc. Co. v. New York*, 57 How. Pr. (N. Y.) 511; *Worth v. Fayetteville*, 2 Winst. (N. Car.) Eq. 70; *Van Cott v. Milwaukee Co.*, 18 Wis. 259; *Chicago etc. R. Co. v. Fort Howard*, 21 Wis. 45; *Peck v. School District*, 21 Wis. 523; *Guimney v. Stockbridge*, 33 Wis. 505; *Union Pacific R. Co. v. Lincoln Co.*, 2 Dill. (U. S.) 279; *Lockwood v. St. Louis*, 24 Mo. 20.

A bill in equity will not lie to restrain a sale of personal property seized for the collection of a tax in the absence, at least, of any showing that the property possessed any peculiar value not capable of compensation in damages; the remedy at law is ample. *Henry v. Gregory*, 29 Mich. 68.

4. The court, in *Lewis v. Spencer*, 7 W. Va. 689, sustained an injunction to the sale of a horse levied on for taxes when the bill averred that the said taxes had been fully paid. In that case *PAULL*, Judge, in delivering the opinion of the court, conceded that the judicial history of Virginia and West Virginia furnished no precedent for the question adjudicated in that case. He also admitted that, if the levy had been made under an execution, the plaintiff would have been "debarred an entrance into a court of equity for the reason that he may apply to the court whence the execution issued and have the wrong corrected." *Morrison v. Speer*, 10 Gratt. (Va.) 228. He made a distinction between a levy under an execution and a levy for taxes, and to sustain the

(c) *Property Exempt from Taxation*.—Injunction will lie to restrain the collection of a tax levied upon property not subject to taxation.¹

(f) *Unconstitutional Tax*.—The collection of a tax will be restrained when the purpose for which it is to be expended is unconstitutional.²

(g) *Municipal Taxation*.—(See MUNICIPAL CORPORATIONS).—Courts of equity will not ordinarily enjoin the proceedings of municipal bodies and of inferior political jurisdictions empowered by law with the levying of assessments.³

(h) *Void Taxes*.—Where the proposed debt of a municipality is wholly illegal, it may be enjoined. So where taxes are levied

remedy by injunction in the latter case. While he admitted it would not lie in the former, he seems to rely on section 2 of chapter 158 of the acts of 1871, which declares that no court shall enjoin the sale of any real estate for taxes unless it be averred in the bill that all taxes and levies assessed thereon have been paid. He says: "This would seem to imply that in regard to real estate, at least, where this allegation is made such injunction may be awarded; and no sufficient reason is perceived why the same course may not be pursued in regard to personal property, where a sale, as we have seen, may also result in great inconvenience to the citizen."

1. *Valle v. Ziegler*, 84 Mo. 214. Where certain property was assessed for state, county and city taxes, and the property was afterwards declared by the supreme court to be exempt from taxation, notwithstanding which the proper authorities continued to levy taxes on the property, an injunction was granted. *Paterson etc. R. Co. v. Jersey City*, 1 Stockt. (N. J.) 434; *Ill. Cen. R. Co. v. Hodges*, 113 Ill. 323; *Mechanics' Bank v. Kansas*, 73 Mo. 555.

2. *Riggsbee v. Durham*, 94 N. Car. 800. An injunction will lie to restrain the collection of a tax, under an unconstitutional law. *Markoe v. Hartranft*, 6 Am. L. Reg. (Pa.) 487.

3. *West v. Ballard*, 32 Wis. 168; *Lambeth v. De Bellevue*, 24 La. An. 394; *Heywood v. Buffalo*, 14 N. Y. 534; *Blake v. Brooklyn*, 26 Barb. (N. Y.) 301; *Brodnax v. Groom*, 64 N. Car. 244; *Brooklyn v. Meserole*, 26 Wend. (N. Y.) 132; *Mitchell v. Board of Commrs.*, 74 N. Car. 489. In *Blake v. Brooklyn*, 26 Barb. 101, ELLIOT, J., said: "If the assessment be illegal or uncon-

stitutional the plaintiff cannot be compelled to pay it, and he need not anticipate in this way (by injunction) this defence to a suit at law. The assessment is not yet laid or its amount ascertained. Indeed, the work is not done or even commenced, and therefore there cannot be a pretence of a cloud upon the title of the land. If an assessment were laid, however, for the expense of this improvement, it is well settled that a bill in equity and an injunction are not the proper means to review or correct such proceedings of a municipal corporation. There are sufficient common law remedies in such cases, and a court of equity will not extend its jurisdiction to review such proceedings, unless they are productive of peculiar or irreparable injury to the land of the plaintiff, or must lead to a multiplicity of suits."

The court has no jurisdiction by bill in equity to restrain a town or the collector thereof from the collection of a tax which is illegally assessed, as the party has a plain and adequate remedy at law. Following *Savings Bank v. Portsmouth*, 52 N. H. 17; disapproving, 19 N. H. 170; distinguishing 21 N. H. 81; 45 N. H. 126; and citing *Coal Tax*, 538; *Dill. Mun. Corp.*, § 737; 12 Alb. Law J. 256; *Loud v. Charleston*, 99 Mass. 208; *Scofield v. Lansing*, 17 Mich. 439; *Dodd v. Hartford*, 25 Conn. 232; *Brown v. Concord*, 53 N. H. 375. And see *Hagenbuch v. Howard*, 34 Mich. 1.

The collection of a tax will not be enjoined where there is doubt as to the validity of the ordinance for the levy thereof; it must be a clear case of illegality to authorize the action of the court. *Burton v. Pittsburg*, 4 Brewst. (Pa.) 373; s. c., 3 Pitts. (Pa.) 242; *S. P. Shea v. Burke*, 3 Luz. L. Reg. (Pa.) 242.

upon exempt property or for a purpose not authorized by law, their collection will be restrained.¹

1. *Hudson v. Marietta*, 64 Ga. 285; *Foster v. Kenoska*, 12 Wis. 616; *Livingston Co. v. Weider*, 64 Ill. 427; *Marshall v. Silliman*, 61 Ill. 218; *Bronenberg v. Madison Co.*, 41 Ind. 502; *Finney v. Lamb*, 54 Ind. 1; *McPike v. Pen.*, 51 Mo. 63; *Garrigus v. Parke Co.*, 39 Ind. 66.

An election was held in an incorporated town, resulting in a majority vote in favor of issuing bonds for railroad purposes, there being at that time no law authorizing such a vote. By a subsequent act of the legislature a new town was incorporated including the old town to issue bonds as voted, under which the new town subscribed to the capital stock of a railroad company and issued its bonds in payment thereof. *Held*, that such bonds were not entitled to be registered in the state auditor's office, and that a tax payer of the town had a right to have the collection of such a tax on his property enjoined. *Flack v. Hughes*, 67 Ill. 384.

A tax will be enjoined when the purpose for which it is to be expended is unconstitutional. *Riggsbee v. Durham*, 94 N. Car. 800. In order that property may be taxed it must be subjected to taxation by statute. *Valle v. Zeigler*, 84 Mo. 219.

If a tax is levied upon property not subject to taxation, or the tax itself is unauthorized by law, or where the property fraudulently is assessed too high, it may be enjoined. Ill. Cent. R. Co. v. *Hodges*, 113 Ill. 323.

Where one of the conditions of a tax voted was that the defendant should have a first class railroad in operation and a first class depot at a certain place by a specified time, which terms it had failed to comply with, it was *held* that the conditions must be complied with before the tax could be collected. *Cox v. Forest etc. R. Co.*, 66 Iowa 289.

Where taxes, which, if levied, would be for an unauthorized purpose and their collection restrained and the creation of an apparent lien prevented, the levy may be enjoined. *Thatcher v. Adams Co.*, 19 Neb. 485.

A bill which charges that the collection of an illegal tax would involve the plaintiff in a multiplicity of suits as to the title of certain lots and prevent their sale, and which would cloud the

title of his real estate states a case for relief. *Union Pac. R. Co. v. Cheyenne*, 113 U. S. 517.

The collection of an entire school district tax assessed without authority of law may be enjoined. *Carlton v. Newman*, 77 Me. 408. Where a town board had no authority to allow a claim, or where its allowance was fraudulent and collusive, a tax to pay the same may be enjoined. *Osterhoudt v. Rigney*, 98 N. Y. 222. Where under the statute a tax payer is entitled to examine the assessment roll before it is completed and show the assessor that the proposed assessment is illegal and unjust, an excessive tax levied where this privilege is denied may be enjoined. *Woodman v. Atty. Gen.*, 52 Mich. 28.

Equity will enjoin the collection of a tax upon property exempt from taxation, to prevent a multiplicity of suits, to prevent destruction of a franchise, to protect the quiet enjoyment of an easement, etc. *North. Pac. R. Co. v. Carland*, 5 Mont. 147.

Fraud and Mistake.—Relief may be allowed upon the ground of fraud and mistake. Thus fraudulent representations made by a railway company to the electors of a township, for the purpose of inducing them to vote a tax in aid of the construction of a railroad, afford sufficient reason for enjoining the collection of the tax. *Sinnet v. Moles*, 38 Iowa 25. So where the question of a tax is submitted to a vote of the citizens of a town, but the tax is not voted and the judges of the election so declare, but by mistake of their clerk the vote is certified to the county authorities as in favor of the tax, its collection may be enjoined. *Cattell v. Lowry*, 45 Iowa 478. A tax payer may, however, be estopped by acquiescence. *Lamb v. B. C. R. & M. R. Co.*, 39 Iowa 333.

Equity will not interfere to restrain the collection of a tax levied for the payment of a municipal subscription in aid of the construction of a railroad bridge, when the election had been properly held and they had voted the subscription. *Harcourt v. Good*, 49 Tex. 455. See *Zorger v. Township of Rapids*, 36 Iowa 175.

Nor will it enjoin the collection of a tax levied by municipal authority for

(i) *Extension of City Limits*.—Where the city limits are extended by legislative enactment so as to embrace agricultural and farming lands, and subject them to larger burdens of municipal taxation, equity will not enjoin the collection of a municipal tax because of its being farm property.¹

(j) *Improvements*.—To enable a municipal corporation to pay for a local public improvement, it may, by assessment, take from an individual whose lands are subject to assessment, and specially benefited by the improvement, such a portion of the costs thereof as is the equivalent, but not in excess of the special benefits conferred by the improvement. An assessment levied upon lands as an entirety, which is properly chargeable only upon a portion of the premises, has been enjoined.²

(k) *Bounties*.—Equity will restrain by injunction the collection of a municipal tax for the payment of bounties to soldiers, or for the purpose of freeing a town from a draft of its citizens in times of public peril.³ Equity will not interfere with a bounty tax, authorized by act of the legislature, when the terms of the statutes are complied with in all their essential points.⁴

(l) *Federal Taxation*.—A circuit court may enjoin the collection of taxes upon national banks, assessed at a greater rate than is lawful under the national banking act.⁵

the payment of principal and interest upon bonds issued pursuant to legislative authority, in aid of the construction of railroads, because certain members of the municipal government issuing the bonds were disqualified from holding office. *Lockhart v. Troy*, 48 Ala. 579. See *Wilkinson v. Peru*, 61 Ind. 1; *Cumines v. Jefferson Co.*, 63 Barb. (N. Y.) 287.

1. *Graff v. Frederick*, 44 Md. 67; *Manly v. Raleigh*, 4 Jones (N. Car.) Eq. 370. *Cooley on Taxation* 120. And it will not enquire into the motives which may have induced a city to take within its corporate limits such lands in an action to restrain the collection of taxes levied on the same by the city. *Logansport v. Seybold*, 59 Ind. 225.

Where authority is given to annex certain lands to a city and an annexation of part of them will be void, and an injunction will lie to enjoin the collection of a municipal tax levied on such land. *Peru v. Bearss*, 55 Ind. 576. See *Windman v. Vincennes*, 58 Ind. 480.

2. *High on Injunctions*, § 554. *Chamberlain v. Cleveland*, 34 Ohio St. 551; *Griswold v. Pelton*, 34 Ohio St. 482. Unless the owners of a majority of the feet fronting on the street to be paved assent in writing to the paving, the proceedings of the city authorities direct-

ing the paving to be done are null and void, and a court of equity has upon application of the nonassenting owners jurisdiction to prevent by injunction the sale of their property to pay for such paving. *Holland v. Baltimore*, 11 Md. 186. See *Newton Co. Draining Co. v. Nopsinger*, 43 Ind. 566; *Robbins v. Sand Creek Turnpike Co.*, 34 Ind. 461.

3. *McMahon v. Welsh*, 11 Kan. 280; *Center Township v. Hunt*, 16 Kan. 430. See *contra*, *Truesdell's Appeal*, 58 Pa. St. 188. But where a town is authorized by act of legislature to levy a tax for relieving its inhabitants from draft, the collection of the tax will not be enjoined, but the persons aggrieved will be left to pursue their remedy at law. *Hoagland v. Delaware*, 2 C. E. Green (N. J.) 106.

4. *Vieley v. Thompson*, 44 Ill. 9.

5. *Boyer v. Boyer*, 113 U. S. 689; *New York v. Commrs. of Texas*, 4 Wall. (U. S.) 244; *Bradley v. Ill.*, 4 Wall. (U. S.) 459; *First National Bank v. Commonwealth*, 9 Wall. (U. S.) 353; *Lionberger v. Rouse*, 9 Wall. (U. S.) 468; *Bagnall v. Wisconsin*, 78 U. S. 240; *Van Slyke v. Wisconsin*, 78 U. S. 240; *Hepburn v. School Directors of Carlisle*, 23 Wall. (U. S.) 480; *Adams v. Nashville*, 95 U. S. 19; *People v. Weaver*, 100 U. S.

27. Fixtures.—Where a party includes certain fixtures in a mortgage of real estate, he may be enjoined from removing the same, as such removal might impair the mortgage security.¹ And fixtures attached to the soil by the mortgagor after the execution of the mortgage became a part of the mortgage security.²

The rule as to fixtures is the same between the mortgagee and mortgagee as between grantor and grantee.³

An infant, who has obtained possession of a furnished house under a lease on the supposition that he was of age, may, upon the lease being declared void, be enjoined from parting with the furniture.⁴ Where the fixtures belong to the landlord, they cannot be levied upon and sold on an execution against the tenant.⁵

Where it is sought to enjoin the removal of chattels from the freehold, it must be clearly shown that they are fixtures.⁶

An injunction restraining the removal of fixtures from real estate does not amount to a conversion of such fixtures so as to

539; *Pelton v. Cleveland Nat. Bank*, 101 U. S. 143. *Cummings v. Toledo Nat. Bank*, 101 U. S. 153; *German Nat. Bank of Chicago v. Kimball*, 103 U. S. 732; *Rosenblatt v. Johnston*, 104 U. S. 462; *Albany Co. v. Stanley*, 105 U. S. 305; *Hills v. Nat. etc. Bank*, 105 U. S. 319; *Evansville Bank v. Britton*, 105 U. S. 322.

A national bank may maintain a suit on behalf of its shareholders to enjoin the collection of tax unlawfully exacted on its shares. Where a shareholder has made the requisite affidavit and the proper demand upon the assessors for deduction from his tax by reason of his debts, and shows that no assessments should be made on his share and he has not yet paid the money, he is entitled to relief by injunction to restrain the collection of the tax. *Hills v. Nat. Albany Exchange Bank*, 105 U. S. 319.

Internal Revenue.—A bill in equity will not lie to enjoin a collector of internal revenue from collecting a tax assessed by the commissioner of internal revenue against a manufacturer of tobacco, although the tax is alleged in the bill to have been illegally assessed. The remedy of a suit to recover back the tax after it is paid, which the statute provides, is exclusive. *Snyder v. Marks*, 109 U. S. 189. See *Litchfield v. Webster Co.*, 101 U. S. 773.

1. *Robinson v. Preswick*, 3 Edw. Ch. 247; *Frankland v. Moulton*, 5 Wis. 1; *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa 57. And under the New York code of procedure, when after a foreclosure sale, but before the confirma-

tion, the mortgagor in possession attempts to remove machinery from the premises, which the purchaser claims as part of the realty, the mortgagor may be enjoined. *Mutual Life Ins. Co. v. Newburgh Bank*, 18 Hun (N. Y.) 371.

A contract under seal, by which T. W. M. & Co. agree to pay certain sums as purchase money of land belonging to plaintiffs, and to repay certain moneys which were to be advanced to them by plaintiffs as a loan on condition that they (T. W. M. & Co.) should put certain buildings and machinery upon said land, free from other liens and which should be liable for the whole debt; and T. W. M. & Co. further agreed to hold the premises as tenants of the plaintiffs, and plaintiffs covenanted on full payment of said moneys to convey the premises to T. W. M. & Co; in action to foreclose it was held that if the machinery which had been put upon the premises so as to become a part of the freehold has been removed therefrom, so as to render plaintiff's security inadequate, they were entitled to restrain all persons whose claims or liens are subordinate to their own from selling or intermeddling with such machinery. *Kimball v. Darling*, 32 Wis. 675.

2. *Snedeker v. Warring*, 12 N.Y. 170.

3. *Lafin v. Griffiths*, 35 Barb. (N. Y.) 50.

4. *Lampriere v. Lange*, 12 Ch. Div. 675; *High on Inj.*, § 433.

5. *Richardson v. Ardley*, 38 L. J. N. S. 508.

6. *Kimpton v. Eve*, 2 Ves. & B. 349.

entitle defendant in the injunction suit to maintain trover therefor.¹

28. Trespass in its broad sense is any misfeasance or act of one man whereby another is injuriously treated or damnified.² In the more restricted sense in which it is generally used, it is any unauthorized entry upon the real estate of another to his damage. The distinction between trespass and waste is that, while the latter is a distinctive use of realty by one lawfully in possession thereof, the former is an injury to the property of another by one who has no right to its use.³

(a) *Origin and Nature of the Jurisdiction.*—The granting of injunctions in cases of trespass seems to have originated from the exercise of jurisdiction in cases of waste, where privity of title and destruction of the estate were the questions involved. Questions relating to the destruction or deterioration of the estate are involved in every application for an injunction to restrain a trespass, and relief is granted upon the ground that the commission or continuance of the trespass would cause irreparable injury to the complainant.⁴

1. *Lacey v. Beaudry*, 53 Cal. 693.

2. 3 Bla. Com. 208; 2 Bow. Law Dict. 747.

3. *Hill v. Bowrie*, 1 Bland (Md.) 593.

4. *Cattle v. Harrold*, 72 Ga. 830.

The foundation of the jurisdiction in equity to issue an injunction in aid of the action of trespass is the probability of irreparable injury, the inadequacy of pecuniary compensation or the prevention of a multiplicity of suits where the rights are controverted by numerous persons. *Thorn v. Sweeney*, 12 Nev. 256; *Leininger's App.*, 106 Pa. St. 398; *Livingston v. Livingston*, 6 Johns. Ch. (N. Y.) 447; *Althen v. Kelley*, 32 Minn. 280; *Harrington v. St. Paul etc. R. Co.*, 17 Minn. 227; *Ryan v. Brown*, 18 Mich. 196; *Nichols v. Jones*, 19 Fed. Rep. 857; *Switzer v. McCulloch*, 76 Va. 777; *Parker v. Winnipeseogee Co.*, 2 Black (U. S.) 545; *Saratoga Co. v. Deyoe*, 77 N. Y. 219; *McHenry v. Hazard*, 45 N. Y. 580; *New York etc. R. Co. v. Schuyler*, 17 N. Y. 592; s. c., 34 N. Y. 30; *West v. New York*, 10 Paige (N. Y.) 539; *Thompson v. Engle*, 4 N. J. Eq. 271; *Youngblood v. Sexton*, 32 Mich. 406; *Hughlett v. Harris*, 1 Del. Ch. 349.

A court of equity may enjoin from the commission of trespasses where there exists a determination on the part of the party enjoined to commit them in order to prevent excessive litigation, or if from his insolvency it is probable that no adequate compensa-

tion at law can be obtained. *Musselman v. Marquis*, 1 Bush (Ky.) 463.

Equity will not enjoin a mere trespass to realty as such in the absence of any element of irreparable injury. *Anthony v. Brooks*, 5 Ga. 576; *Waldron v. Marsh*, 5 Cal. 119; *Hatcher v. Hampton*, 7 Ga. 49; *Catching v. Terrell*, 10 Ga. 576; *Centreville etc. Turnpike Co. v. Barnett*, 2 Ind. 536; *Bolster v. Catterlin*, 10 Ind. 117; *Avery v. Onillon*, 10 La. An. 127; *Shipley v. Ritter*, 7 Md. 408; *Herr v. Bierbower*, 3 Md. Ch. 456; *Carlisle v. Stevenson*, 3 Md. Ch. 499; *James v. Dixon*, 20 Mo. 79; *Scudder v. Trenton etc. Co.*, 1 N. J. Eq. (Sax.) 694; *Hart v. Albany*, 9 Wend. (N. Y.) 571; *Jerome v. Ross*, 7 Johns. (N. Y.) Ch. 315; *Wiggin v. New York*, 9 Paige (N. Y.) 16; *Marshall v. Peters*, 12 How. (N. Y.) Pr. 218; *Sixth Ave. R. Co. v. Kerr*, 28 How. (N. Y.) Pr. 382; *Howell v. Howell*, 5 Ired. (N. Car.) Eq. 258; *Smith v. Pettengill*, 15 Vt. 82; *Ross v. Page*, 6 Ohio 166; *Com. v. Pittsburgh R. Co.*, 24 Pa. St. 159; *Bird v. Wilmington etc. R. Co.*, 8 Rich. (S. Car.) Eq. 46; s. c., 64 Am. Dec. 739; *Burnley v. Cook*, 13 Tex. 586; s. c., 65 Am. Dec. 79; *Wilson v. Mineral Point*, 39 Wis. 160; *Johnson v. City of Rochester*, 13 Hun (N. Y.) 285; *Poirier v. Fetter*, 20 Kan. 47; *Daubenspeck v. Gear*, 18 Cal. 444; *White v. Flannigan*, 1 Md. 525; *Green v. Keen*, 4 Md. 98; *Weigel v. Walsh*, 45 Mo. 560; *DeVeeney v. Gallagher*, 20 N. J. Eq. 33; *West*

(b) *Test of Jurisdiction*.—"If the remedy at law is sufficient, equity cannot give relief, but it is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. . . . To prevent a consequence like this, a court of equity steps in, arrests the proceedings *in limine*, brings the parties before it, hears their allega-

Point Iron Co. v. Reymert, 45 N. Y. 703; Boulo v. New Orleans R. Co., 55 Ala. 480; Shaubut v. St. Paul etc. R. Co., 21 Minn. 502; Whitfield v. Rogers, 26 Miss. 84; VanWert v. Webster, 31 Ohio St. 420; Bell v. Chadwick, 71 N. Car. 329; German v. Clark, 71 N. Car. 417; Roebeling v. First Nat. Bank, 30 Fed. Rep. 744; Thornton v. Roll, 118 Ill. 350; Owens v. Crossett, 105 Ill. 354; Bitting's App., 105 Pa. St. 517; Smith v. Rock, 59 Vt. 232; Wilson v. Hyatt, 4 S. Car. 369, 375; Johnson v. Hahn, 4 Neb. 139; Lyon v. Ilunt, 11 Ala. 295; s. c., 46 Am. Dec. 216.

Term "irreparable damage," to prevent which injunctions may issue, include wrongs of repeated and continuing character, or which occasion damages which are estimable only by conjecture and not by any accurate standard. Stover v. Great Western R. Co., 3 Ry. Cas. 106; North Union R. Co. v. Bolton etc. R. Co., 3 Ry. Cas. 345; Rigby v. Great Western R. Co., 4 Ry. Cas. 186; Addely v. Dixon, 1 Sim. & St. 607; Coulson v. White, 3 Atk. 21; Livingston v. Livingston, 6 Johns. Ch. (N. Y.) 501; s. c., 10 Am. Dec. 353; Boston Water Power Co. v. Boston etc. R. Co., 16 Pick. (Mass.) 525; Jarden v. Philadelphia etc. R. Co., 3 Whart. (Pa.) 502

Where the plaintiff is in possession of real estate he may enjoin trespassers upon the same which would cause irreparable injury to the estate. Lowndes v. Bettie, 33 L. J., Ch. 451; Stanford v. Hurlstone, 9 Ch. App. 116.

Equity will restrain a trespass when the threatened injury is irreparable in damages, or when the trespasser is insolvent, or when there exist other circumstances which, in the discretion of the court, render the interposition of the writ necessary and proper; among which is the avoidance of circuitry and multiplicity of actions. Cattle v. Harrold, 72 Ga. 830; Schoonover v. Bright, 24 W. Va. 698.

The commission or continuance of a

trespass upon land will be enjoined where the injury is irreparable and of such a character that the damages cannot be estimated. Mooney v. Cooledge, 30 Ark. 440; Minnig's Appeal, 82 Pa. St. 373; Weigel v. Walsh, 45 Mo. 560; Mussleman v. Marquis, 1 Bush (Ky.) 463; Webb v. Harp, 38 Ga. 641.

As where the loss of health, the loss of trade, the destruction of the means of subsistence, or the ruin of the property, must ensue. A diminution of the value of the premises without irreparable injury is no ground for interference. Parker v. Winnepesaukee etc. Co., 2 Black (U. S.) 545.

To warrant the interference of a court of equity to restrain a trespass, two conditions must coexist: *First*, the plaintiff's title must be undisputed or established by legal adjudication; and, *second*, the injury complained of must be irreparable in its nature. Schoonover v. Bright, 24 W. Va. 698.

"An injunction is not granted to restrain a mere trespass to real property when the injury is not irreparable, but susceptible of complete pecuniary compensation, and for which the party may obtain adequate satisfaction in the ordinary course of law." Cox v. Douglass, 20 W. Va. 175. Perry v. Parker, 1 Woodb. & M. (U. S.) 280; Chesapeake etc. Co. v. Young, 3 Md. 480; Eskridge v. Eskridge, 51 Miss. 522; Old Telegraph M. Co. v. Cent. S. Co., 1 Utah 331. But in strong cases of irreparable injury the rule has been departed from. Burnley v. Cook, 13 Tex. 586; Hart v. Albany, 9 Wend. (N. Y.) 570; Lowndes v. Bettie, 33 L. J., Ch. 451; Stanford v. Hurlston, L. R., 9 Ch. App. 116.

In Missouri, to maintain injunction against trespass upon property, real or personal, it is not necessary that the defendant should be insolvent or the wrong irreparable. The statute gives the right wherever an adequate remedy cannot be afforded by an action for damages. R. S., § 2722. Thus where the owners of a steamboat were in the constant habit of discharging freight at

tions and proofs and decrees, either that the proceedings shall be unrestrained or else perpetually enjoined. The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case must depend altogether upon the character of the case as disclosed in the proceedings." ¹

a private wharf, without the consent and against the protest of the owner of the wharf, thereby seriously interfering with his business of sawing, receiving and delivering lumber and ties, and they threatened to continue this practice, *held*, that the wharf owner might maintain injunction. *Turner v. Stewerb*, 78 Mo. 480. See *Grant v. Crow*, 47 Iowa 632; *Duncan v. Cent. Pac. R. Co. (Ky.)*, 4 S. W. Rep. 228.

1. *English v. Smock*, 34 Ind. 115; *Watson v. Sutherland*, 5 Wall. (U. S.) 74; *Hicks v. Compton*, 18 Cal. 206; *Clark v. Jeffersonville R. Co.*, 44 Ind. 261; *Sapp v. Roberts*, 18 Neb. 299; *Silva v. Garcia*, 65 Cal. 591; *Moore v. Ferrell*, 1 Ga. 7; *Walker v. Zone*, 50 Ga. 370; *Zeigler v. Beasley*, 44 Ga. 56; *Cox v. Douglass*, 20 W. Va. 175; *Schoonover v. Bright*, 24 W. Va. 698; *Hardesty v. Laft*, 23 Md. 512; *Mulry v. Norton*, 100 N. Y. 424; *Lacustrine Co. v. Lake etc. Co.*, 82 N. Y. 476; *Hart v. Albany*, 3 Paige (N. Y.) 213; *Livingston v. Livingston*, 6 Johns. Ch. (N. Y.) 497; *Van Winkle v. Curry*, 3 N. J. Eq. 422; *De Veney v. Gallagher*, 20 N. J. Eq. 33; *Parker v. Winnepesaukee etc. Co.*, 2 Black (U. S.) 545; *Watson v. Sutherland*, 5 Wall. (U. S.) 74; *Mechanics' etc. Bank v. Debolt*, 1 Ohio St. 591; *Musselman v. Marquis*, 1 Bush (Ky.) 463; *Weigel v. Walsh*, 45 Mo. 500; *Coe v. Lake Co.*, 37 N. H. 254; *Burnham v. Kempton*, 44 N. H. 78; *Morgan v. Palmer*, 48 N. H. 336; *Creely v. Bay State etc. Co.*, 103 Mass. 514; *Jenks v. Williams*, 115 Mass. 217; *Johnson v. Connecticut Bank*, 21 Conn. 148; *Gause v. Perkins*, 3 Jones (N. Car.) Eq. 177; *Stevens v. Beckman*, 1 Johns. (N. Y.) Ch. 318; *Cooper v. Hamilton*, 8 Blatchf. (U. S.) 377; *Murray v. Knapp*, 62 Barb. (N. Y.) 566; *Minnig's App.*, 82 Pa. St. 373; *Burns v. Burns*, 13 Fla. 369; *Seymour v. Morgan*, 45 Ga. 201; *Spafford v. Bangor etc. R. Co.*, 66 Me. 51; *Thorn v. Sweeney*, 12 Nev. 251; *Jordan v. Lanier*, 73 N. Car. 90; *Goodell v. Lessen*, 69 Ill. 145; *Lanahan v. Gahan*, 37 Md. 105; *Nicodemus v. Nicodemus*, 41 Md. 529.

An injunction will not lie to prevent the commission or repetition of a trespass, for which plaintiff has adequate remedy at law, there appearing nothing in the case so special or peculiar as to call for that relief. *Thomas v. James*, 32 Ala. 723; *Crown v. Leonard*, 32 Ga. 241; *Indianapolis etc. Co. v. Indianapolis*, 29 Ind. 245; *Stevens v. Beckman*, 1 Johns. (N. Y.) Ch. 318.

"The court will not grant relief by injunction in case of simple trespass, and when it appears that the plaintiff can have adequate remedy and compensation in damages for the injury sustained. To entitle him to such relief in the first instance he must allege, and it must appear, that he will, or may, probably suffer irreparable injury in some way if it shall not be granted. And it is not sufficient to allege such injury in general terms—it must be done by such specific allegations of facts as will enable the court to see that such injury will or may happen. It is a mistaken notion that seems to prevail extensively that relief by injunction may be had in almost any case, and as a matter of convenience under the code method of procedure. On the contrary it is only to be granted when and where adequate relief cannot be had without it. It is extraordinary and provisional in its nature and purposes." *MERRIMAN, J.*, in *Frink v. Stewart*, 94 N. Car. 484; *Thompson v. Williams*, 1 Jones (N. Car.) Eq. 176; *Gause v. Perkins*, 3 Jones (N. Car.) Eq. 177; *Bell v. Chadwick*, 71 N. Car. 329; *German v. Clark*, 71 N. Car. 417; *Dunkart v. Reinhart*, 87 N. Car. 224; *Ex parte Foster*, 11 Ark. 304; *Waldron v. Marsh*, 5 Cal. 119; *Anthony v. Brooks*, 5 Ga. 576; *Hatcher v. Hampton*, 7 Ga. 49; *Bethune v. Wilkins*, 8 Ga. 118; *Sullivan v. Hearden*, 11 Ga. 294; *Cowles v. Shaw*, 2 Iowa 496; *Brooks v. Diaz*, 35 Ala. 599; *Wilson v. Hughell*, 1 Morr. (Iowa) 461; *Zugenbuhler v. Gilliam*, 3 Iowa 391; *Whitfield v. Rogers*, 26 Miss. 84; *Amelung v. Sukamp*, 9 Gill & J. (Md.) 468; *Livingston v. Livingston*, 6 Johns. (N. Y.) Ch. 497; *New York v. Conover*, 5 Abb. (N. Y.) Pr. 171.

The facts must appear on which the allegation of irreparable injury is predicated, in order that the court may be satisfied as to the nature of the injury. *Hale v. R. R.*, 23 W. Va. 454; *Thorn v. Sweeney*, 12 Nev. 251.

The complainant alleged in his bill that the defendant was about to erect upon the pavement a permanent iron awning post to be inserted in the soil for the purpose of support to a permanent awning frame, and "which said erection will operate as a continuing trespass, to the great and irreparable injury of the property of the complainant." But he failed to show, either by allegation or proof, how or in what manner such irreparable injury was to follow such erection. *Held*, that having failed to present a case in which he was unable to recover full and ample redress in an action at law, the complainant was not entitled to the extraordinary aid of a court of equity by way of injunction. *Whalen v. Dalashmutt*, 59 Ind. 250; *Thompson v. Williams*, 1 Jones (N. Car.) Eq. 176; *Gause v. Perkins*, 3 Jones (N. Car.) Eq. 177; *Bell v. Chadwick*, 71 N. Car. 329; *German v. Clark*, 71 N. Car. 417; *Dunkart v. Reinhart* 87 N. Car. 224, cited and approved; *Lumber Co. v. Wallace*, 93 N. Car. 22, cited and distinguished. *Schoonover v. Bright*, 24 W. Va. 698; *Cresap v. Kemble*, 26 W. Va. 603; *Ganse v. Perkins*, 3 Jones (N. Car.) 182; *Carlisle v. Stevenson*, 3 Md. Ch. 499; *Frink v. Stewart*, 94 N. Car. 484.

But where the injury complained of is in its nature a continuing one, and the remedy at law must, therefore, be by successive suits if the defendants persist in inflicting the injury, and an action for damages would be wholly inadequate for the protection of the complainant's rights, he will not be put to his remedy at law. *Shimer v. Morris Canal etc. Co.*, 27 N. J. Eq. 364. See *Minnig's App.*, 82 Pa. St. 373.

Where a party enters into the possession of premises without any authority from the owner and under pretence of a lease made by an unauthorized agent, and puts said premises to a use which is not forbidden by the law, the owner's remedy is an action at law to recover the equity and obtain an injunction, and thus take away the constitutional right of a trial by jury, on the ground that such use is in his judgment immoral and mischievous in its tendencies, and one calculated to injure his reputation

in the community. *Bodwell v. Crawford*, 26 Kan. 292; s. c., 40 Am. Rep. 306.

But see *Smith v. Wadesborough Bank*, 4 Jones (N. Car.) Eq. 303; *Coit v. Horn*, 1 Sandf. (N. Y.) Ch. 1; *Hatcher v. Hampton*, 7 Ga. 50; *Metbrown v. Thornton*, 10 Ves. 159.

If the trespass be fugitive and temporary, and adequate compensation can be had in an action at law, an injunction should not be granted unless irreparable injury would result. *Minnig's App.*, 82 Pa. St. 373; *Mulvany v. Kennedy*, 26 Pa. St. 44; *Cooper v. Hamilton*, 8 Black. (U. S.) 377; *Bolster v. Catterlin*, 10 Ind. 117. Unless in aid of an action at law. *Hodgman v. Richards*, 45 N. H. 28; *Bolton v. McShane*, 67 Iowa 207; *Ewing v. Ronke* (Oreg.), 13 Pac. Rep. 483; *Poss v. Page*, 6 Ohio 166; *Marshall v. Peters*, 12 How. (N. Y.) Pr. 218; *Brooks v. Diaz*, 35 Ala. 599; *Catching v. Terrell*, 10 Ga. 576; *Mussleman v. Marquis*, 1 Bush (Ky.) 463; *Indianapolis etc. Co. v. Indianapolis*, 29 Ind. 245; *Davidson v. Floyd*, 15 Fla. 667.

Official Oppression.—Where an act of official oppression is committed by a public officer or agent under color of office a less grievance will constitute a ground for the interference of a court of equity by an injunction than where the trespass is by a private person. *Ryan v. Brown*, 18 Mich. 196.

A board of commissioners ordered a change in a certain highway, but their order did not fix the width of the new road, and a copy of the order was placed in the hands of a supervisor to be executed, whereupon the owner of a farm brought suit to enjoin the supervisor from so doing, alleging in his complaint the foregoing facts, and also that the new road would cut his farm into irregular shaped tracts, cut in two his orchard, change the frontage of his buildings and necessitate the construction of much new fence. *Held*, on demurrer, that injunction will lie, that the injury alleged in the complaint is not a mere trespass, and that under the provisions of section 1141, R. S. 1881, it is not necessary that the injury contemplated be irreparable, but such only as would produce great harm to the plaintiff during the litigation. *Erwin v. Fulk*, 94 Ind. 235.

An injunction will lie to restrain a town from opening streets and alleys through a person's land against his consent without first having the same law-

(c) *Title in Dispute*.—If the title of the plaintiff is in dispute, an injunction will not be granted previous to the determination of the legal rights of the parties unless the act about to be committed by the defendant is of such a nature that, should the right to commit it be decided against him, the consequences of its commission would be irreparable.¹

fully taken and condemned and compensation to such person ascertained in the manner prescribed by law. *Mason etc. Co. v. Mason*, 23 W. Va. 211.

Personal trespasses oft repeated and damaging, which are committed against a franchise granted by the sovereign power, may be enjoined. *Stage Horse Cases*, 15 Abb. Pr. N. S. (N. Y.) 60. An injunction will not be granted unless the trespasser is insolvent. *James v. Dixon*, 20 Mo. 79. *Compare Davis v. Society*, 18 Abb. Pr. N. S. (N. Y.) 73. In *Kneeder v. Lane*, 3 Grant's (Pa.) Cas. 523, a doubt is expressed as to the power of the court to restrain the commission of a merely personal tort.

1. *Schurmeier v. St. P. etc. R. Co.*, 8 Minn. 113; *McMillan v. Ferrell*, 7 W. Va. 223; *Waldron v. Marsh*, 5 Cal. 119; *Perry v. Parker*, 1 Woodb. & M. 280; *Eskridge v. Eskridge*, 51 Miss. 522; *Old Tel. etc. Co. v. Cent. etc. Co.*, 1 Utah 331; *Echelkamp v. Schrader*, 45 Mo. 505; *Duval v. Waters*, 1 Bland (Md.) 569; *Frederick v. Groshon*, 36 Md. 436; *Schoonover v. Bright*, 24 W. Va. 698; *Cox v. Douglass*, 20 W. Va. 175; *Moore v. Ferrell*, 1 Ga. 7; *Neal v. Cripps*, 4 Kay & J. 472; *Talbot v. Scott*, 4 Kay & J. 108; *Haigh v. Jaggard*, 2 Coll. 231; *West v. Walker*, 3 N. J. Eq. (2 Green) 279; *Shreve v. Black*, 4 N. J. Eq. (3 Green) 177; *Irwin v. Davidson*, 3 Ired. (N. Car.) Eq. 311; *Powers v. Heery*, R. M. Charl. (Ga.) 523; *Lining v. Geddes*, 1 McCord (S. Car.) Ch. 304; *Nevitt v. Gillespie*, 2 Miss. (1 How.) 108; *Paris v. Berry*, 2 J. J. Marsh (Ky.) 483.

An injunction is not granted to restrain a mere trespass to real property when the bill does not on its face clearly aver good title in the plaintiff; nor even then, as a general rule, where the injury complained of is not destructive of the substance of the inheritance, of that which gives it its chief value, or is not irreparable, but is susceptible of complete pecuniary compensation, and for which the party may obtain adequate satisfaction in the ordinary course of law. *McMillan v. Ferrell*, 7 W. Va.

223. But a court of equity will enjoin a mere trespass to real property where good title in the plaintiff is alleged, and it is also alleged in the bill that the trespasser is insolvent, because in such case the party could have no adequate remedy at law. *Cox v. Douglass*, 20 W. Va. 175.

In Maryland an injunction will not be granted where the title is in dispute unless the damage complained of is intolerable and the mischief irreparable, or where the trespass goes to the destruction of the thing. *Amelung v. Sukamp*, 9 Gill & J. (Md.) 468; *White v. Flannigan*, 1 Md. 525.

A temporary injunction will ordinarily be allowed until the right can be adjudicated, when the plaintiff makes a *prima facie* case. *Falls Village etc. Co. v. Tibbetts*, 31 Conn. 165; *Irwin v. Dixon*, 9 How. (U. S.) 28; *Stewart v. Chew*, 3 Bland Ch. (Md.) 440; *Peak v. Hayden*, 3 Bush (Ky.) 125. See *Clayton v. Shoemaker*, 67 Md. 216; *Union Mut. Life Ins. Co. v. Slee* (Ill.), 13 N. E. Rep. 222; *McArthur v. Matthewson*, 67 Ga. 134.

Where a party committing damage to land fails to produce his title papers when ordered to do so by competent authority, the court will conclude that he is a naked trespasser. *Mayo v. McPhaul*, 71 Ga. 758.

An injunction asked by plaintiffs to restrain defendant from cutting timber from certain land was properly refused, where plaintiffs failed to show that the title of the land was in them, or that they were in possession thereof. *Wearin v. Munson*, 62 Iowa 466.

Where irreparable mischief is being done or threatened going to the destruction of the substance of the estate, such as extracting ores from a mine, or the cutting down of timber or the removal of coal, an injunction will be issued, although the title to the premises may be in litigation. The authority of the court is exercised in such cases to preserve the property from destruction while legal proceedings are pending for the determination of the title. *Erhardt v. Boaro*, 113 U. S. 539; *Le Roy v.*

(d) *Threatened Trespass*.—Equity will restrain a trespass when the threatened injury is irreparable in damages, or when the trespasser is insolvent, or when there exist other circumstances which, in the discretion of the court, render the interposition of the writ necessary and proper, among which shall be the avoidance of circuity and multiplicity of actions.¹

(e) *Mines* are protected by injunction upon the ground that injuries to and depredations upon them are or may cause irreparable injury, and with a view to prevent a multiplicity of suits.²

Wright, 4 Sawy. (U. S.) 535; Jerome v. Ross, 7 Johns. (N. Y.) Ch. 315.

Where a plaintiff, who is the owner of and in the actual possession of a quarter section of land, a part of which is enclosed and fifty acres thereof are broken and in cultivation, brings an action against a defendant who, under some pretended claim of title, has entered upon the premises and commenced to erect a building thereon and threatens to deprive the owner of the possession thereof, to quiet his title thereto, and the defendant is wholly irresponsible, such plaintiff may have a temporary injunction, *pendente lite*, to restrain the defendant from ousting him of the actual possession of the premises, from erecting any buildings thereon and from any interference with the cultivation thereof. Long v. Kasebeer, 28 Kan. 226.

The erection of a building, the thing sought to be restrained, having progressed considerably before the plaintiff applied for an injunction, it was *held* that pending the trial of the title at law the defendant would not be required to remove the building already erected. Clayton v. Shoemaker, 67 Md. 216.

In Vanwinkle v. Curtis, 2 Green Ch. (N. J.) 422, it was *held* sufficient for the complainant to allege that he is the owner of the premises in fee by purchase and to be in possession.

So a party showing an equitable title to real estate will be protected against trespassers by injunction. Wilson v. Rockwell, 29 Fed. Rep. 674.

1. Graham v. Dahlonga Gold Mining Co., 71 Ga. 206; Doughty v. Somerville Commrs., 33 N. J. Eq. 1; McPike v. West, 71 Mo. 199.

In case of a mere trespass, unless the threatened harm will be great or the loss therefrom irreparable, and such as cannot be recompensed in damages by an action at law, an injunction will not be granted to prevent it. Legard v. Moffitt, 13 Neb. 565.

Where one party threatens to go

upon the land of another and remove earth therefrom to make an embankment for a public road, in the absence of any allegation in the bill showing the insolvency of such party, or that irreparable injury will follow, no injunction will lie to prevent the threatened trespass. Thornton v. Roll, 118 Ill. 350.

2. West etc. Co. v. Regmert, 45 N. Y. 703; Anderson v. Harvey, 10 Gratt. (Va.) 386; Bracken v. Preston, 1 Pinney (Wis.) 584; Merced Mining Co. v. Fremont, 7 Cal. 317; Irwin v. Davidson, 3 Ired. Eq. (N. Car.) 311; Beaufort v. Morris, 6 Hare 340; Althen v. Kelly, 32 Minn. 280; Powell v. Aiken, 4 Kay & J. 343; Mitchell v. Dors, 6 Ves. 147; Hopkins v. Caddick, 18 Law Times 236; Lewis v. Marsh, 8 Hare 97; McLaughlin v. Kelly, 22 Cal. 211; United States v. Parrott, McAll. (U. S.) 271; United States v. Gear, 3 How. (U. S.) 120; McBrayer v. Hardin, 7 Ired. Eq. 1; Moore v. Ferrell, 1 Ga. 7. And an injunction will be granted also to prevent the flooding of a mine. Crompton v. Lea, 19 L. R., Eq. 115. Or the flowing of refuse over it. Logan v. Driscoll, 19 Cal. 623; Hamond v. Winchester, 82 Ala. 470; 2 Story's Eq., § 929; Cooper v. Baker, 17 Ves. 128; Livingston v. Livingston, 6 Johns. (N. Y.) Ch. 497; Thomas v. Oakley, 18 Ves. 184; Jerome v. Ross, 7 Johns. (N. Y.) Ch. 314; Leininger's Appeal, 106 Pa. St. 398; Chambers v. Alabama Iron Co., 67 Ala. 353. An injunction was granted to restrain the defendant from digging coal in a mine where he had no right. Hansen v. Gardiner, 7 Ves. 305; Smith v. Collyer, 8 Ves. 90; New York etc. v. Fitch, 1 Paige (N. Y.) 97; Hart v. Albany, 3 Paige (N. Y.) 213.

In Clark v. Willett, 35 Cal. 535, an injunction to restrain miners from working a certain mine because it would interfere with a ditch of the plaintiff was denied.

Where trespass is committed upon mining property, greater latitude is allowed courts of equity than in restraining ordinary trespass to realty.¹

The unlawful quarrying and removal of stone from land may be enjoined. *Althen v. Kelly*, 32 Minn. 280.

Courts of equity will assume jurisdiction of causes for the purpose of restraining acts of trespass to mining property, where the character and extent of the wrongful acts committed renders the injury irremediable, or where an action at law, by reason of the insolvency of the defendant, would not afford an adequate remedy. *Derry v. Ross*, 5 Colo. 295.

R, the owner in fee of a tract of land, verbally agreed to rent the same to S, under a monthly tenancy, with the right or licence to dig ore from ore banks on the land, and S agreed to pay a rent of thirty dollars a month and a royalty of fifty cents a ton for each ton of ore raised. The agreement was to be terminated at any time upon thirty days' notice by either party. After keeping possession of the property for some months, and paying the rent and royalty according to the agreement, S gave notice to R that after a time specified he would not occupy the farm and would not pay the monthly rent, and offered to surrender the key of the dwelling house on the farm, but stated that he intended to continue to dig the ore. R refused to accept the surrender of the farm without the ore banks. On a bill by R for an injunction to prevent S from trespassing upon the premises, and digging and removing the ore therefrom, to the great injury of the complainant, it was held that the digging and removing the ore from the ore beds was a trespass which operated a permanent injury to the property, and the complainant was entitled to have the same enjoined. *Scully v. Rose*, 61 Md. 408.

Equity will not restrain by injunction the working of a mine, or other trespass, until the title, if disputed, has been settled at law, except in extreme cases. *Irwin v. Davidson*, 3 Ired. (N. Car.) Eq. 311; *Lining v. Geddes*, 1 McCord (S. Car.) Ch. 304; *Powers v. Heery*, R. M. Charl. (Ga.) 523; *Nevitt v. Gillespie*, 2 Miss. (1 How.) 108; *Paris v. Berry*, 2 J. J. Marsh. (Ky.) 483.

In cases of applications for an injunction to prevent persons from

working a gold mine to which the plaintiff claims title, where it appears that if the defendant's allegations are true the injunction can do them no harm, but if the plaintiff's allegation are true he may sustain an irreparable injury, the injunction should be continued to the hearing that the facts may be investigated. *McBrayer v. Hardin*, 7 Ired. (N. Car.) Eq. 1.

1. *Lockwood v. Lunsford*, 56 Mo. 68; *Merced M. Co. v. Fremont*, 56 Mo. 68.

In *Anderson v. Harvey*, 10 Gratt. (Vt.) 386, the court said: "The trespass is one which goes to the change of the very substance of the inheritance to the destruction of all that gives value to it. The fact proved by the appellant that the value of the ore per load could be readily estimated does not deprive a court of equity of its right to interfere in the case by way of injunction. The same right may be shown in most cases of the kind. The product of most mines have a value already fixed or easy of ascertainment by proof. Yet it was in prevention to like trespasses, to this very species of property, mines of ore, coal, etc., that the jurisdiction in question had its origin and still continues to be most frequently applied."

Working Through Into Another's Mine.—Where one digging coal upon his own premises has worked through into the ground of another, he may be enjoined from proceeding farther. *Mitchell v. Dors*, 6 Ves. 147.

Digging ore on public lands of the United States is such a trespass as will warrant the interference of equity in behalf of the government. *United States v. Gear*, 3 How. (N. Y.) 121.

A surface owner of lands is also entitled to an injunction to prevent the owner of minerals beneath the surface from obtaining them in such manner as to destroy or seriously injure the surface. *Hext v. Gill*, L. R., 7 Ch. 699. See *Aspden v. Seddon*, L. R., 10 Ch. 394.

The lessee of a mine may be enjoined by the lessor from proceeding to reduce the pillars which had been left to support the roof of the mine so as to endanger the surface. *Thomas Iron Co. v. Allentown Mining Co.*, 28 N. J. Eq., 1 (Stew.) 77.

The general rule requiring complainant to show good title extends to trespass against mines. It may, however, be relaxed somewhat in a case of irreparable injury, which goes to the very substance of the State.¹ In the case of undisturbed possession while large sums of money are expended in developing a mining a court of equity will require a very clear and strong showing to induce it to grant or sustain a preliminary injunction to stop the work.²

When the title to the property is in dispute, the question whether the defendants are solvent and able to respond in damages forms an important element in passing upon an application for an injunction pending the litigation.³

(f) *Cutting Timber*.—A bill in equity will lie to restrain a trespasser from cutting growing trees when it works a permanent injury to the land; and especially when there is no denial of the allegation of irreparable injury.⁴

In order to authorize an injunction against a defendant from cutting timber and removing it, the plaintiff must not only be entitled to the possession of the land, but he must be in the actual possession.⁵

Although a complete remedy for a trespass may be given by statute, yet an injunction may properly issue where the trespass in cutting down timber might become a nuisance or waste, or numberless suits have to be brought, or there is a fiduciary relation, or the loss would be irreparable and not to be compensated in dollars and cents.⁶

1. *Anderson v. Harvey*, 10 Gratt. (Va.) 386; *United States v. Parrott*, McAll. (U. S.) 271.

2. *Real del Monte etc. Co. v. Pond Mining Co.*, 23 Cal. 83; *Hicks v. Compton*, 18 Cal. 210; 3 *Daniels' Ch. Pr.* 1860; *Adams Eq.* 357; *Bruce v. Delaware etc. Co.*, 19 Barb. (N. Y.) 371.

3. *Real del Monte etc. Co. v. Pond Mining Co.*, 23 Cal. 82; *Burnett v. Whitesides*, 13 Cal. 156; 2 *Story's Eq.*, § 925; *Waldron v. Marsh*, 5 Cal. 119.

4. *Smith v. Rock*, 59 Vt. 232.

5. *Hillman v. Hurley*, 82 Ky. 626; *Smith v. Collyer*, 8 Ves. 89; *West v. Walker*, 2 Green (N. J.) Ch. 279. See also *Powell v. Rawlings*, 38 Md. 239.

A claimed to be the owner in possession of a large tract of land. B entered on an unimproved part thereof, under claim of title, cut timber, sunk shafts and began the systematic mining of coal thereon. A afterwards filed a bill in equity praying an injunction. *Held*, that in the absence of circumstances showing imminent peril requiring a remedy speedier than any available at law a court of equity would not

assume jurisdiction. *Leininger's App.*, 106 Pa. St. 398.

Complainants and their father have had possession of certain unenclosed wood and timber land ever since 1820. Defendants (who are pecuniarily irresponsible), under an adverse claim of title, are selling off of the premises the wood and timber, which constitute their chief value. *Held*, that complainants are entitled to an injunction restraining the removal of the wood and timber, but not an injunction to prevent defendants trying an ejectment for the premises begun after this suit had been brought, this suit not being brought under the act to quiet title. *Piper v. Piper*, 38 N. J. Eq. 81; *Southmayd v. McLaughlin*, 9 C. E. Green (N. J.) 181.

An injunction will not be granted to restrain the cutting of timber and removing it from land on the sole ground that the plaintiff has brought an ejectment suit against the defendant to try the title to the same land. *Cox v. Douglass*, 20 W. Va. 175.

6. *Cowles v. Shaw*, 2 Iowa 496. See *Fulton v. Harman*, 44 Md. 251; *Davis*

Acts which would result in the destruction of all the timber on a man's home plantation, where wood and timber are necessary to the enjoyment of the property in that character, and where it constitutes the chief value of the estate, are sufficient to authorize an injunction to restrain the cutting of such wood and timber.¹ But, according to some authorities, the mere cutting of timber, unless coupled with insolvency, is not an irreparable injury.²

(g) *Quarries*.—Acts of trespass upon lands destructive to the estate of the owner, such as the quarrying and removal of stone in which the value of the estate consists, may be restrained by injunction.³

29. Judgments or Actions at Law.—To restrain judgments or actions at law, a court of equity will not exercise jurisdiction in any case to stay proceedings where a court of law can do as full justice to the subject in dispute as can be done in a court of equity.⁴

v. Reed, 14 Md. 152; *Echert v. Ferst*, 10 Phila. (Pa.) 514.

Ornamental Shrubbery and Fruit Trees.—The plaintiff takes up two hundred and twelve acres of land under the possessory act of California, encloses and plants it with fruit and ornamental trees and shrubbery. Defendants enter upon a portion of the tract for mining purposes, dig up and destroy the trees and shrubbery and threaten to continue such trespasses. *Held*, that plaintiff was entitled to a perpetual injunction against the trespassers. *Daubenspeck v. Grear*, 18 Cal. 444. See *Wilson v. Mineral Point*, 39 Wis. 160; *Echert v. Ferst*, 10 Phila. (Pa.) 514.

Where there is no dispute as to the title and the land is the complainant's dwelling plantation, and a portion of it is in timber particularly valuable as such as well as for the protection of his dwelling, besides being ornamental, and defendants, without authority, have cleared up part of this timber land and converted it into waste and pasture land, and are continuing so to clear up the rest, it is a case of irreparable mischief which equity will restrain by injunction. *Shipley v. Ritter*, 7 Md. 408.

1. *Davis v. Reed*, 14 Md. 152; *Powers v. Heery*, R. M. Charl't. (Ga.) 523; *De la Croix v. Villiere*, 11 La. An. 39; *Shreve v. Black*, 3 Green Ch. (N. J.) 177; *Lowndes v. Bettle*, 33 L. J. Ch. 451.

2. *McMillan v. Farrell*, 7 W. Va. 223; *Cowles v. Shaw*, 2 Iowa 496; *Hatcher v. Hampton*, 7 Ga. 49.

A bill alleging that a trespasser was about to commit irreparable injury by

boxing and working turpentine trees and by cutting timber and making staves on land fit only to be cultivated for these products, without any averments of the defendant's insolvency, will be dismissed on motion. *Gause v. Perkins*, 3 Jones (N. Car.) Eq. 177.

3. *Althen v. Kelly*, 32 Minn. 280; *More v. Massini*, 32 Cal. 590; *Thomas v. Oakley*, 18 Ves. 184; *Cowper v. Baker*, 17 Ves. 128. The taking of stone from a ledge on complainant's premises being susceptible of pecuniary compensation, and not being shown to be destructive of the estate, will not be enjoined. *Jerome v. Ross*, 7 Johns. (N. J.) Ch. 315.

Asphaltum.—Removing asphaltum from complainant's land, thus depriving him of a part of his inheritance which cannot be replaced, affords grounds for an injunction. *More v. Massini*, 32 Cal. 590.

4. *Murphree v. Bishop*, 79 Ala. 404; *Collier v. Falk*, 66 Ala. 223; *N. East R. Co. v. Barrett*, 65 Ga. 601; *Baxter v. Baxter*, 77 N. Car. 118; *Parker v. Bledsoe*, 87 N. Car. 221; *Welde v. Scotten*, 59 Md. 72; *Ferguson v. Herring*, 49 Tex. 126; *Palmer v. Gardiner*, 77 Ill. 143; *Baker v. Rinehard*, 11 W. Va. 238; *Lansing v. Eddy*, 1 Johns. Ch. (N. Y.) 49; *Foster v. Wood*, 6 Johns. Ch. (N. Y.) 87; *Southampton D. Co. v. Southampton etc. Board*, 11 Eq. Cas. 252.

After citing a number of cases the VICE CHANCELLOR says: "They all, I think, establish this proposition, that where it is unquestionable that the court of law can do as full justice to the subject in dispute as can be done in this.

court, this court will not interfere." *Womack v. Powers*, 50 Ala. 5.

A defendant in a judgment at law cannot have equitable relief against it, because it is either erroneous or void; since, if void, it may be disregarded or set aside on motion, and, if erroneous, it may be revised on appeal. *Murphree v. Bishop*, 79 Ala. 404.

The defendant cannot, as a general rule, enjoin the prosecution of legal proceedings upon grounds of which he might avail himself in the defence of such proceedings. *Martin v. Orr*, 96 Ind. 27; *Hartman v. Heady*, 57 Ind. 545. In the recent case of *Palmer v. Hayes*, 93 Ind. 189, the rule is thus stated: "Proceedings of a court at law are never enjoined where the court has jurisdiction to afford complete relief and where the party has full opportunity to make good the defence."

A bill in equity was filed to enjoin an action at law because: 1. The action was on a judgment which had been satisfied. 2. The judgment creditor was guilty of *laches* in delaying to bring his action. 3. The action was maliciously brought to harass and oppress. On demurrer to the bill, *held* that the demurrer should be sustained. As to the first allegation of the bill, the remedy at law was complete. As to the second, equity will not enjoin an action at law because delayed if brought within the statutory period of limitation. As to the third, equity will not enjoin the prosecution of legal rights because the prosecutor's motives are malicious. *Clark v. Clapp*, 14 R. I. 248.

The proper remedy to remove an alleged grievance is an application to modify the terms of the judgment and an order suspending proceedings thereunder. *Parker v. Bledsoe*, 87 N. Car. 221.

Equity will not maintain jurisdiction of a suit for relief against a judgment merely on the ground that the demand may be unconscientious and that injustice may have been done, provided it was competent for the party to have pleaded the matter before the court in the original action, either upon issues joined or upon motion to set aside the verdict or judgment; nor can the assistance of equity be invoked so long as the remedy by motion exists. *Ede v. Hazen*, 61 Cal. 360.

The court first taking will retain except on good cause shown. *Northeastern R. Co. v. Barrett*, 65 Ga. 601.

An injunction from the district court

will not lie to restrain a justice of the peace from adjudicating causes arising under a statute on the ground that the statute is violative of the constitution. *Jones v. Stallsworth*, 55 Tex. 138.

Where a separate judgment is rendered against each of two joint wrongdoers neither judgment can be perpetually enjoined while both remain in force and unsatisfied, although one of such judgments has been assigned by the holder thereof to a third person. *Meixell v. Kirkpatrick*, 25 Kan. 19.

The husband having died in possession of lands to which he had no title, the same having been an Indian reservation, and all right to it as such having been declared by the proper authorities of the United States to have been terminated, a judgment in ejectment by default for the possession of the land, and damages for rents recovered by the husband's administrator against the widow, will not be enjoined in equity, at her instance, because the final decision of the commissioner of the land office at Washington was not made until after the rendition of the judgment. *Kirby v. Kirby*, 70 Ala. 370.

An action was brought on certain notes on the 8th of September, 1881, and N, the defendant, was duly served with process, and he appeared to the action, but interposed no defence, and on the 10th of October, 1881, judgment was entered for want of plea. This judgment was extended for \$967.10, with interest and costs. A payment was made on the judgment, and at the time of such payment it was agreed between the parties to the judgment that the lien of the judgment should be waived and deferred to a subsequent mortgage made by N of his property, which was accordingly done, and it was then and there agreed that the balance of the judgment should be soon thereafter paid. The payment was not made as promised, and the plaintiff in the judgment sued out execution on the 4th of October, 1882. On the 2nd of January, 1883, nearly fifteen months after the judgment rendered, N filed a bill for an injunction to restrain the collection of the balance due on the judgment, upon the ground that there was usury in the debt upon which the judgment was recovered. The answer swore away all the equities of the bill, and the averments of the answer were not overcome by proof. The bill did not allege with any exactness the amount of the usury over and above

the principal sum advanced, with legal interest thereon, or the real amount due, principal and interest, after deducting the usury retained. There was no pretence that the complainant was not fully aware of all the facts of the case from the commencement. There was no offer to bring into court the amount of principal and interest that might be actually due on the judgment after deducting the alleged usury. *Held*, that the case was not such as to entitle the complainant to an injunction to restrain the execution of the judgment. *Neurath v. Hecht*, 62 Md. 221.

As a general rule, where a court of law has taken jurisdiction of a legal claim, and the defendant has a claim for a balance, which he alleges to be due him from the plaintiff on the settlement of accounts, which can only be settled in a court of equity as a partnership account or the account of a personal representative of a decedent, a court of equity will not suspend the course of legal proceedings by injunction for the purpose of enabling the defendant in the common law suit to have these accounts settled in equity and the balance, which he claims, ascertained and allowed as an offset against the plaintiff's demand in a suit at law. *Miller v. Miller*, 25 W. Va. 495; *Preston v. Stratton et al*, executors of Stratton, 1 Anst. 50; *Robinson v. Wheeler*, 51 N. H. 384; *Cummings v. Morris*, 25 N. Y. 625; *Ranson v. Samuel*, 1 Craig & Ph. 171; *Duncan v. Lyon*, 3 Johns. (N. Y.) Ch. 351; *Mead v. Merritt*, 2 Paige (N. Y.) 403; *Hewitt v. Rhul*, 10 C. E. Green (N. J.) 24.

An executor cannot enjoin proceedings in the probate court for the recovery of a pecuniary legacy on the ground that he made a tender of the money to the legatee, who refused to receive it, and that he was afterwards robbed without negligence or other fault on his part of the identical money tendered, which he had kept separate and apart; these defences, if valid, involve simple questions of fact, which the probate court is competent to determine. *Newson v. Thornton*, 66 Ala. 311.

A petition which states that the plaintiff is the owner of certain real estate by tax deeds, and that the defendants hold a prior judgment, which was a lien upon the land before the sale and conveyance, and seeking to enjoin the sale under an execution issued on such judgment, does not state a cause of action. In such case the defendants

have a right to complete the sale and contest the validity of the tax deeds in an action at law, and a court of equity will not enjoin a sale under the execution unless some equitable ground exists for its interference. *Rickards v. Coon*, 13 Neb. 420.

Former Adjudication.—A vendee of part of a crop of tobacco who has been held liable in an action at law for its value as for a conversion, cannot by joining his vendor as a co-complainant in a bill, have a retrial of the cause, it not appearing that the defence could not be and was not fully made at law. *McClanahan v. Stovall*, 6 Lea (Tenn.) 505.

Clerical Errors.—Where a judgment is rendered for the costs of "suit laid out and expended, taxed at \$—," the omission to fill the blank is immaterial and affords no cause for enjoining the collection of the judgment. *Pittsburg etc. R. Co. v. Elwood*, 79 Ind. 306. See *Quinn v. Wetherbee*, 41 Cal. 247; *Smith v. Fouché*, 55 Ga. 120; *First Nat. Bank v. Deitch*, 83 Ind. 131; *Gallup v. Manning*, 48 Conn. 25; *Murphree v. Bishop*, 79 Ala. 404.

Judgment by confession or otherwise will not be restrained by injunction on grounds purely legal, unless a defence at law has been prevented by fraud on the one side or ignorance of facts unmixed with negligence on the other. *Harner v. Price*, 17 W. Va. 523; *Shotwell v. Murray*, 1 Johns. (N. Y.) Ch. 512, 515; *Lyon v. Richmond*, 2 Johns. (N. Y.) Ch. 51, 60; *Storrs v. Baker*, 6 Johns. (N. Y.) Ch. 169, 170; *Marshall v. Collett*, You. & Coll. 238. See also *Cockerville v. Cholmeley*, 1 Russ. & M. 418; *McCarty v. Decaix*, 2 Russ. & M. 614.

Irregular Judgment.—A cause was regularly commenced in justice's court by service of notice on defendant, and was set for 9 o'clock a. m. Plaintiff appeared soon after 9 o'clock, and before 10 o'clock, defendant not having appeared, the justice stated that, as there was no appearance for defendant, he would enter judgment for plaintiff by default on the itemized and verified account sued on; and he began to make the entry, but, desiring to leave town, he closed his docket, without completing the entry, stating that he would do what further was necessary on his return in the afternoon. Before 10 o'clock the defendant appeared, examined the docket, found no judgment entered and the justice gone, and after 10 o'clock he departed, and gave the case no

further attention. At 3 o'clock p. m. of the same day the justice returned and completed the judgment entry. Execution was issued, and this action was to enjoin its enforcement. *Held*, that the judgment was irregular, but not void, and that the remedy was by appeal or writ of error, and that injunction would not lie to restrain the enforcement of the judgment. *Central Iowa R. Co. v. Piersol*, 65 Iowa 498; *Cooper v. Sunderland*, 3 Iowa 114; *Morrow v. Weed*, 4 Iowa 77; *Dishon v. Smith*, 10 Iowa 212; *Ryan v. Varga*, 37 Iowa 78.

A court of equity cannot enjoin proceedings, on a judgment at law entered against the complainant on the verdict of a jury taken by the crier of the court, where the complainant does not allege any defence to the proceedings, although he does show an ineffectual attempt to have the judgment set aside at law. *Davis v. Delaware Poor Overseers*, 40 N. J. Eq. 156.

A party seeking to enjoin the collection of a judgment against him, rendered without jurisdiction, who does not deny the indebtedness or allege its payment or an offer to pay it, will be denied relief, on the ground that he must do equity as the condition upon which he asks equity. *Williams v. Hitzie*, 83 Ind. 303.

Relief Against Execution.—A court of equity will not interfere to restrain the sale of lands under an execution issued upon a judgment at law which, though irregular or void, is not inequitable or unjust as between the parties; nor where complete relief can be obtained by motion in the original action. See execution sale, *post*, note. *Wilkinson v. Rewey*, 59 Wis. 554.

A court of equity will not restrain, by injunction, a creditor from levying on land in which he avers that his debtor has an interest. *Walker's App.*, 112 Pa. St. 579.

Void Judgment.—Where a court has no jurisdiction, all proceedings in the cause are void *ab initio*. The judgment and execution thereon are void, and the defendant could maintain suit against the officer selling his property under the execution as a trespasser, and the title of the purchaser at the execution sale would be valueless. The remedy at law is ample and adequate in such case and equity will not interpose to enjoin the enforcement of the judgment. *St. Louis etc. R. Co. v. Reynolds*, 89 Mo. 146.

Bill by Sureties in Replevin Bond, After Judgment.—A bill will not lie by the sureties in a replevin bond, after a judgment on the bond in the suit in which it was given, valid on its face, merely upon the ground that the interest of the principal in the goods replevied was that of a partner in a firm insolvent at the time of the attachment, the bill not being good as a bill of review, nor as an original bill to impeach the judgment for fraud. *Smyth v. Barbee*, 9 Lea (Tenn.) 173.

Continuance.—The record of a case in a justice's court showed service, appearance, and a continuance by consent until the defendant should return from certain business, and that then the case should be called at once. It further showed a trial, and judgment against defendant, at a day appointed by the justice, but it failed to show that defendant had returned, that he had notice of the day appointed for the trial, or that he was present at that time. An action was brought to restrain the collection of that judgment. On the trial, in addition to the record as above stated, it was shown that defendant had been back several times between the day of adjournment and the day of trial; that his attorney was orally notified by the justice of the time fixed for the trial, and that he told the justice that his client had no defence, and to go ahead and render judgment; and also that in truth there was no defence; and the debt was a just one, and ought to be paid. *Held*, that whether enquiry is limited to the record of the justice, or extended to the extrinsic facts, the injunction was properly refused. *Devinney v. Mann*, 24 Kan. 682.

Partition.—Where the defendant, in a petition for partition, set up certain equitable defences, which were disallowed, and on his appeal the decree was reversed and the cause remanded, and pending the appeal the defendant filed a bill in equity against the petitioner, setting up the proceedings under the petition and the same equitable matters relied upon as a defence in the proceeding at law, and praying for an injunction to restrain further proceedings under the judgment at law, and for a partition according to the equities of the parties; *held*, that the bill was properly dismissed on demurrer, the judgment at law, as to the defences interposed, being conclusive until reversed in a direct proceeding for that purpose.

and that where an appeal was taken the party must abide the result of it. *Hopkins v. Medley*, 99 Ill. 509.

Appeal Not Taken.—Equity will not relieve against the enforcement of a justice's judgment from which no appeal was taken, unless the defendant, without his own or his agent's negligence has been hindered by fraud or accident from availing himself of his defence. *Kelleher v. Boden*, 55 Mich. 295.

Mistake.—D and the Maryland Coal Co., by deed of exchange, conveyed to each other certain adjoining parcels of coal land. D afterwards conveyed by deed to the Atlantic and George's Creek Consolidated Coal Co. the same land obtained by him from the Maryland Coal Co. Subsequently the M. C. Co. sued the A. and G. C. C. Co. for mining coal on the land conveyed to the M. C. Co. by D. Whereupon the A. and G. C. C. Co. filed a bill against the M. C. Co. for an injunction to restrain the prosecution of said suit, and for specific performance, and other relief. The A. and G. C. C. Co. claimed that the land conveyed to D did not contain the quantity and quality of coal it was intended he should receive, and that by mistake the land conveyed to D, as described in the deed of exchange, did not include the *locus in quo*, and that by a true location the alleged trespasses complained of in the suit at law were committed on the land that should have been originally conveyed by the M. C. Co. to D. It was alleged by the complainant that it had been agreed that the M. C. Co. by R, its agent, should survey and lay off for D the land to be conveyed to him, and that in conducting its operations after the purchase from D, the boundaries of the land not being sufficiently marked by visible calls in R's survey, S, the complainant's engineer, applied to R to show him the outlines, in order that no trespass might be committed, and that R (since dead), in the capacity of agent of the M. C. Co., pointed out the lines, and that the coal which was the subject of the action of trespass was taken within the lines of the complainant's lands as so pointed out by R, and that if in fact there was a trespass, it was due to the acts and statements of said R. The mistake was denied by the M. C. Co. On appeal from an order dissolving a preliminary injunction which had been granted, it was *held* that the effect of

his acts, if they could be relied on by the complainant, would be in the nature of a defence under a licence, or by way of estoppel, which were legal defences in an action of trespass, and could be set up in the suit at law, and to the extent of their legitimate protection could be made available in that suit. That as to their constituting a reason for equitable relief and injunction, on the ground that the M. C. Co. should be restrained from proceeding at law, because of the rule of damages which must there prevail, and that the court of equity must take jurisdiction of the question of damages, giving only such as were measured by the value of the coal in its native bed; the court knew of no principle for such jurisdiction on the facts of this case. *Atlantic etc. Coal Co. v. Maryland Coal Co.*, 62 Md. 135.

In May, 1878, the appellant filed a bill for an injunction against the appellees to stay execution of a judgment obtained by them against the appellant at the December term, 1877, of the circuit court for Baltimore county, and for general relief, on the alleged ground that an agreement was made between the attorneys of the respective parties to extend the time till the 15th of March, 1878, for having a bill of exceptions signed, as the prayers had been lost and time was needed for preparing the exceptions, and that through the act of the appellees' attorney, the judge to whom the bill of exceptions (finally agreed upon) had been mailed was induced not to sign it. The appellees' attorney denied the material averments of the bill. It appeared from the testimony that the time was limited to the 14th of March inclusive, and that through the fault of the appellant's attorneys the bill of exceptions did not reach the judge till the 19th of March. *Held*: 1. That the complainant was without any equitable claim to relief; and that the injunction could not be granted. 2. That under the prayer for general relief the complainant was not entitled to have a compulsory writ requiring the judge to sign and seal the bill of exceptions. *Ruppertsberger v. Clark*, 53 Md. 402.

Practice.—In a suit to enjoin a judgment on the ground of surprise, the court, without setting aside the judgment, examined into the merits of the original case, and finding that there was no valid defence, refused the injunction.

A court of equity has no jurisdiction to relieve a plaintiff against a judgment where the case in equity proceeds upon a ground equally available at law and in equity, unless the plaintiff can establish some equitable ground for relief,¹ such as

Held, a proper method of procedure. The complainant was not entitled to have the judgment first set aside and his defence then tried by a jury. *Philips v. Samuel*, 76 Mo. 657.

1. *Lockard v. Lockard*, 16 Ala. 423; *Watt v. Cobb*, 32 Ala. 530; *Foster v. State Bank*, 17 Ala. 672; *Bentley v. Dillard*, 6 Ark. 79; *Dugan v. Cureton*, 1 Ark. 31; *Andrews v. Fenter*, 1 Ark. 186; *Watson v. Palmer*, 5 Ark. 501; *Hempstead v. Watkins*, 6 Ark. 317; *Menifee v. Ball*, 7 Ark. 520; *Conway v. Ellison*, 14 Ark. 360; *Phelps v. Peabody*, 7 Cal. 50; *Pollock v. Gilbert*, 16 Ga. 398; *Taylor v. Sutton*, 15 Ga. 103; *Bellamy v. Woodson*, 4 Ga. 175; *Robbins v. Mount*, 3 Ga. 74; *Venmun v. Davis*, 35 Ill. 568; *Skinner v. Deming*, 2 Ind. 558; *Johnson v. Lyon*, 14 Iowa 431; *Smith v. Short*, 11 Iowa 523; *Central Iowa R. Co. v. Moulton & A. R. Co.*, 57 Iowa 249; *Crawford v. Paine*, 19 Iowa 172; *Faulkner v. Campbell*, Mor. 148; *Kreichbaum v. Bridges*, 1 Iowa 14; *Shricker v. Field*, 9 Iowa 366; *Minor v. Stone*, 1 La. An. 283; *McRae v. Purvis*, 12 La. An. 85; *Lee v. Hubbell*, 20 La. An. 551; *Hendrickson v. Hinchley*, 17 How. (U. S.) 443; *Glenn v. Fowler*, 8 Gill & J. (Md.) 340; *Huston v. Ditto*, 20 Md. 305; *Little v. Price*, 1 Md. Ch. 135; *Smith v. Walker*, 16 Miss. (8 Smed. & M.) 131; *Fanning v. Farmers' etc. Bank*, 16 Miss. (8 Smed. & M.) 139; *Cole v. Hundley*, 16 Miss. (8 Smed. & M.) 473; *Love v. Pass*, 22 Miss. (14 Smed. & M.) 158; *Youngue v. Billups*, 23 Miss. 407; *Meek v. Howard*, 18 Miss. (10 Smed. & M.) 502; *Brandon v. Green*, 7 Humph. (Tenn.) 130; *Duncan v. Lyon*, 3 Johns. (N. Y.) Ch. 351; *Wingate v. Haywood*, 40 N. H. 437; *Davis v. Briggs*, 3 How. (N. Y.) Pr. 65; *Wordsworth v. Lyon*, 5 How. (N. Y.) Pr. 463; s. c., 1 Code R. (N. Y.) N. S. 163; *Rathborne v. Warren*, 10 Johns. (N. Y.) 587; *Harn v. Schuyler*, 1 Johns. (N. Y.) Ch. 140; *Rogers v. Rathbun*, 1 Johns. (N. Y.) Ch. 367; *Tupper v. Powell*, 1 Johns. (N. Y.) Ch. 369; *Savage v. Todd*, 9 Paige (N. Y.) 578; *Paterson v. Bangs*, 9 Paige (N. Y.) 578; *Vilas v. Jones*, 10 Paige (N. Y.) 76; s. c., 1 N. Y. 274; *Marine Ins. Co. v. Hodgson*, 7 Cranch (U. S.) 332; *Prewitt v. Perry*, 6 Tex. 260; *McCann*

v. Otoe Co., 9 Neb. 324; *Slack v. Wood*, 9 Gratt. (Va.) 40; *Erie Canal Co. v. Lowie*, 5 Clark (Pa.) 464; *Smith v. Mayor*, 1 Leg. Gaz. R. 86; *Vanarsdalen v. Whitaker*, 31 Leg. Int. (Pa.) 196; *Ashton v. Parkinson*, 8 Phila. (Pa.) 338; s. c., 1 Leg. Gaz. (Pa.) 99; *Wright v. Eaton*, 7 Wis. 595; *Ableman v. Roth*, 12 Wis. 81.

Injunction will not be granted where every matter stated in the bill can be made as fully available in answer and defence to the action at law as by an appeal to equity. *Smith v. Short*, 11 Iowa 523; *Beauchamp v. Putnam*, 34 Ill. 378; *New York D. Co. v. American etc. Co.*, 11 Paige (N. Y.) 384; *Powell v. Chamberlain*, 22 Ga. 123; *Hewitt v. Kuhl*, 10 C. E. Green (N. J.) 24; *Gibson v. Moore*, 22 Tex. 611; *Hardinge v. Webster*, 1 Drew & Sm. 101; *Heath v. Heath*, 9 Ir. Eq. 635; *Olmstead's Appeal*, 86 Pa. St. 284; *Worms v. Mellier*, L. R., 16 Eq. 554; *Anderson v. Dowling*, 11 Ir. Eq. 590. *Contra*, *Bullitt's Exrs. v. Songster's Admrs.*, 3 Munf. (Va.) 55.

It is a familiar principle that courts of equity will not interpose by injunction to restrain the enforcement of a judgment at law, where the rights of the complainant might have been enforced and protected in the trial at law to the same extent as in a court of equity, where no fraud, accident or mistake has intervened to deprive him of his rights in the legal forum. *Hopkins et al. v. Medley et al.*, 99 Ill. 509.

On a creditors' bill filed by the creditors of a testator, certain real estate was sold to B. The property thus sold had been devised by the testator to one for life, and at her death to the youngest son of each of two brothers of the testator who might be living at the death of said devisee for life, as tenants in common in fee. G, who was the youngest son of one of said brothers, was not made a party to the creditors' bill, and after the death of the tenant for life he sued B in ejectment for one half of said land. On a bill filed against G by B to restrain the proceedings in ejectment, on the ground that through mistake G had not been made a party to the creditors' bill, and his existence was not known to B at the time of the

sale, and that although not a party the property was liable for the debts of the deceased, in preference to the rights of the devisee, and that G had his remedy over against the other devisees for contribution, it was *held* that the bill did not show any defence to the suit which could not be availed of in the action at law, and did not present a case for relief by injunction. *Bowen v. Gent*, 54 Md 558; *Harrison v. Nettleship*, 2 Myl. & K. 425; *Protherse v. Forman*, 2 Swanst. 227. The jurisdiction of equity does not arise from the mere fact that a party has failed to make his defence at law. *Ware v. Horwood*, 14 Ves. 331; *Scott v. Nesbitt*, 2 B. C. C. 641; *O'Connor v. Sheriff*, 30 La. An. pt. 1, 441; *Chadwell v. Jordan*, 2 Tenn. Ch. 635.

Pleadings.—Equity will interfere to restrain an adverse party from availing himself of a judgment where there are any facts which prove it to be against conscience to execute such judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fault or negligence in himself or agents. *Fisher v. Greene*, 5 Colo. 541.

To entitle the plaintiff to the aid of the court by way of injunction to restrain proceedings at law, the substance of the ground of relief must not only be fully alleged, but the bill must show grounds upon which the action at law may be sustained; or otherwise the bill is demurrable. In other words, the bill must show a real necessity for coming to the court for the injunction. *Worthington v. Lee*, 61 Md. 530.

A bill in equity, brought to restrain the collection of a judgment, will be dismissed when every question involved was litigated in the suit at law—the pleadings permitting it, and the evidence the same, except more in detail. *Continental Ins. Co. v. Currier*, 58 Vt. 229.

In an action by the assignee of a note and mortgage given for purchase money of real estate, a cross complaint, alleging that the mortgage sought to be foreclosed embraced other lands than that for the purchase money of which the notes sued on were given; that the grantor to whom the mortgage and notes were given, and by whom they were assigned, conveyed a portion of the real estate described in the mortgage, with covenants of warranty, and

that such grantor is insolvent; that a suit is now pending against the parties to this action and the mortgagee, by parties claiming a paramount title, for the purpose of settling the question of title to the land conveyed by the mortgagee, and asking that the action upon the note and mortgage be restrained and delayed until the determination of the suit in relation to the title, is sufficient on demurrer. In such case equity will enjoin the proceeding to enforce collection of the note and mortgage until the result of the suit for the determination of the title to the lands purchased is ascertained. *Fehrlie v. Turner*, 77 Ind. 530.

Where a complaint to enjoin the sale of land on an execution alleged, not only that the plaintiff in the execution had receipted the same, but that the judgment had been actually paid in full and returned satisfied nearly three years before the complainant bought the land and took possession of it and paid for it, and that at the date of such purchase there was no judgment lien or other incumbrance on the property, a demurrer for want of sufficient facts should be overruled. *Whitehill v. Fauber*, 97 Ind. 169.

Where a bill to enjoin the levy of a mortgage *fi. fa.* on certain goods alleged that the goods covered by the mortgage had been destroyed by fire, and that the stock against which the *fi. fa.* was proceeding was not covered by the mortgage, and the affidavits submitted showed that the present stock was not entirely covered by the mortgage, if any part thereof was so covered, the chancellor should have granted an injunction until the final hearing. *Lanier v. Adams*, 72 Ga. 145.

Where, in a suit to enjoin the sale of the plaintiff's lands upon an execution against another, the complaint, by reason of dates being in blank, fails to show that the lands are not subject to the execution, it is bad on demurrer. *First Nat Bank v. Deitch*, 83 Ind. 131.

Contract Given in Escrow.—Injunction will lie to restrain an action on a contract delivered in violation of an agreement to hold it in escrow until certain changes in it had been made. *Wyckoff v. Victor S. M. Co.*, 43 Mich. 309.

Partition.—If one tenant in common of lands erects valuable improvements thereon, with the express authority or knowledge and implied consent of his cotenant, a court of equity will, in

decreeing partition, give him the benefit of his improvements, by assigning to him that part of the lands on which they are situated; and the claim for such improvements gives a court of equity jurisdiction to enjoin, at his instance, proceedings before the probate judge asking a sale for division. *Wilkinson v. Stuart*, 74 Ala. 198.

Specific Performance.—A, as maker and endorser, was liable to B upon two notes. A, being unable to continue his business, arranged to carry it on by means of an incorporated company, and agreed with B to pay one of the notes, to obtain for B the privilege of subscribing for stock in the incorporated company, and to receive from B a release of B's claim on the other note. Subsequently just before the statute of limitations ran against A's liability on the notes, A gave to B a new note for the amount of the two former ones, but without prejudice to the agreement above given. B put the new note in suit, and A filed a bill in equity to enjoin the suit and to obtain specific performance of the agreement. *Held*, on demurrer, that the bill should be sustained. *Baker v. Hawkins*, 14 R. I. 359.

Judgment Pending Appeal.—A brought an action against B upon a promissory note, and the court, after trying the cause and making its finding in favor of B, permitted A to dismiss the action. Thereupon B appealed from such judgment of dismissal to the supreme court. The cause was reversed, and judgment was thereafter rendered by the circuit court upon its finding in favor of B. Pending such appeal, and before such reversal, A brought another action against B, upon the same note, recovered judgment, and, after the reversal and rendition of the judgment in favor of B, sued out an execution upon the judgment so recovered by him, whereupon B brought an action to enjoin the collection of such judgment. *Held*, that the finding in favor of B entitled him to a judgment which, when rendered, conclusively established a complete defence to an action upon the note, and as B had no opportunity to avail himself of such defence during the pendency of the second action, the judgment not then having been rendered, the court will perpetually enjoin the collection of such judgment. *Held*, also, that a failure to ask for a stay of proceedings on the second action until the appeal was

determined in the first, was not such negligence as bars injunctive relief. *Walker v. Heller*, 90 Ind. 198.

Where There Was a Defence at Law.—While, as a general rule, where a party has an adequate remedy at law, a court of equity will not intervene, yet where equity has acquired jurisdiction of a case, such as a bill for partition of land, and to have a written contract respecting other lands specifically enforced, the court, on decreeing the equitable relief sought in that regard, may also enjoin the enforcement of a judgment against the complainant in a forcible detainer suit for possession of the land, although he might, have defended that suit successfully at law.—*McDowell v. McDowell*, 114 Ill. 255.

Property Which the Plaintiff Cannot Deliver.—A judgment was recovered by a railroad company on a subscription for eight of its first mortgage bonds and forty shares of its stock, which it was afterwards unable to give through its own default, having parted with them, its mortgage having been foreclosed and the company become insolvent. The judgment debtor sought by bill to have the collection of the judgment enjoined until the bonds and stock should be deposited in court for him. *Held*, that he was entitled to some relief, but not to the extent sought, as the bonds and stock could not be delivered, but that he was entitled to have the actual value of the proportionate share of the eight bonds credited upon the judgment. In such case the company would be chargeable only with the value of the bonds at the time it disposed of them—not their face value or purchase price. *Galena etc. R. Co. v. Ennor*, 116 Ill. 55.

Ejectment.—A bill to enjoin an ejectment suit and to transfer the litigation to the chancery court, which shows that the complainants claim the land as sub-vendees, under a sale made by order of the county court upon the petition of a guardian against his infant ward, and asks, in the event the sale be declared void, that complainants be subrogated to the rights of the original purchaser for so much of the purchase money as was expended for the benefit of the ward or paid to her, and for a recovery against the guardian for the residue, contains equity and cannot be dismissed on motion; but the court ought not to take jurisdiction of the legal contest nor enjoin the prosecution of the suit at law, except upon the terms of giving judgment at law to be

dealt with as the court might order, *Trousdale v. Maxwell*, 6 Lea (Tenn.) 161.

Wife's Property.—The allegations in a bill, by the wife against the judgment creditors of the husband, that property levied upon by them as the husband's, was property purchased with her own means, and that she always was, and still is, the owner thereof, is a sufficient allegation of a separate property in her, and while, according to the rule prevailing in this State, she is to be held to full and strict proof of a separate property, the chancellor should in such case grant an injunction. *Fairchild v. Knight*, 18 Fla. 770.

A court of equity has jurisdiction to entertain a bill, filed by a married woman in possession of her separate real estate, to restrain repeated actions of ejectment by a purchaser at sheriff's sale of said property under a judgment against her husband, where such actions are brought, not in good faith, and (by means of voluntary nonsuits) are not prosecuted to judgment, but are brought and threatened with the alleged intent of compelling the payment of her husband's debt. *Thompson's App.*, 107 Pa. St. 559.

On a bill filed by a married woman for an injunction to restrain an execution issued against her husband, and levied upon personal property which she claimed to be hers, it was *held*, that conceding that the husband was acting as the agent of the wife, and that the note upon which the judgment was founded, and the execution was issued, was given for cows purchased for her use, and taken to her farm, such cows became her property, and it was but equitable and just that she should pay for them, and the execution ought not to be enjoined at her instance. *Erdman v. Rosenthal*, 60 Md. 312.

A married woman may enjoin the execution creditors of her husband from selling lands, the title whereof stands in his name but which were bought by him, *bona fide*, for her, and paid for with her money. *Cass v. Demarest*, 37 N. J. Eq. 393.

The court will not interfere at the instance of a party, who has only an equitable title, which is not cognizable at law, when it appears that the sale, if consummated, will not cast a cloud on that title, nor otherwise injuriously affect his rights; as, where the wife claims a resulting trust in lands, on account of her moneys used in paying

part of the purchase money, the legal title being taken in the name of a third person, and seeks to enjoin a sale of them under execution against her husband. *Caldwell v. Lawler*, 70 Ala. 293.

Lands were sold by a third person to defendant's wife, who is alleged to have purchased with the husband's money, and to hold the premises in trust for him. Complainant recovered a judgment at law against defendant and levied on the premises and bought them at the sheriff's sale. Thereafter he entered into possession and attempted to occupy and cultivate them. *Held*, that this court would not enjoin an action of trespass brought by defendant's wife against him. *Cox v. Gruver*, 40 N. J. Eq. 473.

Property Exempt.—Jurisdiction is properly exercised to prevent the sale, under an execution issued on a judgment of a justice of the peace, of property exempt under law from forced sale, *Stein v. Frieberg*, 64 Tex. 271; *Alexander v. Holt*, 59 Tex. 205. Jurisdiction, when once thus obtained, should be exercised to finally determine the rights involved under the issues made; and, if necessary, to perpetuate the injunction. *Stein v. Frieberg*, 64 Tex. 271; *Willis v. Gordon*, 22 Tex. 243; *Witt v. Kaufman*, 25 Tex. Sup. 384.

The levy upon land exempt by law from levy and sale, and advertising the same for sale to satisfy an execution, constitute such an attempt to cast a cloud upon the title as to give a court of equity jurisdiction to enjoin the sale. *Lewton v. Hower*, 18 Fla. 872.

Where a judgment debtor applied for an injunction to restrain the sheriff from selling a contingent interest in land, which was not liable to be sold under execution, it was *held* that the injunction should have been refused. *Bristol v. Hollyburton*, 93 N. Car. 384.

Execution Sale.—A court of chancery will entertain an original bill to enjoin its own execution in a proper case. *Anderson v. Mullenix*, 5 Lea (Tenn.) 287.

As a general rule, before equity will restrain the collection of a judgment rendered by a court of competent jurisdiction after legal and personal service, it must affirmatively appear that there is a valid defence to the cause of action. *Muse v. Wafer*, 29 Kan. 279.

A court of equity will ordinarily not interfere to enjoin a sale of lands under

an execution against one person, the title to which is claimed by another, for the reason that such a sale will not prejudice the rights of the latter. To warrant resort to the restraining power of the court the case must present some recognized ground for equitable relief—fraud or irreparable injury. *American etc. Co. v. School Trustees*, 35 N. J. Eq. 181.

A bill to restrain a sale on execution in a proceeding at law against a third person will hardly lie when the only equity complainant asserts is that he is a *bona fide* purchaser. *Manistique etc. Co. v. Lovejoy*, 55 Mich. 189.

Equity will not interfere to impound property or tie up interests after an execution sale thereof in order to establish a lien thereon under attachment proceedings that have not even reached a judgment. *Rollins v. Van Baalen*, 56 Mich. 610.

But when a decree for the sale of land has remained unexecuted for fourteen years and a petition or bill is filed by the debtor asking the enjoining of such sale of his land because the debt for which the land had been decreed to be sold had since the decree been paid in full, and the truth of the facts stated in such bill are sworn to by the debtor, the court should enjoin such sale until the further order of the court, and should refer the cause to a commissioner to ascertain what if anything is still due on such debt. *Buster v. Holland*, 27 W. Va. 510.

After the adjournment of the term at which a judgment is rendered against a garnishee he cannot have in an independent proceeding an injunction to prevent the enforcement of the judgment, except upon facts which show the clearest and strongest reasons for the interposition of a court of equity. *Nevins v. McKee*, 61 Tex. 412.

The defendant railroad and the orators under a partnership arrangement were operating the three lines of road. Defendant, B, obtained a judgment against the defendant railroad for injuries received through its neglect, not knowing of the partnership. He levied his execution on an engine, tender and baggage car owned by the three companies, and the same were sold to his agent, L; and he had also levied upon another engine owned by the same companies and had advertised it for sale when he was enjoined. A bill having been brought setting up the superior rights of partnership creditors, *held*, although the

rights of partnership creditors, as a rule in equity, are superior to those of the individual creditors, yet the court will not enjoin where equities are equal, or where, as in this case, it does not clearly appear, by allegation or proof, that the partnership indebtedness *existed at the time the property was seized on execution*. *Lamoille etc. R. Co. v. Bixby*, 55 Vt. 235.

On the foreclosure of a mortgage on a factory it was decided that the mortgage did not cover certain machinery therein on which the defendant, as a judgment creditor of the mortgagor, had levied. Thereupon the defendant sold that machinery under his execution and bought it himself. Afterwards the complainant appealed from the decision as to the machinery. *Held*, that complainant was entitled to an injunction restraining the defendant from disposing of the machinery pending the appeal, and to have a receiver therefor appointed upon giving the defendant proper security. *Penn Mutual etc. Co. v. Semple*, 38 N. J. Eq. 314.

Where a wife sought to enjoin the sale of her husband's land on the grounds that she had an interest of \$965 principal in the *fi. fa.*, that the holder, who was a transferee, had knowledge of her interest, that she was unable to bid on the property and desired to have the sale restrained until she could contest her rights with the holder, there was no abuse of discretion in refusing to restrain the sale, but ordering a sufficient amount to secure her rights to be retained by the sheriff until further order. *Thomas v. Wilkinson*, 65 Ga. 405.

A bill in equity will not lie to restrain the sale of chattels under execution, unless it shows that some damage will result to the plaintiff not fully remediable at law. *Stillwell v. Oliver*, 35 Ark. 184.

Where there is an absolute judgment for a sum of money, with no restriction in its terms as to the manner or medium of payment, or as to the time or mode of enforcing it, and its enforcement by regular levy and sale is sought to be enjoined because violative of a contemporaneous written contract modifying its ordinary legal effect, the discretion of the chancellor in refusing the injunction will not be controlled, it not appearing that a breach of the contract (granting the contract to be legal and obligatory) would be irreparable at law in damages. *West v. Cobb*, 63 Ga. 341.

Where the defendant in a judgment obtains a rule to show cause why execution thereon should not be stayed, and after depositions are taken the rule is discharged, said defendant cannot subsequently upon proof of substantially the same facts appearing in the depositions on the rule obtain relief by injunction in equity. The principle of *res adjudicata* applies in such case. *Frauenthal's Appeal*, 100 Pa. St. 290.

Under a Statute.—But under the statute, "only so much of any judgment at law shall be enjoined as the complainant shall show himself equitably not bound to pay," so that if he be unable to allege and prove that he has a defence against the claim upon which the judgment was founded, in whole or in part, then the statute would forbid an injunction. *Colson v. Leitch*, 110 Ill. 504.

Execution—Owner Not a Party.—Where no special ground of equitable jurisdiction is alleged, a bill to restrain a sheriff from selling, under execution, lands claimed to belong to a person other than the defendant in execution, cannot be maintained. *Dawes v. Taylor*, 35 N. J. Eq. 40.

An allegation in a bill that the defendant, by virtue of a judgment and execution at law against complainant's grantor, has seized upon and is about to sell lands to which complainant has the legal title, presents no equitable ground for enjoining such sale. *Sheldon v. Stokes*, 34 N. J. Eq. 87.

The owner of land is entitled to an injunction restraining the sheriff from levying an execution thereon, issued upon a judgment against other persons, and in an action to which he was not a party; and the execution plaintiff is a proper, if not a necessary, party to the action. *Bishop v. Moorman*, 98 Ind. 1; s. c., 49 Am. Rep. 731.

A land owner may maintain an injunction to prevent the sale of his land upon a judgment rendered against another person. *Petry v. Ambroscher*, 100 Ind. 510.

A person in quiet possession of real estate as owner may obtain an injunction to restrain others from dispossessing him by means of process growing out of litigation to which he was not a party. *Deans v. Bowden*, 20 Fla. 905.

When personal property is taken in execution, and a third person applies to a court of equity to enjoin the sale on the ground of a prior *incumbrance*, the court has no jurisdiction in such a case,

the rule being that a court of equity cannot interfere when the plaintiff claims as an *incumbrancer* merely; and when he claims as owner of the property, it can only interfere in cases where from the peculiar nature of the property and circumstances of the case the remedy at law is incomplete. *Rollins v. Hess*, 27 W. Va. 570.

Common law courts have jurisdiction and power over their writs, and over the officers who execute them, and may, on motion, recall and quash process illegally issued. This being a plain and complete remedy at law to a party to an execution illegally issued, he cannot apply to chancery for injunction against it. But one who is not a party to an execution illegally levied on his property has not this remedy, and may apply to chancery to enjoin the sale. *King v. Clay*, 34 Ark. 291.

Execution Illegal.—The writ of injunction, should be used with great caution, and should never be granted except on a strong case and in a pressing emergency; and where the strength of the case and the pressure of the emergency rest on a threatened sale of property which can as well be stopped by an additional affidavit of illegality as by resort to injunction, the latter remedy should not be granted. *Gunn v. Woolfolk*, 66 Ga. 682.

If a court of equity has jurisdiction, in any case, to enjoin a sale of partnership property under execution of one of the partners individually, "it can only be called into exercise by clear and strong averments, showing the injury which must result from a disturbance of the possession consequent upon the levy." An averment that irreparable injury will result because the partnership is engaged in farming operations, and the articles levied on, guano and cotton-seed, were advanced to them under the statute to enable them to make a crop, and are necessary to the successful cultivation of a crop, is not sufficient. *Daniel v. Owens*, 70 Ala. 297.

As a general rule, it has been the practice in Pennsylvania for a judgment creditor to seize and sell in satisfaction of his debt any real estate in which his debtor has or is believed to have an interest. Whenever such interest is alleged, the creditor is permitted to proceed with his execution, and, if there be any question in regard to the title, it may be raised and determined afterwards in an action of ejectment. It is only where the creditor is

clearly and undeniably proceeding against right and justice to abuse the process of the law to the injury of another that equity intervenes to stay his hands. Taylor's App., 93 Pa. St. 21; Winch's App., 11 P. F. Smith 424.

Excess in Judgment.—Where the defendant in a judgment at law illegally rendered against him admits that the judgment is partly founded upon a just indebtedness, and claims that it is excessive merely, he is not entitled to restrain by injunction the collection of the judgment for the amount which he admits to be due. But as to the alleged excess in the judgment the plaintiff therein should be required to retry his case, the injunction to be retained till the result is known, and the injunction bond to stand as a security to the plaintiff for any amount which may be found due him, on such trial. Hale v. Bozeman, 60 Miss. 965.

Cloud on Title.—A court of equity has no jurisdiction to enjoin a levy and sale of land under an execution unless by such sale an actual cloud upon the complainant's title will be created. Such a cloud is not produced by a sale under an execution against one who never had title to or interest in the land. Shelby v. Holloway, 19 Fla. 500.

A *fi. fa.* having been levied on certain land, and a claim interposed, and a second *fi. fa.* having been levied on the same property, the holder of the first *fi. fa.* is not entitled to an injunction to stay the proceeding of the second, on the ground that, if sold pending the claim case, the property will be under a cloud and will not bring its value, that he is unable from poverty to bid on it, and that the purchaser will obtain a good title, leaving a nominal amount in the hands of the sheriff, in lien thereof, for him to have applied to his *fi. fa.* Sanders v. Foster, 66 Ga. 292.

Debt Partially Due.—When any part of the debt remains due an injunction will not be granted to restrain the execution of a judgment. Harris v. Alcock, 10 Gill & J. (Md.) 226; Hollingsworth's Admrs. v. Lloyd, 2 Har. & G. (Md.) 87.

Miscellaneous Cases.—A judgment at law in favor of one surety against his cosurety on a draft for contribution, will not bar a bill by such cosurety to enjoin the judgment for equitable reasons involving new issues and new parties which were not before the court in the common law suit. Simmons v. Camp, 65 Ga. 673.

By a written agreement for the exchange of lands, the complainant was to secure to the defendant for his (defendant's) use one half of the rye then growing on complainant's land (which was under lease), and by a simultaneous verbal agreement the growing wheat thereon was reserved to complainant's tenant then on the premises. The deed, which was afterwards given, was a warranty deed, and contained no reservation of the crops at all, because the scrivener regarded it as unnecessary. The defendant, denying the tenant's claim to the wheat, converted it to his own use, whereupon the tenant recovered a judgment against him for its value. Then the defendant recovered a judgment at law in respect thereof against complainant for breach of covenant in the deed, and on that judgment a writ of error by complainant is still pending. Held, that complainant having conclusively shown that the wheat was reserved at the time of the exchange, may restrain defendant from further proceeding on or enforcing his judgment at law, and that such right has not been lost by his laches. Thompson v. Tilton, 34 N. J. Eq. 306.

B recovered a judgment in ejectment against J for the possession of a certain town lot. A writ of *habere facias possessionem* was issued thereon and placed in the hands of the sheriff. J offered to surrender possession of what he regarded as the lot mentioned in the writ, but B contended that the boundary of the lot extended beyond the line recognized by J, and embraced, in addition to the land that J proposed to surrender, a part of the dwelling house in which J resided and some of the outhouses used by him. The sheriff announced his intention of executing the writ as directed by B, and thereupon J filed a bill in chancery to enjoin the execution of the writ until the true boundary lines of the lot should be judicially determined, and praying for an order for the survey of the lot. A temporary injunction was granted. The bill, which alleged the facts here recited, was met by an answer from B denying under oath the equities thereof, and a motion to dissolve the injunction was sustained by the chancellor. Held, that the allegations of the bill, if true, show that irreparable injury would have resulted to the complainant by the execution of the writ of *habere facias possessionem*, and the injunction should not have been dissolved upon mo-

fraud, accident, mistake, or acts of the opposite party, by which he was prevented from prosecuting his action or interposing his defence.¹

tion. *Jones v. Brandon*, 60 Miss. 556.

Defendant loaned \$6,000 to the A. I. Works, a corporation organized under the General Manufacturing act (ch. 40, Laws of 1848). B, a trustee of the corporation, pledged as collateral for the loan bonds of the corporation to the amount of \$6,000, owned by him and for which he had paid full value. The loan not having been paid, defendant sold the bonds at public auction for \$640 to C, who thereafter commenced suit against plaintiff R, a trustee of the corporation, to enforce his liability because of a failure on the part of the officers to file annual reports as required by the act. Judgment was rendered in said action for the full amount of the bonds. This judgment C settled and satisfied on payment to him by R of \$1,300. Defendant also commenced suit against R and the other trustees, plaintiffs herein, to enforce their liability to him on account of the loan, and obtained judgment for the balance due after deducting the \$640 received on sale of the bonds and some interest which had been paid. This judgment was affirmed on appeal by the General term and by this court. This action was brought to restrain the collection of said judgment and the judgment for costs on appeal. It was alleged, and the court found, that the sale of the bonds to C was a sham; that he purchased and prosecuted the action against R solely for the benefit of defendant, which fact was unknown to plaintiffs until after the recovery of said judgment. *Held* (MILLER and DANFORTH, JJ., dissenting), that plaintiffs were not entitled to the relief sought; but as C had the apparent right to satisfy his judgment, and as the \$1,300 presumably was paid in good faith, defendant was bound thereby, and for that sum, less the costs in the C judgment, he was to be charged as so much collected upon his collaterals, and for the balance of his loan he was entitled to pursue his remedy against the plaintiffs. It seems, therefore, that plaintiffs are simply entitled to be allowed as a payment upon defendant's judgment, the balance of the \$1,300, after deducting the \$640, which was allowed, and the costs recovered in C's action; and their

remedy is simply to pay or tender the balance due upon defendant's judgment, and if he refuses to cancel the same, then to apply to the court by motion to compel a cancellation, or to stay execution; a suit in equity is not the proper remedy. *Roach v. Duckworth*, 95 N. Y. 391.

Where the trustees of a corporation gave a bond, secured by a mortgage on the corporate property, which, in strict legal effect, bound them individually, a court of equity will enjoin an action at law against them thereon, if it appears that there was no intention on their part to become personally liable. *Maps v. Cooper*, 39 N. J. Eq. 316.

1. *Holmes v. Stateler*, 57 Ill. 209; *Bateman v. Willoc*, 1 Sch. & Lefr. 201; *McClure v. Miller*, *Bailey's Eq.* (S. Car.) 107; *Graham v. Roberts*, 1 Head (Tenn.) 56; *Comstock v. Henneberry*, 66 Ill. 212; *La Crosse etc. Co. v. Reynolds*, 12 Minn. 213; *Wight v. Eaton*, 7 Wis. 595; *Ableman v. Roth*, 12 Wis. 81; *McCann v. Otoe Co.*, 9 Neb. 324; *Little v. Price*, 1 Md. Ch. 182; *Dugan v. Cureton*, 1 Ark. 31; *Andrews v. Fenter*, 1 Ark. 186; *Watson v. Palmer*, 5 Ark. 501; *Conway v. Ellison*, 14 Ark. 360; *Nevins v. McKee*, 61 Tex. 412; *Wingate v. Haywood*, 40 N. H. 437; *Pearce v. Olney*, 20 Conn. 544; *Stanton v. Embry*, 46 Conn. 595; *Slack v. Wood*, 9 Gratt. (Va.) 49; *Cotton v. Hiller*, 52 Miss. 7; *Newman v. Morris*, 52 Miss. 402; *Collier v. Falk*, 66 Ala. 223. *Walton v. Bonham*, 24 Ala. 513; *Mariott v. Givens*, 8 Ala. 694; *Nunn v. Matlock*, 17 Ark. 512; *Jamison v. May*, 13 Ark. 600; *Bibend v. Kreutz*, 20 Cal. 109; *Carter v. Bennett*, 6 Fla. 214; *Nelson v. Rockwell*, 14 Ill. 375; *Hinrichsen v. Van Winkle*, 27 Ill. 334; *Pearce v. Chastain*, 3 Ga. 226; *Crumpton v. Baldwin*, 42 Ill. 165; *Dickerson v. Ripley Co.*, 6 Ind. 128; *Porter v. Moffett*, 1 Morr. (Iowa) 108; *Rooks v. Williams*, 13 La. An. 374; *Falls v. Robinson*, 5 Md. 365; *Ford v. Weir*, 24 Miss. 563; *Tomkins v. Tomkins*, 11 N. J. Eq. (3 Stock.) 512; *Dougherty v. Scudder*, 17 N. J. Eq. 248; *Skillman v. Holcomb*, 12 N. J. Eq. (1 Beas.) 131; *Williamson v. Johnson*, 5 N. J. Eq. (1 Hals.) 537; *Smith v. Hays*, 1 Jones (N. Car.) Eq. 321; *Partin v. Luterlot*, 6 Jones (N. Car.) Eq. 341; *Hubbard v.*

An injunction will not be granted to restrain an execution on a judgment at law upon grounds which were available as a defence to the judgment;¹ nor will a judgment be enjoined to enable the debtor to set off an unliquidated claim.² A judgment at law will

Martin, 8 Yerg. (Tenn.) 498; Richmond etc. R. Co. v. Shippen, 2 Patt. & H. (Va.) 327.

It is settled law that a court of equity will not restrain the execution of a judgment unless it shall appear that the complainant has no valid defence of which he could not have availed himself at law, or of which he might have availed himself, but was prevented by mistake, surprise or fraud, unmixed with any fault or negligence of his own. *Darling et al. v. Baltimore*, 51 Md. 1; *Hill v. Reifsnider et al.*, 46 Md. 555; *Webster v. Hardisty et al.*, 28 Md. 592; *Suit v. Creswell et al.*, 45 Md. 529; *Taylor v. Sindall*, 34 Md. 38; *Dorsey v. Kyle et al.*, 30 Md. 512; *Barnes v. Dodge*, 7 Gill (Md.) 118; *Fowler v. Lee*, 10 Gill & J. (Md.) 358; *Prather v. Prather*, 11 Gill & J. (Md.) 110; *Windward v. Allen*, 13 Md. 196; *Boyd et al. v. Ches. etc. Co.*, 17 Md. 211.

To authorize the injunction of a judgment at law it is not sufficient that the judgment is erroneous, unjust, or contrary to equity and good conscience; the party complaining must show, not only that he had and has a good defence, but that he was prevented from making it available at law, by surprise, accident, mistake, or the fraud or act of his adversary, without any fault or negligence on his own part. *Collier v. Falk*, 66 Ala. 223.

1. *New Orleans v. Morris*, 3 Wood. (U. S.) 103; *Hungerford v. Sigerson*, 20 How. (U. S.) 156; *Palmer v. Gardner*, 77 Ill. 143; *Wilson v. Hyatt*, 4 S. Car. 369; *Mora v. Avery*, 22 La. An. 417; *Lewis v. Dinkgrave*, 24 La. An. 489; *Chaffraix v. Harper*, 26 La. An. 22.

An injunction is granted "upon the sole ground that, from certain equitable circumstances of which the court granting the process has cognizance, it is against conscience that the party inhibited should proceed in the cause."

Tyler v. Hamersley, 44 Conn. 420. See N. Y. etc. R. Co. v. *Haws*, 56 N. Y. 175; *Hardy v. Broadus*, 35 Tex. 668; *Click v. Stewart*, 36 Tex. 280; *Sidener v. White*, 46 Ind. 588; *Poincy v. Burke*, 28 La. An. 673; *De Ville v. Hayes*, 23 La. An. 550; *Ford v. Rigby*, 10 Cal. 449; *Watson v. Sutherland*, 5

Wall. (U. S.) 74; *Amis v. Myers*, 16 How. (U. S.) 492; *McCreery v. Sutherland*, 23 Md. 471; *Chappell v. Cox*, 18 Md. 513; *Wilson v. Butler*, 3 Munf. (Va.) 559; *Walker v. Hunt*, 2 W. Va. 491; *McFarland v. Dilly*, 5 W. Va. 135; *Baker v. Rinehard*, 11 W. Va. 238.

A court of equity cannot enjoin a prosecution for a penalty imposed by statute, at least until the invalidity of the statute has been determined in a previous action. *Wallack v. Soc. Ref. Jur. Del.* 67 N. Y. 23.

Where a new trial has been granted a court of equity will restrain the enforcing of the judgment. *Rickets v. Hitchens*, 34 Ind. 348.

2. *Jackson v. Bell*, 31 N. J. Eq. 554; *Jackson v. Bell*, 32 N. J. Eq. 411.

B brought trover against R to recover certain cotton. R filed his bill to set off against such recovery charges for storage, commissions and expenses upon that and other cotton due him by B, to assert a lien on that lot for the entire charges, exceeding in value the cotton in suit, and to enjoin the trover suit. B answered setting up counter claims for overcharges, etc. *Held*, that the case was a proper one for equitable relief; appearance and pleading to the merits admits jurisdiction; a bill for injunction against a suit at law brought by a nonresident plaintiff will be retained to grant relief as to all matters involved in a proper settlement of the litigation pending at law. *Beall v. Rust*, 68 Ga. 774.

On the death of M, intestate, his widow and another qualified as administrators of his estate by executing with sureties a joint bond. Afterwards the widow died intestate without making settlement of her administration, and after her death the surviving administrator executed with sureties an additional bond, and thereafter made a final settlement of his administration, on which decrees were rendered against him in favor of the widow's administrator and in favor of the guardian of J and F, who were the only heirs of M and also of the widow, each for one-third of the balance ascertained to be due from him. This balance resulted from a *devastavit* committed during the joint administration. The decree

not be enjoined upon the sole ground that it is unjust, even if the court is convinced that the court of law committed an error.¹

Where a court of equity proceeds to set aside a judgment at law, it proceeds upon equitable considerations only. If the judgment rendered is not inequitable as between the parties, no matter how irregular or void the same may be, a court of equity will not interfere, but will leave the defendant to such remedies as a court of law can give him to avoid the effect thereof.²

(a) *Attachment*.—An action in attachment will not be enjoined at the instance of one not a party unless under circumstances which entitle him to interfere.³

in favor of the widow's administrator was paid to him, and by him distributed equally between J and F. After the rendition of these decrees F died intestate, free from debt and leaving J as her only heir. No executions having been issued on the decrees within twelve months from the date of their rendition, J and the personal representative of F separately moved to revive; and thereupon the decree in favor of J was revived only for a small balance, the court crediting it with \$1,000 as paid by the administrator of M by the conveyance of land to the common guardian of J and F; but on appeal to this court the order of the probate court was reversed, this court holding that only one half of said amount should be credited on J's decree, and that the balance should have been credited on the decree in favor of F. The decree in favor of F was revived for its full amount, less \$100 paid thereon; but after return of execution against M's administrator "no property found," an execution was issued against the sureties on both bonds for the full amount of the decree. *Held*, on a bill filed by the sureties on both bonds to enjoin the proceedings in the probate court, to have said decrees credited with the \$100, and also with the \$1,000 paid thereon, and to have an account stated of the amount of the *devastavit* committed by the widow during said joint administration, and such amount set off against said decrees, that if the complainants were not concluded by the failure of the administrator of M to set up the defence of payment they had a plain and adequate remedy by *supersedeas* in the probate court, and for this reason their bill is without equity. *Larkin v. Mason*, 71 Ala. 227.

1. *Holmes v. Steele*, 28 N. J. Eq. 173;

Cairo etc. R. Co. v. Titus, 12 C. E. Green (N. J.) 102; *Vanarsdalen v. Whitaker*, 10 Phila. (Pa.) 153; *Stillwell v. Carpenter*, 59 N. Y. 414; *Robuck v. Harkins*, 38 Ga. 174; *Slack v. Wood*, 9 Gratt. (Va.) 40; *Hazeltine v. Reusch*, 51 Mo. 50; *Ableman v. Roth*, 12 Wis. 81; *Boley v. Griswold*, 2 Mont. 447; *Bateman v. Willoe*, 1 Sch. & Lef. 201. See ERROR OF COURT, *post*.

An injunction will not be granted to restrain an action in ejectment unless there is some special equity requiring the interposition of the court. *Shaw v. Lindsay*, 60 Ala. 344.

Threats by a plaintiff in an action at law that he will bring other actions against the defendant are not sufficient to authorize the issuing of an injunction. *Hartman v. Heady*, 57 Ind. 545. The court will not enjoin an action at law at the instance of third parties where the parties to the action are content, unless for imperative reasons. *Smith v. Cuyler* (Ga.), 3 S. E. Rep. 406.

2. *Stokes v. Knarr*, 11 Wis. 389; *Ableman v. Roth*, 12 Wis. 81, 90; *Merritt v. Baldwin*, 6 Wis. 439; *Wright v. Eaton*, 7 Wis. 595; *McIndoe v. Hazeltone*, 19 Wis. 567; *Barber v. Rukeyser*, 39 Wis. 590; *Jilsun v. Stebbins*, 41 Wis. 235; *Hilcs v. Mosher*, 44 Wis. 601.

3. *Williams v. Stewart*, 56 Ga. 663.

A justice of the peace has control of an improper or improvident execution issued by him, and may recall and quash it. Or the circuit court may bring up the proceedings by *certiorari* and grant relief. But equity cannot enjoin it. It has no power to *correct* even the grossest errors of inferior courts. *Scanland v. Mixer*, 34 Ark. 354.

The Md. act of 1874, ch. 320, provides

(b) *The foreclosure of a mortgage* will not be enjoined at the instance of the mortgagor to enable him to set off claims against the mortgagee of a purely legal character.¹

that "on all judgments rendered in any court of law an execution or attachment may issue at any time within twelve years from the date of such judgment." *Held*, that a judgment before a justice of the peace is not a judgment within the meaning of said act; that where a judgment of condemnation was rendered by a justice of the peace in a case of attachment upon a judgment rendered more than three years before the issuing of the attachment, and said judgment of condemnation was entered by mistake without any fault on his part, the attachment debtor was entitled to an injunction restraining the execution of the judgment of condemnation which had been entered by mistake against him. The prayer of the bill was that the complainant might be permitted to bring into court the amount due by him upon a judgment against him in favor of S amounting to \$150 and interest (it being the judgment debt attached in his hands), to abide the result of this suit; and that S might be enjoined from executing his judgment against the complainant; and that W, the attaching creditor, might be restrained from executing his judgment *for more than the sum of \$119.40*. The injunction restrained W from executing his judgment against the complainant *for any amount whatever*. *Held*, that the bill was not for an injunction merely, but was in the nature of a bill of interpleader; that all the parties were before the court, and inasmuch as the justice of the peace had no power to issue the attachment, and the judgment of condemnation having been entered by mistake and contrary to the agreement of the parties, the court properly enjoined W from issuing an execution *for any amount* on said judgment. *Weikel v. Cate*, 58 Md. 105.

1. *Knight v. Drane*, 77 Ala. 371.

Set-off in Equity Against Mortgage Debt.—When the mortgagee files a bill to foreclose the mortgagor may set up any defence, except the statute of limitations, which would be available at law in an action on the debt, and hence he may in extinguishment or reduction of the mortgage debt set off any other debt or demand which would be available at law; but when the bill is filed by

the mortgagor himself seeking to enjoin a sale of the property under a power in the mortgage he must show some other ground for equitable interference before he can establish as a set-off an independent debt or demand, for which he has an adequate remedy at law. *Knight v. Drane*, 77 Ala. 371.

Fraudulent Sale.—Where a decree of foreclosure and sale is alleged to be fraudulent and to have been made for the purpose of defrauding, hindering and delaying creditors of the defendants therein, and it is alleged that no money was ever loaned as pretended by the papers, which are the basis of such decree, the chancellor who rendered such decree may upon a bill filed by the assignee of one of such creditors for the purpose of subjecting the property covered by the decree of foreclosure to the payment of his debt, and to set aside such decree as made to hinder and delay creditors, such assignee not being a party to such decree, enjoin the plaintiff in such decree of foreclosure, her agents and attorneys, from enforcing said decree. In such case the court acts upon the parties and not upon itself. *Robinson v. Springfield*, 21 Fla. 203.

Setting Up Legal Defence Against Action at Law.—When a mortgage on the stock of goods in a drug store contains an express stipulation that the mortgagor shall by replenishing the stock keep up the value to a specified amount, all the stock on hand at any time being covered by the mortgage, and the mortgagee after default brings an action at law to recover the property he cannot maintain a bill in equity to enjoin the mortgagor from setting up in defence of that action *pro tanto* the fact that the mortgagor did not have a legal title to the goods bought and mixed with the old stock, nor is the equity of the bill aided by an averment that the only evidence by which the new and the old stock can be distinguished and separated is in the possession of the mortgagor and that he is insolvent. *Tyson v. Weber*, 81 Ala. 470.

Devisee.—Nor will devisee be enjoined from setting up the statute of limitations, no fraudulent conduct being charged. *Martin v. Lamb*, 40 N. J.

(c) *Neglect to Make Defence.*—Where a defendant has a defence which was available in an action at law, the failure to set it up will not authorize resort to a court of equity for relief;¹ nor will the omission of his counsel or himself to procure and present evidence in support of his claim constitute ground for relief.²

Eq. 669. And where no waste or mismanagement is charged will an insolvent executor of an insolvent estate be enjoined from selling part of the estate. *Elam v. Elam*, 72 Ga. 62.

1. *Hendrickson v. Hinckley*, 17 How. (U. S.) 443; *Crim v. Handley*, 4 Otto (U. S.) 652; *Hungerford v. Sigerson*, 20 How. (U. S.) 161; *Marine Ins. Co. v. Hodgson*, 7 Cranch (U. S.) 332; *Katz v. Moore*, 13 Md. 566; *Lyday v. Double*, 17 Md. 188; *Brandon v. Green*, 7 Humph. (Tenn.) 130; *Emerson v. Udall*, 13 Vt. 477; *Clute v. Potter*, 37 Barb. (N. Y.) 199; *Pettes v. Bank of Whitehall*, 17 Vt. 435; *Windwart v. Allen*, 13 Md. 196; *Bateman v. Willoe*, 1 Sch. & Lef. 201; *Lafon v. Dessessart*, 1 Mart. (La.) N. S. 21; *Commissioners etc. v. Patrick, Sm. & M. Ch.* 110; *Meredith v. Benning*, 1 Hen. & M. (Va.) 585; *Stanard v. Rogers*, 4 Hen. & M. (Va.) 438; *Turpin v. Thomas*, 2 Hen. & M. (Va.) 139; *Ponder v. Cox*, 26 Ga. 485; *Beaird v. Foreman, Breese* (Ill.) 385; *Gott v. Carn*, 6 Gill & J. (Md.) 309; *Ewing v. Mickle*, 45 Md. 413; *Stillwell v. Carpenter*, 59 N. Y. 414; reversing *s. c.*, 1 Thomp. & C. (N. Y.) 615; *Shields v. McClung*, 6 W. Va. 79; *O'Connor v. Sheriff*, 30 La. An., pt. 1, 441; *Menifee v. Myers*, 33 Tex. 690; *Jones v. Cameron*, 81 N. Car. 154; *Blandry v. Felch*, 47 Cal. 183; *Abrams v. Camp*, 3 Scam. (Ill.) 290; *Lucas v. Spencer*, 27 Ill. 15; *Albro v. Dayton*, 28 Ill. 325; *Schricker v. Field*, 9 Iowa 366; *Wilsey v. Maynard*, 21 Iowa 107.

R & B were garnished in two attachment cases against T, one in favor of C. & Co., the other in favor of H. In the latter case a judgment was rendered against them for want of an answer, and they filed a bill in chancery to enjoin the execution thereof. The bill alleges that the complainants went to the court for the purpose of answering in both cases, and did file an answer in the case of C. & Co., and either filed a like answer in the case of H, which has been lost or stolen, or else they were honestly mistaken as to the fact of having filed an answer; and they believed it had been filed till after the ad-

journment of the court; that although H and his attorney both knew that complainants only owed T \$107, they took judgment against complainants for \$855. The bill states that B has an attachment against T on a debt of \$1,600; and that H's claim is fraudulent and prosecuted by collusion with T to defraud the creditors of the latter. H and T answered severally, denying the fraud charged, and denying that any answer to the garnishment was filed by R & B, and claiming that the judgment was fairly and regularly obtained. A motion was made to dissolve the injunction, supported by affidavits tending to establish the denials in the defendant's answers, and the chancellor made an order granting the motion. The complainants appealed. *Held*, that the bill is not maintainable. *Ross v. Holloway*, 60 Miss. 553.

An application for injunction, made by the defeated party in a suit, and based on the fact that he was misled as to the time of the adjournment of the term at which the judgment was rendered, whereby he was prevented from obtaining an order giving time after adjournment to make up a statement of facts, should not be granted, even if due diligence in the former cause was shown, unless it is made to appear that the judgment would probably have been reversed on appeal. *Rotto v. Levy*, 63 Tex. 278. *Contra*, *Boyce's Exrs. v. Grundy*, 3 Pet. (U. S.) 210.

A judgment obtained on a false return will not be enjoined. Redress must be sought in the court which rendered the judgment or in an action against the officer making the return. *Walker v. Robbins*, 14 How. (U. S.) 584. *Compare* *Windwart v. Allen*, 13 Md. 196.

2. *Barker v. Elkins*, 1 Johns. Ch. (N. Y.) 465. "A defendant cannot come here for a new trial when no special ground of surprise is suggested and when he neglects or omits due diligence and without due excuse to defend himself in his proper place." See *Matson v. Field*, 10 Mo. 100; *Hill v. Harris*, 51 Ga. 628; *Dodge v. Strong*, 2 Johns. Ch. (N. Y.) 228; *Holmes v. Stateler*, 57 Ill. 209.

(d) *Mistake of Law*.—An injunction will not be granted to enjoin a judgment upon the ground that the debtor had a valid defence, but was advised by his counsel that it was not necessary to bring it forward before the court.¹

(e) *Error of the court* in excluding or admitting evidence, or in charging the jury, is not sufficient to justify the issuing of an injunction. Therefore, if a court of law has already investigated the matter according to the common and ordinary rules of investigation, a court of equity will not enter into it again.²

A court of equity will not enjoin a judgment for irregularities and errors in the proceedings. All errors of decision and in the proceedings must be corrected in the court in which the suit originated, or by appeal to a higher court.³

Newly discovered evidence, made after the final disposition of the case, will not be ground for an injunction. *Ware v. Harwood*, 14 Ves. 31; *Cairo etc. R. Co. v. Titus*, 12 C. E. Green (N. J.) 102; *Campbell v. Briggs*, 3 Rob. (La.) 110; *Crim v. Handley*, 4 Otto (U. S.) 652. *Compare* *Brown v. Luehrs*, 79 Ill. 575; *Hickerson v. Raiguel*, 2 Heisk. (Tenn.) 329; *Baltzell v. Randolph*, 9 Fla. 366; *Ludington v. Handley*, 7 W. Va. 269; *Ferrell v. Allen*, 5 W. Va. 43; *Rust v. Ware*, 6 Gratt. (Va.) 50; *Billups v. Sears*, 5 Gratt. (Va.) 31.

1. *Duckworth v. Duckworth*, 35 Ala. 70; *Brown v. Wilson*, 56 Ga. 534; *Shricker v. Field*, 9 Iowa 367. "The allegation in the bill that complainant's counsel supposed or believed that under the law the court would not render judgment at the first term after the commencement of the action cannot aid appellants. If to enter the judgment at that term was irregular, Johnson had his remedy by appeal. If it was regular, then complainant only stands in the position of a party who has mistaken the law, and the maxim that *ignorantia juris non excusat* is as fully recognized in equity as in law." To the same effect are *Meem v. Rucker*, 10 Gratt. (Va.) 506; *Risher v. Roush*, 2 Mo. 95; *Hubbard v. Martin*, 8 Yerg. (Tenn.) 498.

2. *Bateman v. Willse*, 1 Sch. & Lefr. 201, 206. "And even though the judgment is manifestly wrong in law and in fact, or when allowing it to stand will compel the payment of a debt the defendant does not owe, (yet) unless it appears that it was obtained by fraud or was the result of accident or mistake, relief in equity will not be granted." *Holmes v. Stateler*, 57 Ill. 210; *Hunger-*

ford v. Sigerson, 20 How. (U. S.) 156; *Dunn v. Fish*, 8 Blackf. (Ind.) 407; *Vaughn v. Johnson*, 1 Stock. (N. J.) 173; *Stockton v. Briggs*, 5 Jones (N. Car.) Eq. 309; *Reynolds v. Horine*, 13 B. Mon. (Ky.) 234; *Cassel v. Scott*, 17 Ind. 514.

3. *Clopton v. Carliss*, 42 Ark. 560; *Hazeltine v. Reusch*, 51 Mo. 50; *Mo. Pac. R. Co. v. Reid*, 34 Kan. 410; *Slack v. Wood*, 9 Gratt. (Va.) 40; *De Haven v. Covalt*, 83 Ind. 344; *Ableman v. Roth*, 12 Wis. 81; *Stillwell v. Carpenter*, 59 N. Y. 414; *Holmes v. Steele*, 28 N. J. Eq. 173; *Cairo R. Co. v. Titus*, 12 C. E. Green (N. J.) 102; *Vanarsdalen v. Whitaker*, 10 Phila. (Pa.) 153; *Robuck v. Harkins*, 38 Ga. 174; *Boley v. Griswold*, 2 Mont. 447.

When a court having jurisdiction of the subject matter and of the parties renders a personal judgment in a suit to foreclose a mortgage for sums not due, providing in the decree that if the real estate should not sell for enough to satisfy all the indebtedness there should be execution against other property, there can be no remedy by injunction to prevent collection by execution while the judgment stands unreversed. *De Haven v. Covalt*, 83 Ind. 344.

In a garnishment proceeding before a justice of the peace, under § 44 of the Justices code, a final judgment against the garnishee cannot legally be rendered under any circumstances, but only an order. But where such a judgment has been rendered and an execution issued thereon and levied upon the property of the garnishee an action will lie in favor of the garnishee to perpetually enjoin the holder of such judgment from enforcing the same by execution. *Mo. Pac. R. Co. v. Reid*, 34 Kan. 410.

(f) *Laches of Party*.—A party is bound to exercise at least ordinary care in the management of his case, and if he fails to do so, and is defeated, he cannot resort to equity to enjoin the judgment.¹

1. *Evans v. Taylor*, 28 W. Va. 184; *Slack v. Wood*, 9 Gratt. (Va.) 40; *Hill v. Harris*, 51 Ga. 628; *Platt v. Sheffield*, 63 Ga. 627; *Welchel v. Gordon*, 63 Ga. 610; *Dibble v. Truluck*, 12 Fla. 185; *Vaughn v. Fuller*, 23 Ga. 366; *Rogers v. Kingsbury*, 22 Ga. 60; *Checkley v. Beall*, 37 Ga. 583; *Tarver v. McKay*, 15 Ga. 550; *Ramsey v. Perley*, 34 Ill. 504; *Kriechbaum v. Bridges*, 1 Iowa 14; *Faulkner v. Campbell*, 1 Morr. (Iowa) 148; *Miller v. McGuire*, 1 Morr. (Iowa) 150; *Pittsburgh etc. R. Co. v. Elwood*, 79 Ind. 306; *Todd v. Fisk*, 14 La. An. 13; *Titcomb v. Potter*, 11 Me. (2 Fairf.) 218; *Williams v. Jones*, 18 Miss. (10 Smed. & M.) 108; *Semple v. McGatagan*, 18 Miss. (10 Smed. & M.) 98; *Bruner v. Planters' Bank*, 23 Miss. 406; *Scroggins v. Howorth*, 23 Miss. 514; *Shipp v. Wheelless*, 33 Miss. 648; *Young v. Morgan*, 13 Neb. 48; *Jordan v. Thomas*, 34 Miss. 72; *Vaughn v. Johnson*, 9 N. J. Eq. (1 Stock.) 173; *Paynter v. Evans*, 7 B. Mon. (Ky.) 420; *Schroepell v. Shaw*, 3 N. Y. (3 Comst.) 446; *Champion v. Miller*, 2 Jones (N. Car.) Eq. 194; *Sample v. Barnes*, 14 How. (U. S.) 70; *Wynn v. Wilson*, Hempst. (U. S.) 608; *Kidwell v. Masterson*, 3 Cranch (U. S.) C. C. 52; *Brandon v. Green*, 7 Humph. (Tenn.) 130; *Wells v. Wall*, 1 Oreg. 295; *Gibson v. Moore*, 22 Tex. 611; *Fitzhugh v. Orton*, 12 Tex. 4; *Musgrove v. Chambers*, 12 Tex. 32; *Crawford v. Wingfield*, 25 Tex. 414.

Equity is loth to open a judgment at law and let in defences which could have been made when the case was on trial at law and before the judgment was rendered, and it will never do so when the negligence of the defendant at law is the reason given or apparent from the facts why such defence was not made. *Smith v. Phinizy*, 71 Ga. 641.

In *Quinn v. Weatherbee*, 41 Cal. 247, the defendant in the action at law had objected to the assessment of the roll on the ground that no dollar mark was prefixed to the valuation. This objection, however, was not noted by the official stenographer, and the bill of exceptions was signed without attention being called to the omission. The court declared the defect fatal to the

assessment, but that the defect was waived and equity could give no relief. See also *Smith v. Fonche*, 55 Ga. 120.

A bill was filed for specific performance of an agreement to sell land. Afterwards an action was brought to recover the deposit money, which action was enjoined. Afterwards the specific performance suit was discontinued and the injunction of the action was dissolved. After this the action at law was discontinued and a new action commenced against the devisees of one of the original defendants. *Held*, that in the absence of any promise or fraudulent conduct chargeable to the defendants by which the delay was caused a plea of the statute of limitations in the last action would not be enjoined. *Martin v. Lamb*, 40 N. J. Eq. 669. See *Lehigh etc. Co. v. Central etc. R. Co.*, 42 N. J. Eq. 591.

General averments of "sickness, bad roads, bad weather, personal attention to other business and a message sent to the probate judge through the deputy sheriff that he could not be present on the day appointed for the settlement," are not sufficient to negative fault or negligence on the part of the guardian when it does not appear that he made any effort to employ counsel, to procure a continuance, to bring his condition or defences to the attention of the court or to obtain a rehearing. *Waldron v. Waldron*, 76 Ala. 285.

To entitle a party to enjoin a judgment he must show not only that the judgment was unjust but that it was not the result of any inattention or negligence on his part. That he omitted to defend the suit in consequence of being misled by the clerk of the court as to its character was inexcusable negligence. *Hanna v. Morrow*, 43 Ark. 107.

A party having actual notice of the suit and full knowledge of the rendition of a defective judgment against him, which he could have tested by appeal or *certiorari*, cannot after allowing the time for such proceedings to elapse invoke the aid of the chancery court to relieve him of the result of his own laches. *Fleming v. Munn*, 61 Miss. 603.

O and wife mortgaged a tract of land to Mrs. K, who on default began proceedings to sell. After her death the land was sold by W, appointed trustee for that purpose. The proceeds of sale were paid to the said W, administrator of Mrs. K, and on W's death judgment was obtained by the appellee for the amount against the appellants sureties on W's administration bond. After the judgment had been affirmed by this court the appellants applied for an injunction to restrain the appellee from issuing execution on his judgment on the ground that they had discovered new evidence based on the will of S T K, husband of Mrs. K and a deed of the land from Mrs. K under a power to her to sell contained in the will, which land (afterwards sold by W, trustee) O and wife simultaneously mortgaged to Mrs. K, all of record, by which it appeared, they allege, that the proceeds of sale of the land should have been distributed to S T K's children and not paid over to Mrs. K's administrator. *Held*, that the appellants were not entitled to the relief prayed, as they could have obtained this evidence with reasonable diligence at the trial of the case at law. *Kirby v. Pascault*, 53 Md. 531.

A married woman was sued upon a promissory note which she had signed with her husband, and though personal service was made on her she did not appear, but suffered judgment by default on which execution was levied. *Held*, that as she neglected to make her defence at law and allowed the judgment to stand, she could not maintain a bill in equity to set aside the execution on the ground that she had signed as surety for her husband, and the judgment was void as against her. *Wilson v. Coolidge*, 42 Mich. 112.

Where the gravamen of a bill in equity is a tort committed by the defendant in extorting a promissory note which was the property of complainant from her possession by the defendant and her husband, and complainant waited until the said note had been sued to judgment by the defendant and until the action for the tort was barred by the statute of limitations without the allegation of any good and sufficient reason for such delay, equity will apply the statute of limitations to the complainant's bill and refuse relief. *Hays v. Urquhart*, 63 Ga. 323.

One who desires to avail himself of his discharge in bankruptcy as a defence against a suit pending in a state court

must plead it; failing to do so, neither his ignorance of his duty nor his negligence will invalidate the judgment which may be rendered in the state court against him. *Miller v. Clements*, 54 Tex. 351.

The plaintiff had an admitted claim against the defendant for \$48; the defendant had an account against him for work done under an agreement that it should be applied on the claim, the amount to be allowed being in dispute, the defendant demanding \$41, which was more than the work was worth. The plaintiff brought a suit before a justice of the peace returnable at nine o'clock in the forenoon of a certain day; the defendant brought a suit against the plaintiff before a justice in a town in another county where he resided, returnable at six o'clock in the morning of the same day. The plaintiff sent an attorney to appear in the defendant's suit, who moved for an adjournment, which was refused, and judgment rendered for the present defendant for the full amount claimed by him. The justice allowed two days for an appeal, but none was taken. The plaintiff attended before the justice in his own case, and the defendant appeared, and judgment was rendered for the plaintiff for \$48, after deducting \$18 allowed by the justice for the defendant's work. No appeal was taken from this judgment. Upon a suit afterwards brought by the plaintiff for a permanent injunction against the enforcing of the defendant's judgment, it was *held* that the facts furnished an equitable ground for such an injunction; that the plaintiff could not be regarded as guilty of such laches as to debar him from favorable consideration in a court of equity; that it was not a sufficient reason for refusing him equitable aid, that the defendant, after he had brought his suit, upon the plaintiff's request for an adjournment of it had offered to try it at an earlier day than the one named in the writ, and that the plaintiff had refused to do it; that the defendant had no equitable claim that the judgment should be allowed to stand for whatever might be justly chargeable for his work above the \$18 allowed by the justice in the plaintiff's suit, as he had a full opportunity to be heard in that suit, as well as to appeal, and if any loss resulted to him from the whole matter it was his own fault. *Kelly v. Wiard*, 49 Conn. 443.

A judgment debtor sought to enjoin

(g) *A mistake of fact* may be relieved against an injunction, as where, through such mistake, and without fault on the part of the debtor, a judgment for more than was due should be rendered against him.¹ In such case only the excess over what is justly due will be enjoined, leaving the judgment in full force as to the residue.²

(h) *Ignorance of the law of another State or nation* is ignorance of a fact, and, in a proper case, a mistake as to such law may be relieved against in equity.³

(i) *A mistake of the law, when joined to other considerations*, as surprise, misplaced confidence, ignorance of facts, etc., will be relieved by injunction or otherwise.⁴

the collection of the judgment to the amount of a draft which he had given as collateral security, but which the creditor had failed to collect. It had been accepted merely for accommodation and without funds to pay it, and the drawee had afterwards failed. The suit for injunction was brought more than seven years after it had gone to protest, and it was decreed that complainant pay the amount found due on the judgment. *Held*, that the objection that defendant should have been required to surrender the draft or, if it were lost, give an indemnifying bond had no force, especially if raised for the first time in the appellate court. *Compton v. Blair*, 46 Mich. 1.

Equity will not enjoin an action at law for laches if it be commenced within the period allowed by the statute of limitations. *Concord v. Norton, Trustee*, 16 Fed. Rep. 477.

1. *Chase v. Manhardt*, 1 Bland (Md.) 333. *Compare Falls v. Krebs*, 5 Md. 365.

Clerical Error.—When the purchaser of lands enters into possession under a conveyance in which they are misdescribed, and is afterwards sued in ejectment by his vendor, or the statutory action in the nature of ejectment, he may have the conveyance reformed, and the action at law enjoined pending the suit; but, if the vendor brings an action of unlawful detainer, in which title cannot be enquired into (Code, § 3704), the purchaser cannot enjoin the action or judgment while he seeks a reformation of the conveyance. *Murphree v. Bishop*, 79 Ala. 404.

Service of a writ returnable to the February term of the court, 1879, was made in October, 1878, by a copy left with the defendant, which by mistake described the term as that of October, 1879. The officer's return was in all respects regu-

lar, and the plaintiffs, not knowing of the mistake, took judgment by default at the February term. Upon a bill in equity brought by the defendant to restrain the plaintiffs from collecting the judgment, it was found that the petitioner knew, when the service was made upon him, that the next term of the court was in February, and that he purposely failed to appear; also that he was justly indebted to the respondents to the amount of the judgment. *Held*, that he had no claim for equitable relief. *Gallup v. Manning*, 48 Conn. 25; *Chase v. Manhardt*, 1 Bland (Md.) 333.

2. Since the above decision was rendered the practice in many of the states has been modified so as to permit the filing of a petition in the *same case* stating the facts and praying for a modification of the judgment. Where such statutes exist it is probable that the special procedure must be followed and that a new action to enjoin the excess would not be sustained.

3. *Haven v. Foster*, 9 Pick. (Mass.) 112.

4. *Pusey v. Deshoure*, 3 P. Wms. 316. In this case a daughter accepted a legacy of £10,000 left by her father and thereby released her orphanage part which amounted to £40,000. Relief was granted to her upon the ground that prior to her election her brother, the executor, had not fully informed her as to the facts—in other words, the case was one of misplaced confidence and ignorance of the law.

In some states a mistake of law is relieved against. *Lowndes v. Chisden*, 2 McCord (S. Car.) Ch. 455; *Hopkins v. Mazyck*, 1 Hills (S. Car.) Ch. 242; *Fitzgerald v. Peck*, 4 Litt. (Ky.) 125; *Drew v. Clarke, Cooke* (Tenn.) 374; *Lammot v. Bowley*, 6 Harr. & J. (Md.)

(j) *Ignorance of material facts*, constituting a defence to an action at law, will, where the defendant has not been negligent, be sufficient to authorize an injunction against the judgment.¹

(k) *Fraud*.—A judgment, whether foreign or domestic, may be set aside in equity for fraud.² Though courts of equity and courts of law have a concurrent jurisdiction in cases of fraud, yet if a suit be first brought in a court of law, in which the question of fraud may be tried and determined, the party injured by fraud must make his defence there; and if he neglect to do so, the court of equity has no jurisdiction to relieve him.³

A judgment will be enjoined or a new trial granted where the defendant is prevented from making his defence by the false representations of the plaintiff, or those having control of the case, that it will not be tried or will be dismissed, or makes other

500; *Gilbert v. Gilbert*, 9 Barb. (N. Y.) 534; *Arthur v. Arthur*, 10 Barb. (N. Y.) 9.

1. *Hubbard v. Hobson*, Breese (Ill.) 147; *Brown v. Luehers*, 79 Ill. 575; *Inglehardt v. Lee*, 4 Md. Ch. 514. *Ludington v. Handley*, 7 W. Va. 269; *Ferrell v. Allen*, 5 W. Va. 43; *Rust v. Ware*, 6 Gratt. (Va.) 50; *Billups v. Sears*, 5 Gratt. (Va.) 31. *Hickerson v. Raiguel*, 2 Heisk. (Tenn.) 329. *Baltzell v. Randolph*, 9 Fla. 366. *Compare Crim v. Handley*, 4 Otto (U. S.) 652; *Cairo etc. R. Co. v. Titus*, 12 C. E. Green (N. J.) 102; *Campbell v. Briggs*, 3 Rob. (La.) 110.

Equity will not enjoin a judgment at law on the ground of after discovered evidence, when such evidence relates to a fact in issue on the trial at law, and in support of which testimony was offered on the former trial, unless it is of such a conclusive character that if it had been offered it should have produced a different result. *Bloss v. Hull*, 27 W. Va. 503.

In many of the states the statute provides for a new trial upon the ground of newly discovered evidence. This provision does not divest a court of equity of the power to grant a new trial where the facts will justify such procedure. *Hone v. Queen*, 4 Neb. 108; *Colyer v. Langford*, 1 A. K. Marsh (Ky.) 237; *Letz v. Heirs*, 4 Ohio 493; *Duncan v. Lyon*, 3 Johns. (N. Y.) Ch. 356; *Horn v. Queen*, 5 Neb. 472.

2. *Payne v. O'Shea*, 84 Mo. 129. *Pearce v. Olney*, 20 Conn. 544; *Burkee v. Smith*, Walk. (Mich.) 327; *Carrington v. Holabird*, 17 Conn. 530; *Kent v. Ricards*, 3 Md. Ch. 392; *Greene v. Haskell*, 5 R. I. 447.

When the vendor by his deed "covenants with the vendee for general warranty of title, and that he is seized of the land conveyed in fee simple, and has good right and title to convey the same, and that the same shall not be subject to any liability from incumbrances now thereon," and there are recorded judgment liens on the land at the time of the conveyance, a court of equity will not enjoin or stay the collection of a judgment against the vendee for the purchase money of the land, unless the bill shows that the vendor has no other lands sufficient to satisfy such judgment liens, and that he is unable to pay them because of his pecuniary condition. *Wamsley v. Stalnaker*, 24 W. Va. 214.

3. *Haden v. Garden*, 7 Leigh (Va.) 157; *Meem v. Rucker*, 10 Gratt. (Va.) 506. *Evans v. Taylor*, 28 W. Va. 184. *Lacey v. Admr.*, 1 Ohio 256. The fraud must be distinctly shown. *Jones v. Thacher*, 48 Ga. 83.

The simple fact that a party or his assignee sues on a false claim or one which he knows had been previously adjudged invalid by a competent court, is not such a fraud upon the rights of the party thus sued, as entitles him to enjoin the prosecution of an action on such claim in a court of equity. *Evans v. Taylor*, 28 W. Va. 184.

An injunction will not be granted to restrain the holder of a legal title to land from proceeding at law to recover possession, when an apparently equitable title was passed in fraud of creditors, and the complainant who claims under it have knowledge of and participated in the fraud. *Powers v. Canda*, 40 N. J. Eq. 602.

false representations, and the defendant, relying thereon, fails to make his defence.¹

1. *Keelan v. Elston*, 22 Neb. 310; *Pearce v. Olney*, 20 Conn. 544; *Hinckley v. Miles*, 15 Hun (N. Y.) 170; *Scriven v. Hursh*, 39 Mich. 98; *Penetrance v. Edwards*, 17 Fla. 140; *McLeran v. McNamara*, 55 Cal. 508; *Miller v. Harrison*, 32 N. J. Eq. 76; *Higgins v. King*, 3 Barb. (N. Y.) 616; *Powers v. Butler*, 3 Greene, Ch. (N. J.) 465; *Holland v. Trotter*, 22 Gratt. (Va.) 136; *Brooks v. Whitson*, 7 S. & M. (Miss.) 513; *How v. Mortell*, 28 Ill. 479; *Perry v. Siter*, 37 Mo. 273; *Harris v. Western etc. R. Co.*, 59 Ga. 830; *Markham v. Angier*, 57 Ga. 43; *Baker v. Redd*, 44 Iowa 179; *Kent v. Ricards*, 3 Md. Ch. 392; *Iglehart v. Lee*, 4 Md. Ch. 514; *Katz v. Moore*, 13 Md. 566; *Webster v. Skipwith*, 26 Miss. 341; *Greene v. Haskell*, 5 R. I. 447; *Huggins v. King*, 3 Barb. (N. Y.) 616; *Briesch v. McCauley*, 7 Gill (Md.) 189; *Farmers' etc. Bank v. Ruse*, 27 Ga. 391; *Moore v. Gamble*, 9 N. J. Eq. 246; *Clute v. Potter*, 37 Barb. (N. Y.) 199; *Gotlin v. Kilpatrick*, 1 Law Rep. (N. Car.) 534; *Jones v. Kilgore*, 2 Rich. (S. Car.) Eq. 63; *Pearce v. Chastaire*, 3 Ga. 226; *Meek v. Howard*, 18 Miss. (10 Smed. & M.) 502; *Brandon v. Green*, 7 Humph. (Tenn.) 130; *Bumley v. Rice*, 21 Tex. 171. *Compare Noble v. Butter*, 25 Kan. 645.

Where a defendant was liable as an accommodation endorser upon a promissory note, and after maturity thereof made a payment thereon to the holder, and then, before judgment, pending suit to recover on such note, at the request of the plaintiff, paid him several hundred dollars in addition, upon his promise to credit the amounts upon the claim and take judgment for only the balance, and the said defendant, relying upon such promise, made no answer and interposed no defence, and the plaintiff, notwithstanding the receipt of the money and the agreement, took judgment for the whole amount of the face of the note, *held*, as the defendant was prevented from taking proper steps to have the payments credited on the note in the suit by the fraudulent assurances of the plaintiff made pending the litigation, and as thereby an unfair and unconscionable advantage was taken in depriving him of just credits, a court, in the exercise of its equitable jurisdiction, may interfere by injunction to stay the

collection of the balance of the judgment after payment of all save a sum equal to the amounts paid before judgment and improperly incorporated in it, and in this way prevent the guilty party from profiting by his own fraud. *Hentig v. Sweet*, 27 Kan. 172. *Compare Risher v. Roush*, 2 Mo. 77. *Shricker v. Field*, 9 Iowa 366. *Hubbard v. Martin*, 8 Yerg. (Tenn.) 498. *Meem v. Rucker*, 10 Gratt. (Va.) 506; *Richmond etc. R. Co. v. Shippen*, 2 Patt. & H. (Va.) 327.

A judgment will not be enjoined for facts which existed at the time of its rendition, merely because the defendant was ignorant of them. It must appear that his ignorance was not due to any lack of diligence on his part, or that it was caused by the act of the opposite party. *Carolus v. Koch*, 72 Mo. 645.

B makes a note which is endorsed by M, and discounted by bank. For non-payment at maturity, note is protested and suit brought on it. Maker makes partial payment, and payment of balance is extended to a given day. Payment not being made at said day, suit is again brought. Endorser is a non-resident, but is induced to accept service of process, without information of the partial payment and extension of time, and judgment is had. Afterwards with knowledge of the partial payment, but in ignorance of the extension of time, endorser executes trust deed to secure the balance. Trustee advertises trust property for sale; endorser files bill setting up foregoing facts and sale is enjoined. *Held*, that endorser's failure to defend successfully at law resulting from no laches on his part, but from circumstances entitling him to equitable relief, the judgment and the trust deed should be perpetually enjoined. Having executed the trust deed in ignorance that he had been released as endorser by the extension of time, he cannot be considered as having thereby waived the defence. *Dey v. Martin*, 78 Va. 1. Where one person loans money for another upon a note and mortgage, and includes usurious interest in the note and mortgage; and the agent takes the note and mortgage in his own name and endorses the same to the lender, in accordance with an agreement previously made between the agent and the lender that the note and mortgage

(*l*) *Independent complaint*.—An injunction will not be granted on an independent complaint to stay proceedings under a bill or decree in the same court, whether the application is made by parties, privies, or a stranger to the original suit.¹ The remedy is by petition in the original action.²

(*m*) *Failure to Summon the Defendant*.—A judgment will be enjoined where it was rendered against the defendant without service of process, so that he was ignorant of the pendency of the action against him.³ Nor will the court enquire whether or

should be so executed and endorsed; and this agreement was made for the purpose, among others, that the lender should get the benefit of the usurious interest included in the note and mortgage, and also if the note and mortgage were not paid at maturity, that the lender should get the benefit of protest fees and damages; and the note and mortgage were not paid at maturity, and a suit was commenced by the direction of both the lender and the agent, against the maker of the note and mortgage, also making the agent a party defendant; and it was agreed between the agent and the attorney for the plaintiff that the agent should make no defence to the action, and that when the time came for rendering judgment upon the note and mortgage, the attorney would dismiss the action as to the agent, and not have any judgment rendered against him, but afterward the judgment was in fact rendered against the agent, as well as against the payee and mortgagee of the note and mortgage; and afterwards, but on the same day on which the judgment was rendered, the attorney told the agent that the action had been dismissed as to the agent, and that no judgment was rendered against him; and the attorney having formerly been a law partner of the agent, and the agent believing him and relying upon what he said, gave no further attention to the matter; but afterwards the agent, who was still the agent of the lender, ordered an execution to be issued on the judgment, which was done, and the mortgaged property sold thereunder, and the agent bid it in for the plaintiff and afterwards had the sale confirmed and a sheriff's deed executed to the plaintiff for the mortgaged property; and the mortgaged property did not sell for enough to pay the entire judgment, but left a balance due thereon of some \$300 or \$400; and the agent still did not know that the judgment was rendered against

him, and did not ascertain that fact for about three years after the judgment had been rendered; and after more than three years had elapsed, the plaintiff ordered an execution to be issued on the judgment for the balance due thereon; and the sheriff, by virtue of such execution, levied upon and seized the property of the agent; and he then commenced an action against the plaintiff and the sheriff to restrain them from collecting said execution and judgment. *Held*, that under the circumstances of the case the action cannot be maintained. *Noble v. Butler*, 25 Kan. 645.

1. *Smith v. American etc. Co.*, 1 Clark (N. Y.) Ch. 307. *Lane v. Clark*, 1 Clark (N. Y.) Ch. 309.

2. *Lane v. Clark*, 1 Clark (N. Y.) Ch. 309; *Smith v. American etc. Co.*, 1 Clark (N. Y.) Ch. 307. There are many exceptions to this rule, however.

3. *Ridgeway v. Bank of Tenn.*, 11 Humph. (Tenn.) 523.

A judgment rendered against a party not before the court is invalid, and a court of equity may enjoin the execution of such judgment. Where the judgment is voidable merely, a different rule applies according to the equities of the case. *San Juan etc. Co. v. Finch*, 6 Colo. 214; *Campbell v. Edwards*, 1 Mo. 324.

A personal judgment entered without notice to the defendant is rendered without jurisdiction, and is consequently void; that an officer's return of service of original process may be impeached in a direct proceeding after judgment, where the return states facts which do not come within the personal knowledge of the officer; that an action to perpetually enjoin a judgment is a direct attack upon the judgment, and that such an action may be maintained to enjoin the enforcement of a void judgment, appearing to be valid and regular upon its face. *McNeill v. Edie*, 24 Kan. 108.

A person in possession of real estate

not the defence could have been made at law, as no opportunity to defend was given.¹

(n) *Proceedings in Other Courts.*—As an injunction, when its object is to restrain proceedings at law, is addressed to the parties, and not the court, therefore, where the parties, or the one sought to be enjoined, is within the jurisdiction of a court of equity, he may, in a proper case, be enjoined from instituting or proceeding in an action in another court.² And while an action

as owner may obtain an injunction to restrain others from dispossessing him by means of a writ of *habere facias possessionem* issued by a chancery court without any notice to him in a suit, in which he was no party, where he does not claim the land under any party to the suit but by a title paramount and adverse to them. *Williamson v. Russell*, 18 W. Va. 612.

A judgment, in an action of ejectment against a non-resident having a tenant in possession, the latter not being served with process and there being publication as to the non-resident defendant, who had no knowledge of the suit, and who, being the mere legal holder of the title, during the pendency of the suit, conveyed to the beneficial owner, who was also without notice, is void; and equity will, at the instance of the beneficial owner, restrain the execution of a writ of possession against the non-resident defendant. *The Charter Oak Life Ins. Co. v. Cummings*, 90 Mo. 267.

A judgment rendered against a party without notice will usually be set aside, and its collection enjoined, by chancery; but not if it appears that party holding the judgment has a valid claim whereon it was rendered, to which there is no defence. But where the cause was presented upon a demurrer to the petition, which alleged the facts showing the invalidity of the judgment, without admitting the indebtedness on which it was rendered, the demurrer was properly overruled, and, defendants refusing to plead further, the judgment was properly set aside and its collection enjoined. In such case plaintiff could not be compelled to pay the debt as a condition to the relief asked, because, as the case was presented to the court, it did not appear that he owed defendants anything. *Gerrish v. Hunt*, 66 Iowa 682.

Offer to Pay Void Judgment.—A condition precedent, required by courts of equity before they will enjoin the exe-

cution of a judgment at law void for failure to serve the defendant with process, is that if relief is granted a different result will be attained than that already decreed by the void judgment. But the rule and the reason for it entirely fail when the defendant comes into court with the money and offers to pay the judgment as a condition precedent to its being set aside. *Hanswirth v. Sullivan*, 6 Mont. 203.

1. *Owens v. Ranstead*, 22 Ill. 161; *Harshey v. Blackmarr*, 20 Iowa 1; *McNeil v. Edie*, 24 Kan. 108; *Blakeslee v. Murphy*, 44 Conn. 188; *Crafts v. Dexter*, 8 Ala. 767; *Stubbs v. Leavitt*, 30 Ala. 352; *Bell v. Williams*, 1 Head, 229; *Ryan v. Boyd*, 33 Ark. 778; *Walker v. Gilbert*, *Freem. (Tenn.)* Ch. 85; *Compare Graham v. Roberts*, 1 Head. (Tenn.) 56; *Johnson v. Jones*, 2 Neb. 126; *Ridgway v. Bank of Tenn.*, 11 *Humph. (Tenn.)* 523.

Pleading.—Though judgment may have been rendered in a proceeding wherein the writ or service of process on the party may have been illegal, equity will not interfere to set the judgment aside unless it is made to appear that the result would be different on another trial from that already reached by the judgment. To make this appear, when the remedy is sought by injunction, the petition should state facts which would constitute a good defence to the original action. The facts must be stated, and not the conclusions of the pleader, and when conclusions alone are given, though sworn to in the application for injunction, the writ should not issue. *Sharp v. Schmidt*, 62 Tex. 263; *Schleicher v. Markward*, 61 Tex. 102.

2. *Cranston v. Johnston*, 3 Ves. 182; *Carron v. McClaren*, 5 H. L. Cas. 416; *Harrison v. Gurney*, 2 Jac. & W. 563; *Portarlington v. Soulbey*, 3 Myl. & K. 104; *McLaren v. Stainton*, 16 Beav. 279; *Mackintosh v. Ogilvie*, 4 T. R. 193; *Bushley v. Munday*, 5 Madd. R. 297; *Bunbury v. Bunbury*, 3 Jur. 648; *Beck-*

is pending in a court of equity which will dispose of all the matters in controversy between the parties, it may restrain proceedings in other courts in respect to the same subject matter.¹

The English rule is sustained by the clear weight of authority in this country,² although the cases are not altogether harmoni-

ford *v.* Kemble, 1 Sim. & Stu. 7; Bowler *v.* Orr, 1 Y. & C. 464; Wilson *v.* Joseph, 107 Ind. 490.

After the court of chancery had appointed a receiver for an insolvent railroad corporation the petitioner began an action at law against the corporation to recover damages for personal injuries sustained through the corporation's negligence. On demurrer thereto the supreme court allowed him to amend by inserting the receiver's name in place of the corporation's in his pleadings, and ordered the chancellor to consent to the amendment and to the continuance of the suit by the petitioners. *Held*, that the court of chancery could on petition restrain the receiver from pleading in the action at law the statute of limitations, which had become a bar between the beginning of that action and the filing of this petition. *Lehigh etc. Co. v. Central R. Co.*, 42 N. J. Eq. 591.

The defendant, claiming that he had never received compensation for a strip of land used by complainant, brought ejectment therefor; thereupon complainant obtained a preliminary injunction to stay the action on the ground that it had the legal title to the land, but being unable to establish it prayed a discovery, and it also insisted that if it should be unable to establish its legal title it had an equitable title which equity ought to protect by decreeing that it retain possession of the premises, and consummate its right thereto by awarding just compensation to defendant. *Held*, that although the discovery had been made by defendant's answer the injunction should nevertheless be retained, on the ground that the possession of the premises was originally taken with the knowledge of defendant, and continued for about twenty years as part of the complainant's road with defendant's acquiescence, during which time various negotiations have been had between the parties as to his compensation, and (the land is indispensable to complainant) that complainant may, if necessary, by proceedings under its charter condemn the land, or if it has not the power to do so

may make compensation therefor, to be ascertained and awarded to defendant in this court. *Paterson etc. R. Co. v. Kamlah*, 42 N. J. Eq. 93.

An endorsee of a bill of exchange was enjoined in England from bringing an action thereon in the courts of Ireland. *Portarlington v. Soulby*, 3 Myl. & K. 104. And a creditor who had obtained a decree against an estate in England was enjoined from bringing suit against the same estate in Ireland. *Beauchamp v. Huntley*, Jac. 546; *Wedderman v. Wedderman*, 2 Beav. 208.

1. *Beckford v. Kemble*, 1 Sim. & Stu. 7. Where, however, it appears that the questions involved in the other suit or suits can be separated from the first and can be more conveniently litigated in the foreign court, the parties will not be enjoined. *Jones v. Giddes*, 1 Ph. 724.

At about the time of the commencement of an action to compel specific performance of an alleged agreement to sell land, brought by one who was in possession claiming under such agreement and had made improvements, the vendor conveyed the land to another person, and a lessee of the latter afterwards took forcible possession of the premises, and when the defendant attempted to go thereon brought an action of trespass against him in justice's court. *Held*, that an injunctive order was properly granted restraining said grantee and his lessee from interfering with plaintiff's possession and from further prosecuting said action of trespass, and from bringing other similar actions until the determination of the action for specific performance. *Hadfield v. Bartlett*, 66 Wis. 635.

2. *Bank v. R. & B. R. Co.*, 28 Vt. 470; *Vermont etc. R. Co. v. Vermont etc. R. Co.*, 46 Vt. 792; *Pearce v. Olney*, 20 Conn. 543; *Hays v. Ward*, 4 Johns. (N. Y.) Ch. 123; *Keyser v. Rice*, 47 Md. 203; *Snook v. Snetzer*, 25 Ohio St. 516; *Engel v. Scheuerman*, 40 Ga. 206; *Vail v. Knapp*, 49 Barb. (N. Y.) 299; *Field v. Holbrook*, 3 Abb. Pr. (N. Y.) 377; *Thompson v. Norris*, 11 Abb. (N. Y.) N. Cas. 163; s. c., 63 How. (N. Y.) Pr. 424; *Dehon v. Foster*, 4 Allen (Mass.) 545; s. c., 7 Allen 57.

ous on that subject. The general rule is, that a court of equity in one State or country having jurisdiction of the proper parties, will, where the facts are sufficient, enjoin the parties from instituting actions in other States or countries.¹

1. *Pickett v. Ferguson*, 45 Ark. 177; *Engel v. Scheuerman*, 40 Ga. 206; *Hines v. Rawson*, 40 Ga. 376; *Zimmerman v. Franke*, 34 Kan. 650; *Mo. Pac. R. Co. v. Maltby*, 34 Kan. 125; *Wilson v. Joseph*, 107 Ind. 490; *Pindell v. Quinn*, 7 Ill. App. 655; *Snook v. Snetzer*, 25 Ohio St. 516; *Baltimore etc. R. Co. v. May*, 25 Ohio St. 347; *Keyser v. Rice*, 47 Md. 203; *Pearce v. Olney*, 20 Conn. 543; *Cunningham v. Butler*, 142 Mass. 47; *Dehon v. Foster*, 4 Allen (Mass.) 545; *Vail v. Knapp*, 49 Barb. (N. Y.) 299; *Clafin v. Hamlin*, 62 How. Pr. (N. Y.) 284; *Kittle v. Kittle*, 8 Daly (N. Y.) 72; *Erie R. Co. v. Ramsey*, 45 N. Y. 637; *Dobson v. Pearce*, 4 Duer (N. Y.) 142; s. c., 12 N. Y. 156; *Great Falls etc. Co. v. Worster*, 23 N. H. 462; *Bank v. Rutland etc. R. Co.*, 28 Vt. 470; *Vermont etc. R. Co. v. Vermont etc. R. Co.*, 46 Vt. 792; *Dinsmore v. Neresheimer*, 32 Hun (N. Y.) 204; *Hays v. Ward*, 4 Johns. (N. Y.) Ch. 123; *Massie v. Watts*, 6 Cranch (U. S.) C. Ct. 148; *Fisk v. Union Pac. R. Co.*, 10 Blatchf. (U. S.) 518; *French v. Hay*, 22 Wall. (U. S.) 250; *Carron Iron Co. v. McLaren*, 5 H. L. Cas. 438. *Compare Williams v. Ayrault*, 31 Barb. (N. Y.) 364; *Carroll v. Farmers' etc. Bank*, Harr. (Mich.) 197; *Mead v. Merritt*, 2 Paige (N. Y.) 402; *Bicknell v. Field*, 8 Paige (N. Y.) 440; *Harris v. Pullman*, 84 Ill. 20; *Evans v. Taylor*, 28 W. Va. 184; *Cole v. Young*, 24 Kan. 435.

"In a case of fraud or trust or of contract the jurisdiction of a court of equity is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree." *Massie v. Watts*, 6 Cranch (U. S.) C. Ct. 148 (C. J. Marshall). See *Great Falls Mfg. Co. v. Worster*, 23 N. H. 462.

"In exercising this authority courts proceed not upon any claim of right to control or stay proceedings in the courts of another State or country, but upon the ground that the person upon whom the restraining order is made resides within the jurisdiction and is in the power of the court issuing it. . . They do not pretend to direct or control the foreign court, but, without

regard to the situation of the subject matter of dispute, they consider the equities between the parties and decree *in personam* according to those equities and enforce obedience to their decrees *in personam*." *Foster v. Vassall*, 3 Atk. R. 589; *Toller v. Carteret*, 2 Vern. 494; *Snook v. Snetzer*, 25 Ohio St. 516; *Penn. v. Ld. Baltimore*, 1 Ves. Sr. 444; *Portarlington v. Soulbby*, 2 M. & R. 104.

No such restraining order will be made simply because the litigation is in a foreign state, or to enforce a mere legal right, even though such right be granted by the statutes of this state, but only where there is a manifest equity which compels such restraining order. *Cole v. Young*, 24 Kan. 435.

Attachment in Another State.—Injunction will lie to restrain a resident of Indiana from prosecuting an attachment proceeding against another resident, in the courts of another State, in violation of section 2162, R. S. 1881, which makes it an offence to send a claim against a debtor out of the State for collection, in order to evade the exemption laws. *Wilson v. Joseph*, 107 Ind. 490; *Uppinghouse v. Mundel*, 103 Ind. 238.

If A, a citizen of Massachusetts, with knowledge that his debtor residing here has stopped payment, and anticipating that proceedings in insolvency will be begun against the debtor, makes an assignment of his claim to a citizen of another State, without consideration, and the latter, before proceedings in insolvency are begun against the debtor, brings an action upon the claim in said State and attaches property of the debtor there, this court will, on a bill in equity, by the assignee in insolvency of the debtor, restrain A from prosecuting the action to judgment if A has control of such action. *Cunningham v. Butler*, 142 Mass. 47; s. c., 56 Am. Rep. 657.

A and B were residents of Kansas. A owed B a just debt. He went into Missouri, taking certain personal property with him. This property was exempt by the laws of Kansas. B commenced an action in Missouri by attachment before a justice of the peace seizing

this property. *Held*, that upon the mere showing that the particular property seized was exempt, and without any showing as to A's liability to pay, or his possession of none save exempt property, or as to whether the debt was fraudulently contracted or not, or as to any fraudulent disposition of property since the contraction of the debt, a court of equity in Kansas will not restrain the prosecution of said action in Missouri. *Cole v. Young*, 24 Kan. 435.

In *Dehon v. Foster*, 4 Allen (Mass.) 545, it was *held* that this court had jurisdiction in equity upon a proper case made, to enjoin a citizen of Massachusetts from availing himself of an attachment of personal property in another State, in an action against a debtor who was insolvent under the laws of Massachusetts, and thus preventing the same from coming to the hands of the assignee; and that it was no objection that the action was commenced before the institution of proceedings in insolvency, if this was done with a knowledge that such proceedings were about to be instituted, and with a view to obtain a preference. In the same case, *Dehon v. Foster*, 7 Allen (Mass.) 57, it was *held* that the equitable right of the assignees, was paramount, unless some valid claim or lien existed on the funds which, under the laws of the foreign State, would divert them from the assignees if the defendants were compelled to abandon the attachment of them in the courts of that State.

See case *Lawrence v. Batcheller*, 131 Mass. 504.

A sues B before a justice in West Virginia, and a final judgment is rendered by such justice for the defendant; while said judgment remains in full force, A assigns the claim on which said action was brought to C, who sues B on it before a justice in the State of Ohio, and obtains a judgment thereon; C then assigns said Ohio judgment to E, who institutes an action on the same in West Virginia before the justice who rendered the said first mentioned judgment for the defendant. *Held*, a court of equity has no jurisdiction to enjoin the prosecution of said last mentioned action, because, by the statutes of the State of Ohio, the defendant in said Ohio judgment had a plain and adequate legal defence both before the justice who tried the action and by appeal as of right to the court of common pleas, where the case would

be tried *de novo*. *Evans v. Taylor*, 28 W. Va. 184.

A, B and C were residents and citizens of New York. A, being indebted to both B and C, mortgaged certain personal chattels then in Illinois, to B. Before the mortgage could be recorded in Illinois, or the property delivered there, one of which acts is essential by the laws of Illinois to the validity of the mortgage as against third parties, although not by the laws of New York, C took an attachment out from one of the courts of Illinois, a proceeding *in rem*, and under the laws of that State, in due form levied on and sold the property. B did not make himself a party to this suit in attachment, although he had notice of it, and, by the law of Illinois, a right to make defence to it, but, after its termination, brought suit in New York against C for taking and converting the chattels. C pleaded in bar the proceedings in attachment and the judgment obtained in Illinois. It was *held* in the supreme court of the United States, reversing the decision of the supreme court of New York, that, in order that the "full faith and credit" required by the constitution should be given to the judicial proceedings in the State of Illinois, the judgment of the court there, that the personal property there situated was subject to this process of attachment, and that the proceeding in attachment took precedence of the prior unrecorded mortgage from A, was binding elsewhere; that as the effect of the attachment, judgment, levy and sale was to protect C, if sued in Illinois, for the property thus acquired, it would protect him when sued in the court of another State for the same transaction, if he justified in the same manner; that the fiction of law, that the domicile of the owner draws to it his personal estate, yields whenever, for the purposes of justice, the actual situs of property should be examined into; that a title acquired under the attachment laws of a state, and held valid there, would be held valid in another state, even if all parties interested in the controversy were citizens of such other state; and that thus, as an attachment of personal property in Illinois would take precedence of an unrecorded mortgage executed in another state where record was not necessary, it would do so though the owner of the chattels, the attaching creditor, and the mortgage creditor were all residents of such

(o) *Exception to the Rule.*—The United States courts are prohibited by statute from enjoining proceedings in the State courts.¹

(p) *Actions at Law Under the Codes.*—In the year 1847, the State of New York adopted a code of civil procedure which unites the jurisdiction of law and equity in all tribunals having common law jurisdiction, and permits an equitable defence to an action at law. This procedure, with various modifications, has been adopted in a majority of the States and territories; and a system, very similar, became a law in England in 1854.

These codes recognize the separate jurisdiction of courts of law and equity, while they greatly enlarge the equity powers of the courts by permitting a defendant to interpose an equitable defence to a legal action. This defence in many of the States may not only bar the plaintiff's cause of action,² but will entitle the defendant to affirmative relief.³

other state. *Green v. Van Buskirk*, 5 Wall. (U. S.) 307.

A general assignment for the benefit of creditors had been made under the general assignment act of New York (Laws of 1877) on March 1, 1881. It was not recorded in Pennsylvania until March 18, where it could only become operative by record so as to affect any *bona fide* purchaser, creditor, etc. Previously to the 18th, the defendant had brought suit in Pennsylvania, and attached property there. He was himself a citizen of New York, as were the debtor and his assignee. It was held, in a proceeding brought against the creditor in New York, that the lien he had acquired in Pennsylvania was saved from the operation of the assignment; that he had the same right to enforce payment of his claim out of the debtor's property that a resident creditor in Pennsylvania had; and that he would not, by any order, be restrained from pursuing it. *Warner v. Jaffray*, 96 N. Y. 248. DEVENS, J., in speaking of this case, *Cunningham v. Butler*, 142 Mass. 47, says: "In *Warner v. Jaffray*, 96 N. Y. 248, the assignment was of an entirely different nature from that made in proceedings in insolvency, such as is found in the case at bar. The property of the debtor was not taken for distribution by the law, but by his own voluntary act. The assignment did not operate on the claims of the creditors, or place them under any obligations to join in it. They were entirely free to act, could refuse to have anything to do with it, could retain their claims, and enforce them after-

wards against the debtor, or immediately against any property not covered by the assignment. The assignee was a trustee only to the extent that the creditors chose to accept him as such. As he violated no rights of other creditors in pursuing any property not covered by the assignment, and was bound in no way thereby, he could not properly have been restrained from seeking his remedy, wherever there was attachable property which the assignment did not reach."

Rogers v. Cincinnati, 5 McLean (U. S.) 337; *Driggs v. Wallcott*, 4 Cranch (U. S.) 179; *Bank v. Skelton*, 2 Blatchf. (U. S.) 14; *Chaffin v. St. Louis*, 4 Dill. (U. S.) 19; *Moore v. Holliday*, 4 Dill. (U. S.) 52; *Orton v. Smith*, 18 How. (U. S.) 263; *Campbell's Case*, 1 Abb. (U. S.) 185; *Carroll v. Farmers' etc. Bank*, Harr. (Mich.) 197.

1. "Nor shall a writ of injunction be granted to stay proceedings in any court of a state." 1 Stat. at Large 335.

A state court will not restrain an action in a federal court, *Riggs v. Johnson Co.*, 6 Wall. (U. S.) 166; *U. S. v. Keokuk*, 6 Wall. (U. S.) 514; *McKim v. Voorhies*, 7 Cranch (U. S.) 279; *Coster v. Griswold*, 4 Edw. Ch. (N. Y.) 364; *Schuyler v. Pelissier*, 3 Edw. Ch. (N. Y.) 203; *Thompson v. Norris*, 63 How. Pr. (N. Y.) 418. *Compare Hines v. Rawson* 40 Ga., 356; s. c., 2 Am. Rep. 581.

2. In *Jeffs v. Day*, L. R., 1 Q. B. 372, it was held that such equitable defences only were admissible as would bar the plaintiff's action.

3. In *Dobson v. Pearce*, 12 N. Y.

(*q*) *Multiplicity of Suits*.—Under the new procedure an injunction may still be necessary where the entire controversy should be settled in one action, and it is necessary to restrain other actions in respect to the same subject matter in other courts.¹

(*r*) *Where Additional Parties Are Required*.—In those States where the new procedure fails to provide for bringing in additional parties in order that there may be a complete determination of all matters in controversy in an action, a defendant may find it necessary to set up the facts constituting his defence against all persons interested by a bill for an injunction.²

156, 168, it is said: "An equitable defence to a civil action is now as available as a legal defence. The question now is, ought the plaintiff to recover? And anything which shows that he ought not is available to the defendant, whether it was formerly of equitable or legal cognizance." See also *Crary v. Goodman*, 12 N. Y. 266; *Seely v. Engell*, 13 N. Y. 542; N. Y. Ins. Co. v. Nat. etc. Co., 14 N. Y. 85; *Despard v. Walbridge*, 15 N. Y. 374; *Chase v. Peck*, 21 N. Y. 581; *Wisner v. Ocum-paugh*, 71 N. Y. 113, 117; *Maxwell v. Campbell*, 45 Ind. 360; *Holland v. Johnson*, 51 Ind. 346; *Hammond v. Perry*, 38 Iowa 217; *Carpenter v. Oakland*, 30 Cal. 439; *Cannon v. Johnson*, 20 Mo. 108; *Kennedy v. Daniels*, 20 Mo. 104; *Hubble v. Vaughn*, 42 Mo. 138; *Harrington v. Fortner*, 58 Mo. 468; *Ballinger v. Lantier*, 15 Kan. 608; *Hackett v. High*, 28 Iowa 539; *Walker v. Kynett*, 32 Iowa 524; *Struman v. Robb*, 37 Iowa 311; *N. Eastern R. Co. v. Barrett*, 65 Ga. 601. In all cases the defendant must plead the facts constituting his defence and the court will adopt the relief to the facts pleaded and proved. This is not the place to enter into a discussion of the new procedure, but simply to call attention to changes made by it and the consequent modification of the rules of equity in enjoining judgments recovered at law. In the states mentioned the power, while it continues to exist in certain cases, will rarely be exercised except in two classes of cases.

Where, after the commencement of an action in the superior court of New York city to recover the amount of interest coupons upon bonds secured by a trust mortgage, the trustee commenced an action in the supreme court to foreclose the mortgage for the benefit of all the bondholders who, includ-

ing the plaintiff in the former action, were made parties, *held*, that the supreme court had the power in its discretion to stay the proceeding in the superior court suit until the determination of the foreclosure suit. *Cushman v. Leland*, 93 N. Y. 653.

1. *Erie R. Co. v. Ramsey*, 45 N. Y. 637.

In *Erie R. Co. v. Ramsey*, 45 N. Y. 637, *Ramsey* brought an action against the railway company in the sixth judicial district. The company thereupon brought an action against *Ramsey* in the first district, and obtained an injunction, which was violated by him. *FOLGER, J.*, states the rule as follows: "The suit to bring to one judgment all the actions must be in one of the courts, and to make that suit effectual to the end sought the power must be in that court to enjoin the parties to the suits in the co-ordinate court from proceeding therein. An instance of the exercise of one branch of this power sanctioned by this court is found in the case of *New York etc. R. Co. v. Schuyler*, 17 N. Y. 592." In the case cited in the above opinion the officers of the railway company had issued a large amount of spurious stock which had the appearance of being genuine. This stock was sold and held by three hundred and twenty-six separate persons, many of whom had commenced suits on the stock against the company. The company thereupon brought an action against all the holders of such stock to enjoin the actions then pending and to determine the controversy. The action was sustained, although on the final hearing the stock was held valid and a separate judgment rendered in favor of each holder of such stock.

2. *Erie R. Co. v. Ramsey*, 45 N. Y. 637.

In many of the states the codes pro-

(s) *Criminal Prosecutions*.—Chancery will not interfere by injunction to prevent anticipated criminal prosecutions.¹ It is no part of the mission of a court of equity to administer the criminal law of the State, or to enforce the principles of religion and morality, except so far as it may be incidental to the enforcement of property rights, and perhaps other matters of equitable cognizance.²

30. Trustees.—A court of equity regards the *cestui que trust* as the real owner of the trust property, and entitled to all the rights of such ownership; therefore an injunction will be granted to prevent the trustee from encumbering the trust property by mortgage conveyance or contract, or in any other manner in violation of the trust.³ In actions to attach a trust to specific prop-

vide for bringing in additional parties when necessary to a complete determination of the case. Ohio, § 96; Iowa, § 2662; Indiana, § 63; Kansas, § 97; Nebraska, § 103. And even in those states where the code contains no such provision there is no doubt of the powers of the courts to bring the necessary parties before them.

Exceptions to the Rule.—Where plaintiffs recovered of the defendant by writ of replevin goods which he as sheriff had seized upon an attachment, *held*, that the defendant was not thereby barred from again seizing the goods upon other attachments placed in his hands by persons not parties to the replevin suit, and that a temporary injunction restraining him from such second seizure was properly dissolved upon further hearing. Such successive attachments are not vexatious in any such sense that chancery will interfere to restrain them. *Patterson v. Seaton*, 64 Iowa 115.

1. *New Home Sewing Machine Co. v. Fletcher*, 44 Ark. 139; *Saull v. Browne*, L. R., 10 Ch. 64; *Kerr v. Corporation of Preston*, 6 Ch. Div. 463; *Montague v. Dudman*, 2 Ves. Sen. 396; *Phillips v. Stone Mountain*, 61 Ga. 386; *Gault v. Wallace*, 53 Ga. 675; *Garrison et al. v. Atlanta*, 68 Ga. 64; 2 Story's Equity Jurisprudence (12 ed.), § 893; *Bispham's Prin. Equity*, § 424.

A court of equity will not exercise jurisdiction by way of injunction to stay proceedings in any criminal matters, or in any case not strictly of a civil nature. *Portis v. Fall*, 34 Ark. 375.

No power exists in any court of equity to interfere by injunction with the prosecution and punishment of crimes and offences in the courts of

common law. *Suess v. Noble*, 31 (Iowa) Fed. Rep. 855.

Contra Mayor of York v. Pilkington, 2 Atk. 302; *Turner v. Turner*, 15 Jur. 218.

2. *Cope v. District Fair Ass'n*, 99 Ill. 489; s. c., 39 Am. Rep. 30; *Saull v. Browne*, L. R., 10 Ch. 64; *Kerr v. Corporation of Preston*, 6 Ch. Div. 463; *Montague v. Dudman*, 2 Ves. Sen. 396; *High on Inj.*, § 23; *Sparhawk v. Union etc. Co.*, 54 Pa. St. 401.

An injunction will not lie at the suit of a stockholder in an incorporated fair association, restraining the company and its officers from permitting, for a pecuniary reward, gamblers to congregate and ply their vocation upon the grounds of the company during its annual exhibitions, where it does not appear, from the bill or otherwise, that the complainant or the company has thereby sustained some pecuniary injury or loss. *Cope v. District Fair Assoc.*, 99 Ill. 489; s. c., 39 Am. Rep. 30.

3. *Great W. R. Co. v. Birmingham Co.*, 2 Ph. 597; *Curtis v. Buckingham*, 3 V. & B. 168; *Spiller v. Spiller*, 3 Swanst. 556. *Winslow v. Wood*, 70 N. Car. 430; *Lee v. Pearce*, 68 N. Car. 76; *Harris v. Carstarphen*, 69 N. Car. 416; *Craycroft v. Morehead*, 67 N. Car. 422; *Ponton v. McAdoo*, 71 N. Car. 101; *McCorkle v. Brem*, 76 N. Car. 407; *Peebles v. Davie Co. Commrs.*, 82 N. Car. 385; *Williams v. Wadsworth*, 51 Conn. 277.

When a trustee is dealing with a *cestui que trust*, through an intermediate agency, and for an insignificant price he may be enjoined from obtaining a transfer of the trust estate. *Lee v. Pearce*, 68 N. Car. 76; *Harris v. Carstarphen*, 69 N. Car. 416. In case

erty, or to compel a conveyance of the legal title where there is danger of a transfer of the property in suit, an injunction will be granted.¹

Under the established jurisdiction of equity, in matters of trust, and its power to enforce by trustees the proper performance of their duties, the court may enjoin trustees from proceeding in disregard of the conditions necessary to the proper exercise of their authority, or from an improper use of such authority, there being no adequate remedy at law.²

of repugnancy in the testimony and when the fund is in possession of the court and there is a reasonable probability that a party is entitled to relief, the settled practice is to retain control over it until the rightful owner is ascertained. Nor will the court, upon an interlocutory application, pass upon the merits of the controversy, but leave them to be determined upon the final hearing. *Craycroft v. Morehead*, 67 N. Car. 422; *Ponton v. McAdoo*, 71 N. Car. 101; *McCorkle v. Brem*, 76 N. Car. 407; *Peebles v. Davie Co. Commrs.*, 82 N. Car. 385. *Morris v. Willard*, 84 N. Car. 293.

1. This is upon the principle that in all cases where an ordinary relation exists the person holding the property will be compelled to deliver it in specie. *Somerset v. Corkson*, 3 P. Wms. 389. *Fills v. Read*, 3 Ves. 71; *Nutbrown v. Thornton*, 10 Ves. 163; *Arundel v. Phillips*, 10 Ves. 139. In the later case the injunction was granted to restrain the transfer of ancient family-pictures. *SIR J. WIGRAM, V. Ch.*, says: "I have not the slightest doubt that the plaintiff is entitled to the protection of the court against the wrongful act which is threatened by his agent. I have known many bills to have been filed in the court of exchequer formerly on behalf of the owners of cargoes to prevent improper dealings with the goods by the agents or persons in the situations of agents. The right to be protected in the use or beneficial enjoyment of property in specie is not confined to articles possessing any peculiar or intrinsic value." *Lamphiere v. Lange*, L. R., 12 Ch. D. 675; *Hart v. Herwig*, L. R., 8 Ch. Div. 860; *Joseph v. McGill*, 52 Iowa 127; *French v. Snell*, 29 N. J. Eq. 95; *Vogler v. Montgomery*, 54 Mo. 577; *Venable v. Everett*, 63 Ga. 633; *Sierra Nevada etc. Co. v. Sears*, 10 Nev. 346.

2. *People v. Clark*, 70 N. Y. 518; *Mendar v. Hood*, 68 Ill. 121; *Owen v. Ford*,

49 Mo. 438; *Chesapeake etc. R. Co. v. Patton*, 5 W. Va. 234.

Trustees may be enjoined from selling the trust property upon conditions which are unfavorable to the *cestui que trust* and which are calculated to depreciate the value of the property. *Dance v. Goldingham*, L. R., 8 Ch. 902; See *Fernie v. Maguire*, 6 Ir. Eq. 137; *Davis v. Browne*, 2 Del. Ch. 188.

Marshalling Assets.—At a sale under a judgment against M, a tract of land was purchased by O which was encumbered with a deed of trust previously executed by M in favor of A. The trustee was about to sell under the deed when O filed a bill in chancery charging that there was much less due upon the claim secured than the ostensible amount thereof, and seeking a discovery from A as to the amount really due, and also praying that an account of the indebtedness be stated by a commissioner. The bill further stated that the deed of trust covered a lot of personal property, and prayed that it should be first sold and applied to the payment of the debt. There was a prayer for an injunction, and accordingly, a temporary injunction against the sale of both personalty and realty was granted. A answered admitting the above stated allegations of the bill and making a statement of the amount due on his claim. He thereupon made a motion to dissolve the injunction; which was granted as to the personalty but overruled as to the realty. From this order of partial dissolution O appealed, and gave a bond for *supersedeas*. A then renewed his motion for a dissolution of the injunction as to the land, and it was sustained. From this order O also appealed, and the two appeals were presented to this court to be considered together. *Held*, that the action of the chancellor was correct in both instances. *Osburn v. Andre*, 58 Miss. 609.

31. To Restrain Transfer, etc., of Notes, Bills, etc.—A party who has given a note or bill under such circumstances that, as between himself and the holder or payee, he has a good defence, may enjoin the transfer of such note or bill to an innocent party, whereby the defence would be lost.¹

32. The transfer of stocks or other securities not negotiable may be enjoined, as where an agent or trustee attempts to transfer them for his own benefit to the injury of the beneficiary.² And where there is a controversy respecting the title under different wills, an injunction will be granted *pendente lite*.³

33. Voidable Instruments.—Where an instrument, valid on its face, is void, by reason of some collateral circumstance, it may be enjoined, as where a partner draws a bill of exchange in the firm name, but for his own private debt;⁴ or where an insolvent debtor, having entered into a composition with his creditors privately, gives a bond for the deficiency to one of them.⁵

Where the instrument is void on its face, so that mere lapse of time will not defeat or weaken the defence to the same when an action shall be brought thereon, it was held, in an early case, that an injunction would not be granted against the same.⁶ CHANCELLOR KENT, after an able review of the authorities, was of the opinion that an injunction should be granted.⁷

1. *Metler v. Metler*, 18 N. J. Eq. 270; s. c., 19 N. J. Eq. 457; *Hile v. Davison*, 20 N. J. Eq. 228; *Zeigler v. Beasley*, 44 Ga. 56.

A note which was signed and delivered without consideration and with an understanding that it would not be enforced was enjoined when suit was brought thereon by the administrator. *Bell v. Gamble*, 9 Humph. (Tenn.) 117. So where a draft entirely failed, but being transferable might greatly harass the plaintiff by being the foundation of other suits, an injunction was granted. *Ferguson v. Fisk*, 28 Conn. 501. And where a partner sold to his copartner his interest in the firm property upon an implied warranty of title and such property was thereafter levied upon and sold by the creditors of the firm for partnership debts, the sureties of the purchaser enjoined the collection of the purchase money. *Hough v. Chaffin*, 4 Sneed (Tenn.) 238.

2. *Osborn v. Bank of U. S.*, 9 Wheat. (U. S.) 738, 844; *Rogers v. Rogers*, 1 Anst. 174; *Stead v. Clay*, 1 Sim. 294.

A party who borrows money at a bank, although the loan be forbidden by law and the securities therefore void, yet the borrower will not be permitted to retain the money and enjoin the bank from negotiating the securities. *Elder v. First Nat. Bank*, 12 Kan. 238.

3. *King v. King*, 6 Ves. 172.

4. *Ryan v. Mackmorth*, 3 Bro. 15.

5. *Jackson v. Mitchell*, 13 Ves. 581; *Bromley v. Holland*, 7 Ves. 3.

In *Hamilton v. Cummins*, 1 Johns. (N. Y.) Ch. 517, certain bonds good on their face had been held for twenty-seven years when an action at law was brought thereon. The court perpetually enjoined the defendant from prosecuting an action at law on either of said bonds. And where a defendant who was defeated at law caused a deed to be proved by an aged witness and recorded the same, the court enjoined the defendant from using the record as evidence and ordered the deed to be delivered up. *Bushnell v. Harford*, 4 Johns. (N. Y.) Ch. 301. So where it was alleged that a deed had been fraudulently obtained, the court ordered it to be brought into court, together with certain promissory notes, and enjoined proceedings at law until the determination of the case in equity. The jurisdiction of a court of equity to cancel and enjoin the use of deeds and other instruments obtained by fraud is now firmly established. *Harrington v. Bigelow*, 11 Paige (N. Y.) 349; *Loomis v. Cline*, 4 Barb. (N. Y.) 453.

6. *Gray v. Mathias*, 5 Ves. 286.

7. *Hamilton v. Cummins*, 1 Johns. (N. Y.) Ch. 520. The tendency of the

34. Patents.—In this class of cases the United States courts have exclusive jurisdiction.¹ An injunction is granted in aid of the legal right, the protection of which is the principal object of the suit;² hence the English courts formerly required the establishment of the patent at law before an injunction would be granted.³ In this country, however, where it is apparent that the patent is genuine and in full force, and that the defendant has infringed the same, the plaintiff will not be compelled to establish his right at law before bringing an action for an injunction;⁴ and especially is this true where the application is for a preliminary injunction.⁵

If a reasonable doubt exist as to the novelty and originality of the plaintiff's patent, or that the defendant has been guilty of an infringement thereof, or there is a question as to the substantial identity between the articles covered by the plaintiff's patent and the articles manufactured by the defendant, a preliminary injunction will not be granted.⁶

Where the plaintiff can show an undisturbed possession and

courts is to sustain the views of Chancellor Kent, although the court, as a condition of relief, may require the plaintiff to pay the costs.

A void judgment will be perpetually enjoined. *Chambers v. King Bridge Co.*, 16 Kan. 270. So where the judgment has been satisfied but is sought to be enforced. *Shaw v. Dwight*, 16 Barb. (N. Y.) 536.

1. Sec. 8, art. 1, Constitution, subdivision 8. By a subsequent provision the judicial power of the United States is made to extend to all cases arising under the constitution and laws of the United States. Art. 3, subdivision 2. The act of February 15th, 1819, extends the jurisdiction of the U. S. courts to the bases relating to patents and copyrights. Laws U. S., vol. 6, 369. By the act of July 4th, 1836, express authority is conferred on the U. S. circuit courts to grant injunctions to prevent the violation of the rights of inventors, etc. Laws of 1836, 242. Some doubt seems to have existed whether or not the act of 1819 conferred exclusive jurisdiction on the United States courts. *Burrall v. Jewett*, 2 Paige 134, 135. But no such doubt exists under the act of 1836. *Gibson v. Woodworth*, 8 Paige 132; *Dudley v. Mayhew*, 3 Comst. (N. Y.) 49; *Parkhurst v. Kinsman*, 2 Halst. (N. J.) Ch. 600. See also U. S. Rev. Statutes 1874, § 4921; and see this section construed in *Yuengling v. Johnson*, 1 Hughes (U. S.) 607.

2. *Bacon v. Jones*, 4 Myl. & Cr. 436.

3. *Universities v. Richardson*, 6 Ves.

689. And see *Hicks v. Raincock*, Dick 647.

4. *Potter v. Muller*, 2 Fish. Pat. Cas. (U. S.) 465; *Shelly v. Brannan*, 4 Fish. Pat. Cas. (U. S.) 198; s. c., 2 Biss. (U. S.) 315. And see *Sickles v. Gloucester Mfg. Co.*, 1 Fish. Pat. Cas. (U. S.) 222; *Sanders v. Logan*, 2 Fish. Pat. Cas. (U. S.) 167; *Goodyear v. Day*, 2 Wall. (U. S.) Jr 283; *Buchanan v. Howland*, 5 Blatchf. (U. S.) 151.

5. *Brooks v. Norcross*, 2 Fish. Pat. Cas. (U. S.) 251. In *Farsbush v. Bradford*, 1 Fish. Pat. Cas. 315, CURTIS, J., said: "The application (for a preliminary injunction) may be granted or refused unconditionally, or terms may be imposed on either of the parties as conditions for making or refusing the order. And the state of the litigation, where the plaintiff's title is denied, the nature of the improvement, the character and extent of the infringement complained of, and the comparative inconvenience which will be occasioned to the respective parties by allowing or denying the motion, must all be considered in determining whether it should be allowed or refused, and if at all whether absolutely, or upon some and what conditions."

6. *Dodge v. Card*, 2 Fish. Pat. Cas. (U. S.) 166; *Winans v. Eaton*, 1 Fish. Pat. Cas. (U. S.) 181; *Sullivan v. Redfield*, 1 Paine (U. S.) 441. In *Ogle v. Edge*, 4 Wash. (U. S.) 584, WASHINGTON J. says: "I take the rule, in cases of injunctions in patent cases, that where the bill states a clear right to the thing

user for a considerable time, he may obtain an injunction without establishing his right at law.¹

patented, which, together with the alleged infringement, is verified by affidavit, if he has been in possession of it by having used or sold it, in part or in whole, the court will grant an injunction and continue it till the hearing or further order without sending the plaintiff to law to try his right. But if there appear to be a reasonable doubt as to the plaintiff's right or to the validity of the patent, the court will require the plaintiff to establish his title at law, sometimes accompanied with an order to expedite the trial, and will permit him to return for an account in case the trial at law should be in his favor." See *Day v. Candee*, 3 Fish. Pat. Cas. (U. S.) 9.

The court will not grant a preliminary injunction to protect a patent the validity of which is in some doubt. *Consolidated etc. Co. v. Ashton Valve Co.*, 26 Fed. Rep. 319. Where the novelty of a patent is in doubt, the application for preliminary injunction to restrain infringement will be refused, on condition that defendants execute a bond to secure complainant on the accounting if, upon final hearing, the patent is sustained although the infringement is clearly shown. *New York etc. Co. v. Magowan*, 23 Fed. Rep. 596.

1. *Stevens v. Keating*, 2 Ph. 333; *Orr v. Littlefield*, 1 Woodb. & M. (U. S.) 13; *Ogle v. Edge*, 4 Wash. (U. S.) 584; *Foster v. Moore*, 1 Curt. (U. S.) 279; *Isaacs v. Cooper*, 4 Wash. (U. S.) 259; *Washburn v. Gould*, 3 Story (U. S.) 156, 169; *Blackford v. Skeurs* Web P. C. 211; *Goodyear v. Central R.*, 1 Fish. Pat. Cas. (U. S.) 626. Such possession and user for eight years were held sufficient to authorize an injunction without a trial at law. *Potter v. Muller*, 2 Fish. Pat. Cas. (U. S.) 465. In *Caldwell v. Vanvlissengen*, 9 Hare 415, the reason is stated very clearly that "In a case where there has been a long enjoyment under the patent . . . the public have had the opportunity of contesting the patent; and the fact of their not having done so successfully affords at least *prima facie* evidence that the title of the patentee is good; and the court therefore interferes before the right is established at law." *Hill v. Thompson*, 3 Merio 622; *Potter v. Holland*, 1 Fish. Pat. Cas. (U. S.) 382.

In *Foster v. Moore*, 1 Curt. (U. S.) 279, said "The reason for the presumption in favor of the validity of the grant is the acquiescence of the public in the exclusive right of the patentee, which, it may reasonably be assumed, would not exist unless the right was well founded." "The question whether the court will interfere to protect a patentee before he has established his right at law, or will suspend its interference until the right at law has been established, appears to me to depend upon very simple principles. It is part of the duty of this court to protect property pending litigation, but when it is called upon to exercise that duty the court requires some proof of title in the party who calls for its interference. In the case of a new patent this proof is wanting; the public, whose interests are affected by the patent, have had no opportunity of contesting the validity of the patentee's title, and the court therefore refuses to interfere until his right has been established at law. But in a case where there has been long enjoyment under the patent (the enjoyment, of course, including use) the public have had the opportunity of contesting the patent, and the fact of their not having done so successfully affords at least *prima facie* evidence that the title of the patentee is good; and the court therefore interferes before the right is established at law. In the present case I think that the plaintiffs have proved such a case of enjoyment under the patent, and of their title having been maintained at law against the several attempts which have been made to impeach it, that the court is bound at once to interfere for their protection, unless there are other sufficient grounds for withholding its interference." VICE CHANCELLOR in *Caldwell v. Vanvlissengen*, 9 Hare 415. Exclusive possession, if of sufficient duration, may warrant the relief even in the absence of any previous adjudications in favor of the validity of the patent. *Goodyear v. Central R. Co.*, 1 Fish. Pat. Cas. (U. S.) 626.

A patent which has been issued less than a year is too recent to have acquired any settled construction by acquiescence; and never having received any judicial construction, and its construction being doubtful, a pre-

(a) *Threat of Legal Proceedings*.—A court of equity has jurisdiction to restrain an attempted intimidation by one issuing circulars threatening to bring suits for infringements against persons dealing in a competitor's patented article, the bill charging, and the proofs showing, that the charges of infringement were not made in good faith, but with malicious intent to injure complainant's business.¹

(b) *Patent for Separate Parts*.—Where different parts of a machine are covered by separate patents, a purchaser of such machine from the patentee, who replaces one of the parts or elements covered by an individual patent, when worn out, is guilty of an infringement.²

(c) *Prior Use of Invention*.—When a prior use of the same article is shown, by affidavit, in detail, and specimens of the article are produced, such doubt is thrown over the question of novelty as to allow a dissolution of an injunction.³

(d) *Repeal of Patent*.—An action brought to procure the repeal of an interfering patent may be enjoined⁴ by injunction if the bill is filed before the expiration of the patent.⁵

liminary injunction to restrain the use of different mechanism alleged to infringe will be refused. *Johnston Ruffler Co. v. Avery Machine Co.*, 28 Fed. Rep. 193.

When allegations of exclusive possession are avoided by averments and proof of a more peaceable and exclusive possession by defendants under patents purchased and used by them no injunction will be granted. *Parker v. Sears*, 1 Fish. Pat. Cas. (U. S.) 93.

Mere lapse of time is not considered sufficient evidence of public acquiescence in and recognition of plaintiff's right to warrant an injunction. *Guidet v. Palmer*, 10 Blatchf. (U. S.) 217; s. c., 6 Fish. Pat. Cas. (U. S.) 82. See *Earth Closet Co. v. Fenner*, 5 Fish. Pat. Cas. (U. S.) 15.

1. *Emack v. Kane*, 34 Fed. Rep. 46.

In a suit to restrain one from issuing circulars threatening to bring suits for infringements against all customers dealing in a competitor's patented article a court of equity will not pass on the validity of the patent, but it may consider the state of the art in connection with defendant's conduct to ascertain his good faith in issuing the circulars. *Emack v. Kane*, 34 Fed. Rep. 46.

2. *Singer Mfg. Co. v. Springfield Foundry Co.*, 34 Fed. Rep. 393.

3. *Young v. Lippman*, 9 Blatchf. (U. S.) 277; s. c., 5 Fish. Pat. Cas. (U. S.) 250.

A motion for preliminary injunction to restrain the infringement of a patent should be denied where the defence of prior public use is much more strongly fortified by corroborative evidence than on a prior application for the same writ, where the defence was overruled and the writ issued. *Lockwood v. Faber*, 27 Fed. Rep. 63.

4. *Ayling v. Hull*, 2 Cliff. (U. S.) 494.

5. *Vaughan v. Cent. Pac. R. Co.*, 4 Sawy. (U. S.) 280. See *Draper v. Hudson*, 6 Fish. Pat. Cas. (U. S.) 327. *Brooks v. Miller*, 28 Fed. Rep. 615. It is no ground for a demurrer to a bill for infringement of a patent that the patent, at the time of filing the bill, had only twenty-one days to run, when, by the rules of court an injunction, if applied for, could have been granted within four days and would thus have had seventeen days to run. *Kittle v. DeGraaf*, 30 Fed. Rep. 689; *Kittle v. Schneider*, 30 Fed. Rep. 690.

Where a bill filed twenty-six days before the expiration of the patent sets forth that plaintiff has the exclusive right to make and sell the patented article, and is exercising such right, and is able to supply the market, and that defendants are making and selling machines in large quantities embodying the invention, and threaten to put on the market, after the expiration of the patent, machines made before its expiration, and prays for an injunction re-

(e) *Expiration of Patent*.—The mere fact that the patent expires pending the suit will not oust the jurisdiction of a court of equity if, at the time of the filing of the bill, an injunction was prayed, and the right to it existed. Courts are authorized to grant an injunction, after the expiration of a patent, to restrict the sale of infringing articles made during its term.¹

(f) *Violation of Injunction*.—When one has been enjoined from using a patent, he is not at liberty to disregard the injunction. The fact that he has acted under the advice of counsel is not a sufficient justification for disobeying the injunction, the proper course being to take the judgment of the court upon the matter by a motion to dissolve or otherwise.²

straining the sales, as well after as before the patent expires, of machines unlawfully made before it expires, it states a case within the equitable jurisdiction of the circuit court, and is not demurrable. *Toledo etc. Co. v. Johnston Harvester Co.*, 24 Fed. Rep. 739; *Hewitt v. Pennsylvania Steel Co.*, 24 Fed. Rep. 367.

Where a bill, in addition to the usual charges of infringements of three patents specified therein, states that "these several letters patent are applicable to the same process and are so used by defendants," and it appears that it may be impossible to award damages for infringement of two of the patents without also taking into consideration the value of the other patent, a motion to dismiss the bill as to such patent, because it was so near its expiration that an injunction could not be granted under it, will be overruled. *New York Grape Sugar Co. v. Peoria Grape Sugar Co.*, 21 Fed. Rep. 878.

1. *New York etc. Co. v. Magowan*, 17 Fed. Rep. 111. But in *Lord v. Whitehead etc. Co.*, 24 Fed. Rep. 801, a bill was brought for the infringement of a patent which has expired previous to the bringing of the suit, and was dismissed for want of jurisdiction, notwithstanding it averred that defendants manufactured and used the infringing machines secretly, and that complainant is ignorant of the number of the machines so used and unable to estimate the amount of damages, and prays for an account of profits and damages to complainant from said infringement other than the profits being sued for in a pending action at law. See *Hewitt v. Pennsylvania Steel Co.*, 24 Fed. Rep. 367; *Consolidated etc. Co. v. Ashton Valve Co.*, 26 Fed. Rep. 319.

2. *Hamilton v. Simons*, 5 Biss. (U. S.) 77.

Where officers of a corporation are enjoined and subsequently engage in the manufacture of the infringing article as managing officers of another corporation not licenced to manufacture under the patent, they are guilty of contempt. *Iowa Barb Steel Wire Co. v. Southern Barb Wire Co.*, 30 Fed. Rep. 123.

Where defendant was enjoined from making a certain kind of pen and thereafter made a different pen on which he obtained a patent, *held*, on motion to attach for contempt, that the fact that a patent had been issued to defendant entitled him to have the question of infringement determined on a motion to prevent the making of this form of pen, and that the present motion should be denied. *Wirt v. Brown*, 30 Fed. Rep. 187.

Where the principle involved in a patent is the point in issue in a suit to restrain its infringement, the defendant will commit a breach of a preliminary injunction and be punished for contempt if for the purpose of evading the injunction he continues to manufacture articles involving the same principle with but slight modifications of structure. *Burr v. Kimbark*, 29 Fed. Rep. 428.

A suit was brought against several as partners in the steamship business to recover damages for the infringement of a patent by use upon one of their ships and for an injunction. While the action was still pending they sold out their business, ships and property to a corporation, which assumed all their debts and liabilities. After the sale the corporation was not made a party to the suit, but the suit progressed and an injunction was granted. *Held*, that the corporation, never having been made a party to the suit, is not bound by the injunction, and neither it nor its agents

(g) *Prior Adjudications*.—Where a patent has been upheld by repeated adjudications, a preliminary injunction will lie against a clear infringement.¹

can be punished for refusal to obey the injunction. *Bate Refrigerating Co. v. Gillett*, 30 Fed. Rep. 686.

Where a party is led to disobey an injunction in a patent suit through a mistake as to the legal effect of a contract entered into by the complainant, he should not be punished as for a wilful contempt of court, but should be discharged upon payment of costs. *Iowa etc. Co. v. Southern etc. Co.*, 30 Fed. Rep. 615.

1. *Thayer v. Wales*, 9 Blatchf. (U. S.) 170; s. c., 5 Fish. Pat. Cas. (U. S.) 130. The plaintiff showed long enjoyment under his patent with repeated adjudications at law sustaining its validity. *Held*, that he was entitled to an injunction against its infringement. *Newall v. Wilson*, 2 De Gex, M. & G. 282.

If defendant was not a party to the former proceedings, it is the duty of the court, upon the hearing of the motion for a preliminary injunction, notwithstanding the fact of the previous adjudications sustaining the validity of the patent, to examine the case anew, and when the questions of fact are identical the court must recognize such decisions as entitled to very great weight in determining the application. *Potter v. Whitney*, 3 Fish. Pat. Cas. (U. S.) 77; s. c., 1 Lov. (U. S.) 87; *Goodyear v. Evans*, 3 Fish. Pat. Cas. (U. S.) 390.

Where a patent had been sustained after a long and ably contested litigation, and against all the defences ordinarily set up in patent cases, and such decisions had been followed by another court and the patent has only a short time to run, the owners are entitled to be protected in their monopoly until defendants are able to show that the former decisions sustaining the validity of the patent were wrong. *Cary v. Domestic Spring Bed Co.*, 27 Fed. Rep. 299.

Where patents have been the subject of judicial investigation ending in decisions of the circuit courts of the United States maintaining their validity so far as the issues presented in those causes have been identical with those involved in the case at bar, for the purpose of granting a preliminary injunction, to run *pendente lite*, those decisions elsewhere obtained are

sufficient. *American Bell Tel. Co. v. National Imp. Tel. Co.*, 27 Fed. Rep. 663.

On application for a preliminary injunction in an action for infringement of a patent, the validity of which has been sustained in three former suits, defendant, a witness and party in one of the former suits, corroborated by one other witness, testified that a machine identical with the one used by him was perfected and in use prior to the issuance of plaintiff's patent, but admitted that he did not apply for a patent for more than nine years after perfecting his invention, and the evidence showed that the invention as patented by him differed essentially from the one originally used. *Held*, that this testimony, not having been introduced in the former suits, does not establish prior invention and use beyond a reasonable doubt, so as to overcome the presumption arising from the issuance of plaintiff's patent, supported by three adjudications in his favor. *Seibert Cylinder Oil Cup Co. v. Michigan Lubricator Co.*, 34 Fed. Rep. 33.

Defendant corporation did not deny infringement, but claimed that it had ceased to infringe before bill filed, and did not intend to renew the use of the infringing machine which still remained in its possession. *Held*, the patent having been adjudicated to be valid, that a preliminary injunction should be granted. *Celluloid Mfg. Co. v. Arlington Mfg. Co.*, 34 Fed. Rep. 324.

Where a patent, involving the subjection of steel springs to heat, had been before the courts, and had been sustained to the extent of covering such process "when the springs are kept below red heat," *held*, in this suit on application for preliminary injunction, that the patent would be presumed valid only to the extent expressly covered by the decisions referred to. As upon the preliminary affidavits it appeared that defendants, in the process used by them, heated the springs above this limit, *held*, that the application for preliminary injunction should be denied, with leave to renew should complainants be able to produce such further evidence of defendant's process of manufacture as to indicate that complainant's patent was infringed. *Carey v. Miller*, 34 Fed. Rep.

35. Copyrights.—The jurisdiction of the courts and the grounds for an injunction are substantially the same as in the case of patents.¹ To entitle the plaintiff to an injunction his work must not itself be a piracy,² nor irreligious, immoral, libellous or

392; *Cary v. Wolff*, 24 Fed. Rep. 139, 141; *Cary v. Spring Bed Co.*, 27 Fed. Rep. 299; *Cary v. Lowell Mfg. Co.*, 31 Fed. Rep. 344.

1. *Wilkins v. Aikens*, 17 Ves. 422; *Sandures v. Smith*, 3 Myl. & Cr. 728; 2 Story's Eq., § 930. In this country, the jurisdiction for the protection of statutory copyright is exercised exclusively by the United States courts. § 629, 4970, Rev. St. See *Dudley v. Mayhew*, 3 N. Y. 9.

Equity Jurisdiction in cases of copyright is dependent on the legal right, and is exercised for the purpose of making that right more effective, on the ground that relief in law is inadequate. *Drone on Copyright*, p. 496. See also *Bramwell v. Halcomb*, 3 Myl. & Cr. 737; *Spottiswoode v. Clarke*, 2 Ph. 154; *Lawrence v. Smith*, Jac. 471; *Pierpont v. Fowle*, 2 Woodb. & M. 23; *Hogg v. Kirby*, 8 Ves. 215; *Wilkins v. Aiken*, 17 Ves. 422.

English chancery courts formerly exercised their discretion as to whether they would interfere by injunction before the establishment of the right in a court of law. *Lowndes v. Duncombe*, 2 Coop. (Temp Cottenham) 216; *Rundell v. Murray*, Jac. 311; *Southey v. Sherwood*, 2 Meriv. 435; *Wolcott v. Walker*, 7 Ves. 1; *Lawrence v. Smith*, Jac. 471; *Bramwell v. Halcomb*, 3 Myl. & Cr. 737; *M'Neill v. Williams*, 11 Jur. 344; *Spottiswoode v. Clark*, 2 Ph. 154; *Saunders v. Smith*, 3 Myl. & Cr. 737.

Sometimes an injunction was granted and, at the same time, the plaintiff directed to establish his title at law; the continuance of the injunction depending, of course, on the result of the legal title. *Mawman v. Tegg*, 2 Russ. 385; *Sweet v. Shaw*, 3 Jur. 217; *Bacon v. Jones*, 4 Myl. & Cr. 433; *Wilkins v. Aiken*, 17 Ves. 422; *Sweet v. Mangham*, 11 Sim. 51; *Campbell v. Scott*, 11 Sim. 31; *Sweet v. Carter*, 11 Sim. 572; *Dickens v. Lee*, 8 Jur. 183; *Bogue v. Houlston*, 5 De G. & Sm. 267.

Jerrold v. Houlston, 3 Kay & J. 708. Courts of equity were afterwards empowered to adjudicate all questions of law or fact on which the title to relief depended (25 & 26 Vict., ch. 42, § 1),

and now under the recent judicature acts (36 & 37 Vict., ch. 66; 38 & 39 Vict., ch. 77; 39 & 40 Vict., ch. 59; 40 & 41 Vict., ch. 9, & ch. 57), the chancery and law divisions of the high court of justice have equal jurisdiction in determining rights and redressing wrongs. Hence courts of equity in both England and the United States now determine all questions relating to the validity of the copyright and the alleged piracy. *Barker v. Taylor*, 2 Blatchf. (U. S.) 82; *Atwill v. Ferrett*, 2 Blatchf. (U. S.) 39; *Pierpont v. Fowle*, 2 Woodb. & M. (U. S.) 23; *Little v. Gould*, 2 Blatchf. (U. S.) 165, 362; *Paige v. Banks*, 7 Blatchf. (U. S.) 153; 13 Wall. (U. S.) 608; *Lawrence v. Dana*, 2 Am. L. T. (U. S.) N. S. 402; *Farmer v. Calvert etc. Co.*, 5 Am. L. T. R. 168.

2. *Cary v. Faden*, 5 Ves. 24; *Barfield v. Nicholson*, 2 Sim. & Stu. 1.

In *Folsom v. Mash*, 2 Story (U. S.) 100, STORY, J., said: "We must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used and the degree in which the use may prejudice the sale or diminish the profits or supersede the objects of the original work. Many mixed ingredients enter into the discussion of such questions. In some cases a considerable portion of the materials of the original work may be fused, if I may use such an expression, into another work so as to be indistinguishable in the mass of the latter, which has other professed and obvious objects, and cannot fairly be treated as a piracy; or they may be inserted as a sort of distinct and mosaic work into the general texture of the second work and constitute the peculiar excellence thereof, and then it may be a clear piracy. If a person should, under color of publishing 'elegant extracts' of poetry, include all the best pieces at large of a favorite poet whose volume was secured by a copyright, it would be difficult to say why it was not an invasion of that right, since it might constitute the entire value of the volume."

Directory.—The compiler of a directory or guide book containing information derived from sources common to

obscene.¹ The compiler of work which, from the nature of the case, cannot be original, may use preceding works on the same

all, which must of necessity be identical in all cases if correctly given, is not entitled to spare himself the labor and expense of original enquiry by adopting and republishing the information contained in previous works on the same subject. He must obtain and work out the information independently for himself, and the only legitimate use which he can make of previous works is for the purpose of verifying the correctness of his results. *Kelly v. Morris*, 1 Eq. 697.

Use of Slips in Compiling New Directory, Where Justifiable.—Although the compiler of a new directory is not justified in using slips cut from one previously published for the purpose of deriving information from them for his own work, yet he may use such slips for the purpose of directing him to the parties from whom such information is to be obtained. The plaintiff, who was the publisher of a trades directory, filed a bill against the defendant, who was preparing for publication a new directory, charging him with using slips cut from the plaintiff's work in obtaining materials for the new directory, and with copying from such slips. The plaintiff having moved for an interlocutory injunction, the defendant filed an affidavit in which he admitted that at first he had used slips from the plaintiff's work in obtaining materials for his own, but having discovered that it was illegal to do so he had discontinued the practice, and he denied having copied any of such slips. In the absence of satisfactory evidence of the actual contents of the new directory, which was not yet published, the court refused the injunction. Decision of *JAMES, V. C.*, affirmed. *Kelly v. Morris*, Law Rep., 1 Eq. 697; and *Morris v. Ashbee*, Law Rep., 7 Eq. 34, explained. *Morris v. Wright*, 5 Ch. 279.

A bona fide abridgment is not such a piracy as will be enjoined. *Bell v. Walker*, 1 Bro. C. C. 451; *Gyles v. Wilcox*, 2 Atk. 141; *Campbell v. Scott*, 11 Sim. 31. Compare *D'Almaine v. Boosey*, 1 Y. & C. Exch. 288; *Gray v. Russell*, 1 Story (U. S.) 11; *Dickens v. Lee*, 8 Jur. 184; *Wheaton v. Peters*, 8 Pet. (U. S.) 591.

Infringement Abroad.—The proprietors of an English copyright discovering

a piracy by an America firm, sent notice to the agents in England of that firm not to distribute the copies complained of, and immediately afterwards brought an action against the agents for an injunction to restrain them from selling or importing for sale such copies in this country. The defendants, in their statement of defence, stated that they had not received the copies from America until after the service of the writ in the action, and that when they did receive the copies they recognized the infringement of the plaintiff's copyright and at once determined not to sell. *Held*, that the defendants had, within the terms of the copyright act, 1842, § 17, "imported for sale" the copies complained of, and must, therefore, pay the costs of the action. The offences mentioned in the copyright act, 1842, § 17, are, to "import for sale" and to "sell knowingly" foreign piracies of copyright. *Held*, that a distinction is created by the addition in the statute of the word "knowingly" to the one offence, and therefore that the plaintiff who proceeds in respect of "importing for sale" is not required to give the defendant any notice, but may at once obtain an *ex parte* injunction. If, however, it is intended to take proceedings in respect of "selling knowingly," notice of the nature of the copies complained of should properly be sent to the importer. Where an action is brought to enforce a legal right, and there is no misconduct on the part of the plaintiff, the court has no discretion to refuse him costs. Where a statute creates a new offence and imposes a penalty, the ancillary remedy by injunction may still be claimed. *Cooper v. Whittingham*, 15 Ch. D. 501.

1. 2 Story's Eq. Juris., § 956.

Prudential Assurance Co. v. Knott, L. R., 10 Ch. 142; s. c., 7 Chicago Leg. N. 405; overruling *Springhead Spinning Co. v. Riley*, L. R., 6 Eq. 551. And *Dixon v. Holden*, L. R., 7 Eq. 488; *Clark v. Freeman*, 11 Beav. 112; *Mulkern v. Ward*, L. R., 13 Eq. 619; s. c., Chicago Leg. N. 440; *Hammersmith Co. v. Dublin Co.*, 1. R. 10 Eq. 235; *Brandreth v. Lance*, 8 Paige (U. S.) 24; *Life Association v. Boogher*, 3 Mo. App. 173; *Thorley's Cattle Food Co. v. Massam*, 6 Ch. D. 582.

Walcot v. Walker, 7 Ves. 1; Law-

subject sources of information for the purposes of preparing his work, but his work, when completed, must be original in its treatment of the subject and arrangement.¹

rence v. Smith, Jac. 471; *Southey v. Sherwood*, 2 Meriv. 435. See *Martinetti v. Maguire*, 1 Abb. (U. S.) 358.

In *Lawrence v. Smith*, Jac. 471, LORD ELDON said: "Considering that the law does not give protection to those who contradict the scriptures, and entertaining a doubt, I think a rational doubt, whether the book does not violate the law, I cannot continue the injunction. The plaintiff may bring an action, and when that is denied he may apply again."

Equity will not enjoin the publication of a literary composition on the ground that it is libellous. *Southey v. Sherwood*, 2 Meriv. 435; *Seely v. Fisher*, 11 Sim. 581; *Hime v. Dale*, 2 Camp. 27; *Clark v. Freeman*, 11 Beav. 112; *Bradreth v. Lance*, 8 Paige (N. Y.); *Gee v. Pritchard*; 2 Swanst. 413. Nor on the ground that it is blasphemous, immoral or mischievous. *Murray v. Benbow*, 6 Peters' Abr. 558; *Wolcott v. Walker*, 7 Ves. 1; *Lawrence v. Smith*, Jac. 471; *Southey v. Sherwood*, 2 Meriv. 435; *Martinetti v. Maguire*, 1 Deady (U. S.) 216; *Shook v. Daly*, 49 How. Pr. (N. Y.) 368.

Statutory Conditions.—The author must comply with the statute before seeking relief by injunction. § 4956 Rev. St. 1874. *Jollis v. Jaques*, 1 Blatchf. (U. S.) 618; *Wheaton v. Peters*, 8 Pet. (U. S.) 591; *Baker v. Taylor*, 2 Blatchf. (U. S.) 82; *Struve v. Schwedler*, 4 Blatchf. (U. S.) 23; *Chase v. Sanborn*, 6 Pat. Off. Gaz., (U. S.) 932; *Parkinson v. Laselle*, 3 Sawy. (U. S.) 330. The mistake of a year in the notice of entry required to be printed upon the title page, or the succeeding page, is fatal to an application for an injunction. *Baker v. Taylor*, 2 Blatchf. (U. S.) 82. See *Low v. Routledge*, 33 L. J., N. S. ch. 717; *Matheson v. Harrod*, L. R., 7 Eq., 270; *Murray v. Bogue*, 1 Drew 353; *Correspondent Newspaper Co. v. Saunders*, 12 L. T., N. S. 540; *Henderson v. Maxwell*, 4 Ch. D. 163.

1. *Drone on Copyright*, 416, 417; *Farmer v. Calvert*, etc. Co. 5 Chicago Leg. N. 1. On a motion to dissolve a preliminary injunction, LONGYEAR, J., said: "The courts in the interest of learning and science have at all times and in all countries recognized the right of subsequent authors, compilers and publish-

ers to use the works of others to a certain extent, but the great difficulty has always been and always must be to determine where such use ceases to be legitimate and becomes an invasion on the rights of others. The difficulty is greatest in cases of maps and the like, in which there is not and cannot be any originality in the facts or materials of which they are composed, and which facts and materials are equally open to all." *Folsom v. Marsh*, 2 Story (U. S.) 100; *Blunt v. Patten*, 2 Paine (U. S.) 397; see *Kelly v. Morris*, L. R. 1 Eq. 697; *Kelly v. Hooker*, 1 Y. & C. C. C. 197; *Morris v. Ashbee*, L. R., 7 Eq. 34; *Mathewson v. Stockdale*, 12 Ves. 270; *Morris v. Wright*, L. R., 5 ch. 279.

The author of a work of a scientific nature, such as a treatise upon grammar, who takes existing materials from common sources open to all writers and arranges and combines them in an new form, giving them an application which was unknown before and exercising selection, arrangement and combination in producing his work, is entitled to the aid of equity to restra in an infringement. And where in such case the author of the work which it is sought to enjoin, instead of going to the original sources of information which open and common to all, contents himself with copying from and adopting the plan of plaintiff's book, a proper case is presented for relief by injunction. *High on Injunctions*, § 993. *Greene v. Bishop*, 1 Cliff. (U. S.) 186.

Where defendant, in the preparation of a dictionary, has made considerable use of plaintiff's dictionary in common with others, but has also bestowed his own labor upon his book and has produced a new result and a different work from that of plaintiff, by the use of his own mental labor, and where there is nothing tending to show any fraudulent design upon the part of defendant to make an unfair use of plaintiff's work, it was *held*, that an injunction should not be allowed. *Spiers v. Brown*, 6 W. R. 352.

Quantity and Value of Selections.—In enjoining the infringement of a copyright, the court will consider the nature and objects of the selections made, and the quantity and value of materials used. *Folsom v. Marsh*, 2 Story (U. S.) 100;

Gray v. Russell, 1 Story (U. S.) 11; *Farmer v. Calvert*, L. E. & M. P. Co.; s. c., 5 Chica Leg. N. 1; *Bramwell v. Halcomb*, 3 Myl. & Cr. 738.

One may use the same materials as his predecessor, and derive them from the same source, but he cannot avail himself of his labor. If he should adopt his arrangement of those materials, he would be guilty of such an infringement as would warrant the interference of equity, even though the new work should be disguised under a colorable variation from the old. *Hotten v. Arthur*, 1 Hen. & M. (Va.) 603; *Gray v. Russell*, 1 Story (U. S.) 11; *Jarrold v. Houlston*, 3 Kay & J. 708.

The name or title of a book may be protected by injunction. *Bradbury v. Beeton*, 39 L. J., Ch. N. S. 57; *Weldon v. Dicks*, 10 Ch. D. 247; *Mack v. Petter*, L. R., 14 Eq. 431; *Chappell v. Davidson*, 2 Kay & J. 123; s. c., on appeal, 8 DeG. M. & G. 1; *Chappell v. Sheard*, 2 Kay & J. 117; *Matsell v. Flanagan*, 2 Abb. Pr. (N. Y.) U. S. 459; *Hogg v. Kirby*, 8 Ves. 215; *Prowett v. Mortimer*, 2 Jur. N. S. 414; *Constable v. Brewster*, 3 Sc. Sess. Cas. 214; *Ingram v. Stiff*, 5 Jur. N. S. 947; *Clement v. Maddick*, 1 Giff. 98; *Bradbury v. Dickens*, 27 Beav. 53; *Kelly v. Hutton*, Law Rep., 3 Ch. 703; *Ward v. Beeton*, 19 Eq. 207; *Mack v. Petter*, Law Rep. 14 Eq. 431; *Meltzer v. Wood*, 8 Ch. D. 606; *Ward v. Beeton*, 19 Eq. 207; *Jollie v. Jaques*, 1 Blatchf. (U. S.) 618; *Matsell v. Flanagan*, 2 Abb. Pr. (N. Y.) 459; *Osgood v. Allen*, 1 Holmes (U. S.) 185; *Harte v. DeWitt*, 1 Cent. L. J. 360; *Benn v. LeClercy*, 18 Int. Rev. Rec. (Pa.) 94.

Injury to Employer's Property.—The plaintiff's had purchased the copyright of and the right to use the name of the defendant in the publication of a work called "Beeton's Christmas Annual," and the defendant agreed to give his whole time to the service of the plaintiff's and not to engage in any other business. *Held*, that the defendant must be restrained from advertising a rival work. *Ward v. Beeton*, 19 Eq. 207.

Violation of Covenants.—The publication of a work which is not piratical may be restrained on the ground of a violation of a covenant. *Barfield v. Nicholson*, 2 Sim. & St. 1; *Colburn v. Simms*, 2 Hare 543; *Morris v. Colman*, 18 Ves. 437; *Brook v. Chitty*, 2 Coop. (Temp. Cottenham) 216; *Colburn v. Simms*, 2 Hare 543; *Warne v. Routledge*, 18 Eq. 497; *Ward v. Beeton*, Law

Rep. 19 Eq. 207. So equity may interfere to prevent the violation of a negative covenant. *Kimberly v. Jennings*, 6 Sim. 340; *Baldwin v. Society for Diffusion of Useful Knowledge*, 9 Sim. 393; *Lumley v. Wagner*, 5 DeG. M. & G. 604; *Kemble v. Kean*, 6 Sim. 333; *Montague v. Flockton*, L. R., 16 Eq. 189; 38 (N. Y.) 158.

In *Montague v. Flockton*, Law Rep. 16 Eq. 189, the defendant was enjoined from playing in another theatre than that of the plaintiff in violation of an implied covenant in his agreement with the plaintiff. See also *Fechter v. Montgomery*, 33 Beav. 22; *Webster v. Dillon*, 3 Jur. N. S. 432; *Croakes v. Petter*, 3 L. T., N. S. 225; *Pulte v. Derby*, 5 McLean (U. S.) 328; *Strahan v. Graham*, 17 L. T. 457; *Warne v. Routledge*, Law Rep., 18 Eq. 499.

How Piracy Determined.—The usual practice is to refer the subject to a master, who examines the works and reports the court; and upon this report the interlocutory as well as the final decree is generally based. 2 Story's Eq. § 941; *Cary v. Farden*, 5 Ves. 24; *Lewis v. Tullarton*, 2 Beav. 6; *Folsom v. Marsh*, 2 Story (U. S.) 100; *Webb v. Powers*, 2 Woodb. & M. (U. S.) 497; *Story v. Derby*, 4 McLean (U. S.) 160; *Story's Exrs. v. Holcombe*, 4 McLean (U. S.) 306; *Greene v. Bishop*, 1 Cliff. (U. S.) 186; *Lawrence v. Dana*, 2 Am. L. T. R., N. S. 402; *Chase v. Sanborn*, 6 (U. S.) Pat. Office Gaz. 932. But in *Smith v. Johnson*, 4 Blatchf. (U. S.) 252, it is *held* that the motion for the injunction must be disposed of on the moving papers of complainant and defendant's affidavits in opposition thereto, and that on such motion no reference to a master will be allowed. See *Reade v. Conquest*, 11 C. B., N. S. 479; *Webb v. Powers*, 2 Woodb. & M. 497.

Indecent Plays.—In *Martinette v. Maguire*, 1 Deady (U. S.) 216; s. c., 1 Abb. U. S. R. 356, the refusal to interfere was based upon the supposed immorality and indecency of the spectacle in question. *DEADY, J.*, said: "The Black Crook is a mere spectacle in the language of the craft, a spectacular piece. The dialogue is very scant and meaningless and appears to be a mere accessory to the action of the piece—a sort of verbal machinery tacked on to a succession of ballet and tableaux. The principal part and attraction of the spectacle seems to be the exhibition of women in novel dress or no dress and

in attractive attitudes or action. The closing scene is called Paradise, and, as witness Hamilton expresses it, consists mainly 'of women lying about loose,' a sort of Mohammedan paradise, I suppose, with imitation grottoes and unmaidenly hours. To call such a spectacle a 'dramatic composition' is an abuse of language and an insult to the genius of the English drama. A menagerie of wild beasts or an exhibition of model artists might as justly be called a dramatic composition. Like those, this is a spectacle; and although it may be an attractive or gorgeous one, it is nothing more. In my judgment an exhibition of women 'lying about loose,' or otherwise, is not a dramatic composition and, therefore, not entitled to the protection of the copyright." See *Shook v. Daly*, 49 How. (N. Y.) Pr. 366; s. c., 1 N. Y. Weekly Dig. 198.

External appearance of a book when made to resemble a copyrighted work for the purpose of misleading the public may be a sufficient ground for an injunction to restrain its publication. *Metzler v. Wood*, 8 Ch. D. 606; *Mack v. Petter*, Law Rep. 14 Eq. 431; *Chappell v. Davidson*, 2 Kay & J. 123; *Spottiswoode v. Clarke*, 2 Ph. 154; *Talcott v. Moore*, 1 N. Y. Weekly Dig. 485.

Musical Compositions.—Where the plaintiffs, who were musical publishers in England, published an original song which was written and composed for them and set to the music of an old American air rearranged for their song, the song being published by plaintiffs under a particular title as sung by a famous singer, whereby it had become very successful and popular, plaintiffs were held to have a property in the title and description of the song. And defendants having published substantially the same melody with different words, but with a similar title page announcing the song under a similar name and as sung by the same person, an injunction was allowed to restrain such infringement upon plaintiff's right. *Chappell v. Sheard*, 2 Kay & J. 117; s. c., 1 Jur. N. S. 996; 3 W. R. 646.

Court Calendar.—The court will interpose to restrain the piracy of a court calendar, the individual work being regarded as a proper subject of copyright. *Longman v. Winchester*, 16 Ves. 269.

Law Reports.—A reporter who prepares and publishes the reports of judicial decisions of the courts is entitled to

a copyright and to the protection of equity by enjoining an infringement upon his work. *Little v. Hall*, 18 How. (U. S.) 165; *Backus v. Gould*, 7 How. (U. S.) 798; *Paige v. Banks*, 13 Wall. (U. S.) 608; *Chase v. Sanborn*, 6 Pat. Off. Gaz. (U. S.) 932; *Banks v. McDivitt*, 13 Blatchf. (U. S.) 163; *Stweet v. Shaw*, 1 Jur. 917; *Sweet v. Maugham*, 11 Sim. 51; *Butterworth v. Robinson*, 5 Ves. 709.

A reporter has a copyright in his own marginal notes, and in the arguments of counsel as prepared and arranged in his work, not in the written opinions delivered by the court. The judges cannot confer on any reporter any such right. *Wheaton v. Peters*, 8 Pet. (U. S.) 591.

Maps and Charts.—In *Farmer v. Calvert L. E. & M. P. Co.*, 5 Chicago Leg. N. 1, LONGYEAR said: "The court, in the interest of learning and science, have at all times and in all countries recognized the right of subsequent authors, compilers and publishers to use the works of others to a certain extent; but the great difficulty has always been, and always must be, to determine where such use ceases to be legitimate and becomes an invasion of the rights of others. The difficulty is greatest in cases of maps and the like, in which there is not, and cannot be, any originality in the facts or materials of which they are composed, and which facts and materials are equally open to all. The following rule laid down by Mr. Copinger (*Copinger's Law of Copyrights*, 91) comes as near to defining this right as anything I have been able to find or can invent. He says: 'The rule appears now to be settled that a compiler of a work in which absolute originality is of necessity excluded is entitled, without exposing himself to a charge of piracy, to make use of preceding works upon the subject, where he bestows such mental labor upon what he has taken and subjects it to such revision and correction as to produce an original result, provided that he does not deny the use made of such preceding works and the alterations are not merely colorable.' To apply this rule to the present case, what mental labor did the defendant bestow upon those portions of the complainant's map admitted to have been taken in the preparation of his own, viz, the boundaries of the large townships of Wisconsin? None whatever beyond the mere mechanical operation of reducing them

from the larger scale of complainant's to the smaller scale of defendant's map. Neither does it appear that there was any revision whatever to ascertain if there were errors which needed correction or for any other purpose. There is, in fact, nothing whatever to bring the case within the rule. So far as those boundaries are concerned, it is scarcely a case of naked piracy. But it is contended that boundaries of townships are not a legitimate subject of copyright, that they are fixed and defined by statute law, and that the marking of them down on paper is but a transcription in another form of the legal enactment. What is claimed in this regard is true in regard to all original materials from which maps are made, and that is that none of them are subjects of copyright—they are open to all. But no one has the right to avail himself of the enterprise, labor and expense of another in the ascertainment of those materials, and the combining and arrangement of them and the representing them on paper. The defendant, no doubt, had the right to go to the common source of information, and having ascertained those boundaries, to have drawn them upon its map, notwithstanding that in this respect it would have been precisely like complainant's map (which of course it would have been if they were both correct). But he had no right to avail himself of this very labor on the part of complainant in order to avoid it himself. As appears by complainant's affidavit, these boundaries were fixed by the board of supervisors of the respective counties, and not by legislative enactment, thus showing that the labor must have been much greater than it could have been ascertained from the statutes of the state." See *Blunt v. Patten*, 2 Paine (U. S.) 397; *Matthewson v. Stockdale*, 12 Ves. 270.

Printed Diary.—Where plaintiff's publication consisted of a printed diary interleaved with blank sheets so arranged as to give a blank space for writing opposite each day in the diary, and underneath each date a verse of scripture, to which work plaintiff had given a particular name, defendant was enjoined from publishing and selling a book which was a mere colorable imitation of that of plaintiff. *Mack v. Peters*, L. R., 14 Eq. 431.

Statistical Tables.—Where defendant's book consists of statistical tables taken bodily from plaintiff's work it

will be treated as an infringement for which an injunction will lie. *Scott v. Sanford*, L. R., 3 Eq. 718.

Newspapers are entitled to protection as an article of property. *Cox v. Land & Water Journal Co.*, L. R., 9 Eq. 324. But there is no copyright in a descriptive advertisement or illustrated guide. *Cobbett v. Woodward*, L. R., 14 Eq. 407.

Allegations in Bill.—Before a court of equity will interfere in a case of alleged violation of copyright it must appear that a valid copyright exists. *Drone on Copyright*, 498.

"The copyright is *prima facie* evidence that he was the author, and the burden of proof is upon the defendant to show the contrary." *TANEX, C. J.*, *Reed Carusi Tan*. Dec. 74. "*Prima facie*," said MR. JUSTICE STORY, "the copyright confers title, and the onus is on the other side to show clearly that notwithstanding the copyright there is an intrinsic defect in the title."

Legal Title.—"It is not essential to relief in equity that the legal title shall be in the plaintiff. Where a valid copyright exists a court of equity will protect the rights of a complainant who has a good equitable title." *Drone on Copyright*, p. 500. See also *Chappell v. Purdy*, 4 Y. & C., Exch. 485, 493; *Hodges v. Welsh*, 2 Ir. Eq. 266; *Colburn v. Duncombe*, 9 Sim. 151; *Sweet v. Carter*, 11 Sim. 572; *Lawrence v. Dana*, 2 Am. L. T. (U. S.) N. S. 402; *Mawman v. Tegg*, 2 Russ. 385; *Pulte v. Derby*, 5 McLean 328; *Little v. Gould*, 2 Blatchf. (U. S.) 165, 369; *Colburn v. Duncombe*, 9 Sim. 151; *Sweet v. Shaw*, 3 Jur. 217; *Bohn v. Bogue*, 10 Jur. 420; *Sims v. Marryat*, 17 Q. B. 281; *Turner v. Robinson*, 10 Ir. Ch. 121, 510.

Consent by the plaintiff to the publication of an alleged piratical work will bar his right of relief in equity by injunction. *Rundell v. Murray*, Jac. 311; *Strahan v. Graham*, 17 L. T., N. S. 457; *Latour v. Bland*, 2 Stark. 382; *Saunders v. Smith*, 3 My. & Cr. 711; *Heine v. Appleton*, 4 Blatchf. (U. S.) 125.

Acquiescence.—Where a defendant has been induced by plaintiff's conduct, or even encouragement, to go on with the publication in question, or when plaintiff has for a long period knowingly acquiesced in such publication without remonstrance or complaint, a court of equity may properly refuse to lend its aid by injunction to restrain the alleged infringement of plaintiff's copyright. *High on Inj.* § 1028; *Drone on*

In deciding questions relating to the violation of copyright, the court will consider the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which such use may prejudice the sale or diminish the profit or supersede the objects of the original work.¹

(a) *Literary Productions Distinct from Copyright.*—Courts of equity will restrain the unauthorized publication of manuscript, pictures, dramatic compositions, etc., where no copyright has been obtained. A publication, literary or dramatic, may be limited, as the performance of a play in a theater, or general, as when the publication is not restricted, both as to the purpose for and the persons to whom it was made. The proprietorship, however, continues after a general publication, so as to prevent others from making ulterior publication or otherwise using the property as his own.²

(b) *The unauthorized use of lectures, which have not been pub-*

Copyright, 508. See also *Lewis v. Chapman*, 3 Beav. 133; *Lindsley v. Lacey*, 1 *Hern. & M.* 747; *Saunders v. Smith*, 3 *Myl. & Cr.* 711; *Rundell v. Murray Jac.* 311; *Bolery v. Taylor*, 3 *L. J.* 66; *Assignees v. Wilkins*, 8 *Ves. Chappell v. Sheard*, 1 *Jur. N. S.* 996; *Correspondent Newspaper Co. v. Saunders*, 12 *L. T., N. S.* 540.

Plaintiff is not responsible for delay when ignorant of piracy. *Greene v. Bishop*, 1 *Cliff.* 186, 202; *Boucicault v. Wood*, 2 *Biss. (U. S.)* 34; s. c., 7 *Am. Law Reg. N. S.* 539; *Lewis v. Tullarton*, 2 *Beav.* 6; *Chappell v. Sheard*, 1 *Jur. N. S.* 997.

The tendency of recent decisions, however, are toward the doctrine that the plaintiff's rights in equity are not lost by mere delay in asserting those rights. *Maxwell v. Somerton*, 30 *L. T., N. S.* 11; *Morris v. Ashbee*, *Law Rep.* 7 *Eq.* 34; *Hogg v. Scott*, *Law Rep.* 18 *Eq.* 444; *Strahan v. Graham*, 17 *L. T., N. S.* 457; *Boucicault v. Fox*, 5 *Blatchf. (U. S.)* 87; *Greene v. Bishop*, 1 *Cliff. (U. S.)* 186, 202; *Boucicault v. Wood*, 2 *Biss. (U. S.)* 34; s. c., 7 *Am. Law Reg., N. S.* 539, 550.

Interlocutory injunction against the piratical part without waiting to determine the full extent of the infringement. *Stevens v. Wildy*, 19 *L. J., N. S. (Ch.)* 190; *Farmer v. Calvert etc. Co.*, 5 *Am. L. T. R.* 168; *Lewis v. Fullarton*, 2 *Beav.* 6; *Kelly v. Morris*, *Law Rep.* 1 *Eq.* 697. But if the court is not reasonably satisfied that the plaintiff has a valid copyright or that piracy has been committed, an injunction will not be granted before these questions have

been determined. *Jarrold v. Houlston*, 3 *Kay & J.* 708; *M'Neill v. Williams*, 11 *Jur.* 344; *Morris v. Wright*, *Law Rep.* 5 *Ch.* 279; *Bramwell v. Holcomb*, 3 *My. & Cr.* 737; *Jollie v. Jaques*, 1 *Blatchf. (U. S.)* 618; *Miller v. McElroy*, 1 *Am. Law Reg.* 198; *Blunt v. Patten*, 2 *Paine (N. Y.)* 397; *Smith v. Johnson*, 4 *Blatchf. (U. S.)* 618; *Flint v. Jones*, 1 *W. N. C. (Pa.)* 334.

A permanent injunction will be granted when material piracy is clear, but if a small part of the defendant's publication has been copied from that of the plaintiff, and the piracy is so slight as to create a doubt whether it is a proper case for the interference of a court of equity, an injunction will not be granted. *Sweet v. Carter*, 11 *Sim.* 572, 580; *Bohn v. Bogue*, 10 *Jur.* 420; *Mawman v. Tegg*, 2 *Russ.* 385; *Bell v. Whitehead*, 3 *Jur.* 68; *Lewis v. Fullerton*, 2 *Beav.* 6; *Campbell v. Scott*, 11 *Sim.* 31; *Jarrold v. Heywood*, 18 *W. R.* 279; *Webb v. Powers*, 2 *Woodb. & M. (U. S.)* 497; *Greene v. Bishop*, 1 *Cliff. (U. S.)* 186.

1. *Folsom v. Marsh*, 2 *Story (U. S.)* 100; *Farmer v. Calvert*, *L. E. & M. P. Co., s. c.*, 5 *Chicago Leg. N. (Ill.)* 1.

2. *Keene v. Wheatley*, 9 *Am. L. Reg. (U. S.)* 33; *Queensberry v. Shebbeare*, 2 *Eden* 329; *Southey v. Sherwood*, 2 *Meriv.* 435; *Pope v. Carl*, 2 *Atk.* 342; *Grigsby v. Breckinridge*, 2 *Bush. (Ky.)* 480. *Story's Eq.*, § 943. *Prince v. Albert v. Strange*, 1 *Mac. & G.* 25.

Lord Eldon was of the opinion that a lecture delivered orally could not be published by another for profit, but that anyone rightfully admitted to hear it

lished, otherwise than by delivery to audiences, may be enjoined.¹

might take it down for his own information. *Abermathy v. Hutchinson*, 3 L. J. Ch. 209. This appears to be a correct statement of the law. In this class of cases the state courts have jurisdiction.

When plaintiff has the literary proprietorship of a manuscript play, but no statutory copyright, although she has publicly performed it at her theatre with the intention of continuing such performance, if defendants, against plaintiff's will, produce the play at another theatre, having obtained it by taking advantage of a breach of confidence committed by a person in plaintiff's employ, a bill may be maintained for equitable relief. *High on Injunctions*, § 1039; *Keen v. Clark*, 5 Rob. (N. Y.) 38.

In *Daly v. Palmer*, 6 Blatchf. (U. S.) 256, the plaintiff, being the owner of a copyrighted play known as "Under the Gaslight," filed a bill to enjoin defendant from producing a play called "After Dark," the injunction being specially sought to prevent defendant from representing in his play a particular scene known as the "railroad scene" in "Under the Gaslight." The injunction was allowed. BLATCHFORD, J., said: "All that is substantial and material in the plaintiff's 'railroad scene' has been used by Boucicault in the same order and sequence of events and in a manner to convey the same sensations and impressions to those who see it represented as in the plaintiff's play. Boucicault has, indeed, adopted the plaintiff's series of events of the story of his play, and in doing so has evinced skill and art, but the same use is made in both plays of the same series of events to excite by representation the same emotions in the same sequence. There is no new use, in the sense of the law, in B's play, of what is found in the plaintiff's 'railroad scene' in B's play; it contains everything which makes the 'railroad scene' in the plaintiff's play attractive as a representation on the stage. As in the case of a musical composition, the air is the invention of the author and a piracy is committed if that in which the whole meritorious part of the invention consists is incorporated in another work, without any material alteration in sequence of bars; so, in the case of a dramatic composition designed or suited for representation,

the series of events directed in writing by the author in any particular scene, is his invention, and a piracy is committed if that in which the whole merit of the scene consists is incorporated in another work, without any material alteration in the constituent parts of the series of events, or in the sequence of the events in the series. The adaptation of such series of events to different characters who use different language from the character and language of the first play, is like the adaptation of the musical air to a different instrument, or the addition to it of variations or of an accompaniment. The original subject of invention, that which requires genius to construct it and set it in order, remains the same in the adaptation. A mere mechanic in dramatic composition can make such adaptation, and it is a piracy of the appropriated series of events when represented on the stage, although performed by a new and different language, is recognized by the spectator through any of the scenes to which the representation is addressed, as conveying substantially the same impressions to and exciting the same emotions in the mind, in the same sequence or order. Tested by these principles, the 'railroad scene' in B's play is undoubtedly, when acted, performed or represented on a stage or public place, an invasion or infringement of the copyright of the plaintiff in the 'railroad scene' in his play. The substantial identity between the two scenes would naturally lead to the conclusion that the latter one had been adapted from the earlier one. The charge of actual plagiarism on the part of B, made in the bill, is not denied. It is hardly possible that the resemblances are accidental and that the differences are not merely colorable with the view to disguise the plagiarism. The true test of whether there is a piracy or not is to ascertain whether there is a servile or evasive imitation of the plaintiff's work, or where there is a *bona fide* original compilation, made up from common materials and common sources with resemblances which are merely accidental or result from the nature of the subject. *Emerson v. Davies*, 3 Story (U. S.) 768, 793."

1. *Keene v. Kimball*, 16 Gray (Mass.) 545.

A person who attends oral lectures is

So the unauthorized sale of copies of engravings, paintings and other like works.¹

(c) *Private letters*, whether on matters of business, literary topics, or relating to family affairs, if attempted to be published without authority, the publication may be enjoined.² Judge STORY says that there may be a distinction between private letters and those official letters addressed to the government, or any of its departments, by officers, which, from principles of public policy, may be published or withheld as circumstances may require.³

36. Trade Marks.—The fraudulent use of another's trade mark will be restrained by injunction.⁴

not justified in publishing them for profit, and an action will lie against him for doing so. The court will grant an injunction against third persons publishing lectures orally delivered, who must have procured the means of publishing these lectures from persons who attended the oral delivery of them and were bound by the implied contract. *Abernethy v. Hutchinson*, 1 H. & Tw. 28; s. c., 3 L. J. Ch. 209.

1. *Prince Albert v. Strange*, 1 Mac. & G. 25; *Turner v. Robinson*, 10 Ir. Ch. 121; *Martin v. Wright*, 6 Sim. 297; *Abernethy v. Hutchinson*, 1 Hall & Tw. 40; *Keene v. Kimball*, 16 Gray (Mass.) 551; *Bartlett v. Cuttenden*, 4 McLean, (U. S.) 303; *Granard v. Dunkirk*, 1 Ball & B. 207; *Palin v. Gothercole*, 1 Coll. 565.

2. *Pope v. Carl*, 2 Atk. 342; *Thompson v. Stanhope*, Amb. 737; *Gee v. Pritchard*, 2 Swanst. 402; *Percival v. Phipps*, 2 V. & B. 19; *Woolsey v. Judd*, 4 Duer (N. Y.) 379; *Denis v. Leclerc*, 1 Mart. (La.) 297; s. c., 5 Am. Dec. 712; *Eyre v. Higbee*, 35 Barb. (N. Y.) 502; s. c., 22 How. (N. Y.) Pr. 198; *Grigsby v. Breckinridge*, 2 Bush. (Ky.) 481; *Howard v. Gunn*, 32 Beav. 462; *Hopkins v. Burghley*, L. R. 2 Ch. App. 447; s. c., 36 L. J. Ch. 504; *Wetmore v. Scovell*, 3 Edw. (N. Y.) Ch. 515. The latter case contains a review of the authorities to the year 1842 and will be found instructive. In *Pope v. Carl*, 2 Atk. 342, the defendant was enjoined from vending a book entitled "Letters from Swift, Pope and others." LORD HARDWICK, upon the objection being made that a letter sent to another person was in the nature of a gift to the latter, expressed the opinion that the receiver only acquired a special property therein; and that he was not author-

ized to publish it to the world, so at the most the receiver had only a joint property with the owner.

The general principles laid down in this case have become the recognized law in England. *Thompson v. Stanhope*, Amb. 737; *Granard v. Dunkin*, 1 Ball. & B. 207; *Gee v. Pritchard*, 2 Swanst. 402; *Oliver v. Oliver*, 11 C. B., N. S. 139; *Cadell v. Stewart*, 10 Mor. Dict. of Dec., tit. Prop., App., p. 13; *Perceval v. Phipps*, 2 Ves. & B. 19; *Palin v. Gather*, Cole 1 Coll. 565; *Howard v. Gunn*, 32 Beav. 462. And in the United States, *Wetmore v. Scovell*, 3 Edw. Ch. (N. Y.) 515; *United States v. Tanner*, 6 McLean (U. S.) 128; *Eyre v. Higbee*, 22 How. Pr. (N. Y.) 198; *Grigsby v. Breckinridge*, 2 Bush. (Ky.) 481; *Hoyt v. Mackenzie*, 3 Barb. Ch. (N. Y.) 320; *Woolsey v. Judd*, 4 Duer (N. Y.) 379; *Denis v. Leclerc*, 1 Martin (Orleans T.) 297; *Folsom v. Marsh*, 2 Story (U. S.) 100.

3. *Folsom v. Marsh*, 2 Story R. 100-113; *Story's Eq.* 947.

The interference by equity in cases of this kind is exercised for the protection of property rights, not wounded feelings or of violated friendship. *Hoyt v. Mackenzie*, 3 Barb. (N. Y.) Ch. 320; *Gee v. Pritchard*, 2 Swanst. 422; *Wetmore v. Scovell*, 3 Edw. (N. Y.) Ch. 515; *Brandreth v. Lance*, 8 Paige (N. Y.) 24.

4. *Pierce v. Guittard*, 68 Cal. 68; *New Haven Patent Rolling Spring Bed Co. v. Farren*, 51 Conn. 324; *Williams v. Brooks*, 50 Conn. 278; s. c., 47 Am. Rep. 642; *Bradley v. Norton*, 33 Conn. 157; *Funk v. Dreyfus*, 34 La. An. 80; s. c., 44 Am. Rep. 413; *Myers v. Kalamazoo Buggy Co.*, 54 Mich. 215; s. c., 52 Am. Rep. 811; *McCann v. Anthony*, 21 Mo. App. 83; *Plant Seed Co. v. Michel Plant Seed Co.*, 23 Mo. App. 579;

(a) *Ground for Relief*.—Relief is granted upon the ground that the plaintiff has a valuable property in the good will of his business or trade; and that, having adopted a particular mark in effect certifying that the goods containing such symbol were manufactured by him, he, as well as the public, is entitled to protection against a person who attempts to palm his goods off as those of the other.¹

(b) *When Granted*.—An injunction will be granted to restrain the use of names, marks, letters or indicia by which such party may induce purchasers to believe that the goods he is selling are the manufacture of another person.²

Enoch Morgan's Sons Co. v. Schwacher, 5 Abb. (N. Y.) N. Cas. 265; Bell v. Locke, 8 Paige (N. Y.) 75; Taylor v. Carpenter, 11 Paige (N. Y.) 292; Patridge v. Menck, 2 Barb. (N. Y.) Ch. 101; Clark v. Clark, 25 Barb. (N. Y.) 76; Smith v. Woodruff, 48 Barb. (N. Y.) 438; Newman v. Alvord, 49 Barb. (N. Y.) 588; New York Cab Co. v. Mooney, 15 Abb. (N. Y.) N. Cas. 251; Low v. Hart, 90 N. Y. 457; Hegeman v. O'Byrne, 9 Daly (N. Y.) 264; Godillot v. Harris, 81 N. Y. 263; India Rubber Co. v. Rubber Comb etc. Co., 45 N. Y. Super. Ct. 258; England v. New York Pub. Co., 8 Daly (N. Y.) 375; Electro-Silicon Co. v. Levy, 59 How. (N. Y.) Pr. 469; Royal Baking Powder Co. v. Sherrill, 59 How. (N. Y.) Pr. 17; Potter v. McPherson, 21 Hun (N. Y.) 559; Dreydoppel v. Young, 14 Phila. (Pa.) 226; Carroll v. Ertheiler, 14 Phila. (Pa.) 424; Alexander v. Morse, 14 R. I. 153; s. c., 51 Am. Rep. 369; Coats v. Holbrook, 2 Sand Ch. (N. Y.) 586; Pennsylvania Salt Manuf. Co. v. Babbitt, 24 Leg. Int. (Pa.) 165; Williams v. Johnson, 2 Bos. (N. Y.) 1; Curtis v. Ryan, 2 Daly (N. Y.) 312; s. c., 36 How. Pr. (N. Y.) 33; Dixon Crucible Co. v. Guggenheim, 2 Brewst. (Pa.) 321; s. c., 7 Phila. (Pa.) 408.

1. An injunction is granted upon the ground that the defendant has no right to sell his goods as those of the plaintiff. Croft v. Day, 7 Beav. 88.

In Hostetter v. Vowinkle, 47 Barb. (N. Y.) 455, DILLON, J., said: "The law is well settled that a party who has appropriated a particular trade mark to distinguish his goods from other similar goods has a right or property in it which entitles him to its exclusive use. This right is of such a nature that equity will protect it by injunction from invasion, and if it has been invaded the

wrongdoer is liable for the damage he has thereby caused the party whose trade mark he has adopted or illegally imitated, which damage will ordinarily be the loss of profits caused by the illegal or fraudulent infringement. Candee v. Deere, 54 Ill. 439; s. c., 10 Am. Law Reg. (U. S.) 694; Motely v. Downman, 3 Myl. & Cr. 1; Millington v. Fox, 3 Myl. & Cr. 338; Eden on Inj., ch., 14, p. 314; Story's Eq. Juris., § 951; Taylor v. Carpenter, 2 Woodb. & M. (U. S.) 1; Walton v. Crowley, 3 Blatchf. (U. S.) 440; Coffeen v. Brunton, 4 McLean (U. S.) 518; Seixo v. Provezende, 1 Ch. App. 104; Amoskeag Manfg. Co. v. Spear, 2 Sandf. (N. Y.) 606; Filley v. Fassett, 44 Mo. 168; s. c., 8 Am. Law Reg. (U. S.) 402; and cases cited: Gillott v. Esterbrook, 47 Barb. (N. Y.) 469; Burnett v. Phalon, 9 Bosw. (N. Y.) 192; Edleston v. Vick, 23 Eng. C. L. & Eq. 53. These cases and others also show that it is not necessary to constitute an illegal infringement that the trade mark of the originator should be copied in every particular. It is sufficient to warrant equitable relief that it is likely to deceive or mislead the patrons of the originator or make it pass with the public as his."

2. Anheuser Busch Brewing Assoc. v. Clarke, 26 Fed. Rep. 410; Southern White Lead Co. v. Cary, 25 Fed. Rep. 125; Royal Baking Powder Co. v. Davis, 26 Fed. Rep. 293; Davis v. Davis, 27 Fed. Rep. 490; Pratt Manfg. Co. v. Astral Refining Co., 27 Fed. Rep. 492; Estes v. Leslie, 23 Blatchf. C. Ct. 476; s. c., 27 Fed. Rep. 22; Estes v. Worthington, 31 Fed. Rep. 154; Pierce v. Guittard, 68 Cal. 68; Glen Cove Manfg. Co. v. Ludeling, 22 Fed. Rep. 823; Alexander v. Morse, 14 R. I. 153; s. c., 51 Am. Rep. 369; New York Cab Co. v. Mooney, 15 Abb. (N. Y.) N. Cas. 152; Avery v. Meikle, 81 Ky. 73; Estes

v. Williams, 21 Fed. Rep. 189; *Carroll v. Ertheiler*, 14 Phila. (Pa.) 424; *Humphreys etc. Co. v. Wenz*, 14 Fed. Rep. 250; *Collins Co. v. Oliver etc. Cor.*, 20 Blatchf. (U. S.) 542; *Funke v. Dreyfus*, 34 La. An. 80; s. c., 44 Am. Rep. 413; *Hegeman v. O'Byrne*, 9 Daly (N. Y.) 264; *Godillot v. Harris*, 81 N. Y. 263; *Enoch Morgan's Sons Co. v. Schwachofer*, 5 Abb. (N. Y.) N. Cas. 265; *Enoch Morgan's Sons Co. v. Troxell*, 57 How. (N. Y.) Pr. 121; *Gilman v. Hunnewell*, 122 Mass. 139; *Enoch Morgan's Sons Co. v. Schwachofer*, 55 How. (N. Y.) Pr. 37; *Bell v. Locke*, 8 Paige (N. Y.) 75; *Taylor v. Carpenter*, 11 Paige (N. Y.) 292; *Partidge v. Menck*, 2 Barb. (N. Y.) Ch. 101; *Clark v. Clark*, 25 Barb. (N. Y.) 76; *Gillott v. Esterbrook*, 47 Barb. (N. Y.) 455; *Gillott v. Kettle*, 3 Duer (N. Y.) 624; *Burnet v. Phalon*, 9 Bosw. (N. Y.) 192; *Christy v. Murphy*, 12 How. (N. Y.) Pr. 77; *Binger v. Wattles*, 28 How. (N. Y.) 206; *Fetridge v. Merchant*, 4 Abb. (N. Y.) Pr. 156; *Colladay v. Baird*, 4 Phila. (Pa.) 139; *Coats v. Holbrook*, 2 Sandf. (N. Y.) Ch. 586; *Taylor v. Carpenter*, 2 Sandf. (N. Y.) Ch. 603; *Perry v. Truefit*, 6 Beav. 66.

Injunctions were granted in the following cases, the first trade mark having been an infringement upon the second: "Sweet German Chocolate" for "German Sweet Chocolate." *Pierce v. Guitard*, 68 Cal. 68. "Frank Leslie's Chatter Box" for "Chatter Box." *Estes v. Leslie*, 23 Blatchf. C. Ct., 476; s. c., 27 Fed. Rep. 22. "St. Louis Lager Beer" for the same. *Anheuser Busch Brewing Assoc. v. Piza*, 24 Fed. Rep. 149. "Dr. Morse's Improved Yellow Dock and Sarsaparilla Compound" for "Morse's Compound Syrup of Yellow Dock Root." *Alexandre v. Morse*, 14 R. I. 153; s. c., 51 Am. Rep. 369. "Lone Jack Cigarettes" for "Lone Jack Smoking Tobacco." *Carroll v. Ertheiler*, 14 Phila. (Pa.) 424. "Independent National System of Penmanship" for "Payson, Duntun & Scribner's National System of Penmanship." *Potter v. McPherson*, 21 Hun (N. Y.) 559. "Electric Silicon" for "Electro Silicon." *Electro Silicon Co. v. Trask*, 59 How. (N. Y.) Pr. 189.

"Bethesda" may be protected as the trade mark of a spring. *Dunbar v. Glenn*, 42 Wis. 118.

"Eureka" sustained and protected as a trade mark. *Alleghany Fertilizer Co. v. Woodside*, 1 Hughes (U. S.) 115.

The trade mark "Sapolio" will be

protected, independent of the trade marks act of congress may create, against sale of a like article, in similar wrappers and labels, under the name "Saphia." *Morgan v. Schwachofer*, 55 How. (N. Y.) Pr. 37.

Upon a bill for injunction to restrain the use of a trade mark claimed by complainant in the name "Acid Phosphate," applied to a medicinal preparation, *held*, that the proofs showed that the name was not meaningless and arbitrary, but with reasonable exactness described the characteristics and qualities of the preparation for the purpose for which it was intended to be used, and that, being thus descriptive, it could not be exclusively appropriated by complainant as its trade mark. *Rumford Chemical Works v. Muth*, 35 Fed. Rep. 524.

G was engaged in putting up in packages and importing from Paris a vegetable compound for making Julienne soup. His trade mark consisted of the words "Conserve Alimentaires" over a coat of arms of that city, and on either side the monogram "A. G." in a circle, and underneath the words "Paris" and "Julienne," with directions for use. *Held*, that he was entitled to restrain a subsequent dealer from using upon like packages a like device, except that the monogram had "F" instead of "A." *Godillot v. Harris*, 81 N. Y. 263.

A corporation calling itself "The Humphreys Specific Homeopathic Medicine Company" for many years put up and sold remedies called on the wrappers and labels "Homeopathic Specific," and numbered and entitled "No. 1, fever, congestion, inflammations;" "No. 2, worm fever or worm disease," and so forth. Defendant put up specifics which he entitled "Reeves' Improved Homeopathic Specifics," and similarly numbered and labeled. *Held*, that although the term "homeopathic specific" could not alone be the subject of a trade mark, yet that on the whole case the corporation was entitled to an injunction against defendant's use of the term in connection with the numbers and descriptions. *Humphreys etc. Co. v. Wenz*, 14 Fed. Rep. 250.

Cases where injunction was refused, the first trade mark not being an infringement upon the second: "Standard White Astral Oil" for "Pratt's Astral Oil." *Pratt Manfg. Co. v. Astral Refining Co.*, 27 Fed. Rep. 492. "Brown's Iron Tonic" for "Brown's Iron Bitters." *Brown Chemical Co. v. Myer*, 31 Fed.

Rep. 453. "Drummond *Randle* Tobacco Company" for "Drummond Tobacco Company." *Drummond Tobacco Co. v. Randle*, 114 Ill. 412.

The plaintiff, a cigar merchant in London, registered a label at Stationers' Hall, which he requested G, the manufacturer at Havannah who supplied him with cigars of a particular description, to affix to each box consigned to him. G accordingly affixed the label, with his own name as manufacturer, to all boxes so consigned. The plaintiff subsequently discovered that G was supplying cigars of the same description and with the same label to the defendants, who were G's agents, and brought his action to restrain the alleged infringement of his trade mark. On a motion for an injunction against the defendants, *held*, that there being no evidence of any contract that G should supply the plaintiff exclusively with that description of cigars, the court could not on an interlocutory application restrain the defendants from using the label. *Hirsch v. Jonas*, 3 Ch. D. 584.

A firm of forwarding agents in London received from correspondents abroad several boxes of cigars bearing forged brands, which were to be delivered to several persons in England. On application by the makers whose brand had been forged the agents gave information as to the consignors, and offered either to send back the cigars or to erase the brands. *Held* (affirming the decree of the master of the rolls), on a bill for injunction filed by the makers whose brands were forged, that the fact of the agents being merely carriers was no defence to the suit, but that as they had given sufficient information and offered to erase the brands they were not to pay costs. The appellant gave notice to a respondent, whose costs the appellant had been ordered to pay, that no alteration in the order as to his costs was asked for, and offered to pay his costs. *Held*, that the respondent was not entitled to his costs of appearing on the appeal. *Upmann v. Elkan*, 12 Eq. 140; 7 Ch. 130.

One's Own Name.—Defendants using his own name in his signs and advertisements, disguising or half concealing the initials, so that customers would easily mistake it for plaintiff's (the surname of the two being the same), may be a violation of an injunction confirming him to the use of his own name, as compared with any simulation of plaintiff's, but leaving him at liberty to use

his own. *Devlin v. Devlin*, 67 Barb. (N. Y.) 290. See *England v. New York Pub. Co.*, 8 Daly (N. Y.) 375.

Where one named "Oakes" sold the exclusive right to manufacture and sell "Oakes' Candies," he was restrained from manufacturing and selling candies made by him as "Oakes' Candies." *Probasco v. Bouyon*, 1 Mo. App. 241.

A defendant will not be restrained by injunction from the use of his own name, on motion of a competitor having the same name and engaged in the same business, unless it plainly appears that it is used for the purpose of deception, or with a view to mislead the public or injure the plaintiff. *Decker v. Decker*, 52 How. (N. Y.) Pr. 218.

The use of an individual's name attached to a theatre or public building will not be restrained by injunction, as being in the nature of a trade mark. *Booth v. Jarrett*, 52 How. (N. Y.) Pr. 169.

No one can make a trade mark of his own name and thus debar others having the same name from using it in their business. *Mencely v. Mencely*, 62 N. Y. 427.

A Corporate Name.—The Amoskeag Manufacturing Company may be protected as a trade mark. *Amoskeag Manuf. Co. v. Garner*, 54 How. (N. Y.) Pr. 297.

The use of "Nevada Silicon Co." for "Electro-Silicon Co." will be enjoined. *Electro-Silicon Co. v. Levy*, 59 How. (N. Y.) Pr. 469. See *Humphreys etc., Co. v. Wenz*, 14 Fed. Rep. 250; *Collins Co. v. Oliver etc. Corp.*, 20 Blatchf. (U. S.) 542.

A petition which states that the adoption and use by defendant of plaintiff's corporate name were with the fraudulent intent of appropriating plaintiff's trade, that the public were deceived; and plaintiff's trade diverted to defendant thereby, states a case for equitable relief. *Plant Seed Co. v. Michel Plant & Seed Co.*, 23 Mo. App. 579.

Fancy Name.—A manufacturer who has produced an article of merchandise [*e. g.* a new pattern of cloth] and applied to it a particular fancy name, and sold it with a particular mark, under which name and mark it has obtained currency in the market, acquires an exclusive right to the use of such name and mark, and is entitled to restrain all other persons from using such name and mark to denote articles similar in kind and appearance, although he may have no exclusive right of manufacturing the

article. If the use of such name and mark, by any other person than the first inventor has been adopted for the purpose of selling goods of an inferior quality, though of similar external appearance, so that purchasers may be misled into the belief that they are buying the goods of the first inventor, the injury to the first inventor is one for which he is entitled to compensation in damages and relief by injunction. *Hirst v. Denham*, 14 Eq. 542.

Firm Name.—An injunction will lie after the dissolution of a firm to restrain the purchaser of the business from continuing to use the firm name; and in such case, it is not necessary to show actual damages. *Reeves v. Denicke*, 12 Abb. Pr. (N. Y.) N. S. 92; *Fenn v. Bolles*, 7 Abb. Pr. (N. Y.) 202; see *Peterson v. Humphrey*, 4 Abb. Pr. (N. Y.) 394. See *Ottoman Cahvey Co. v. Dane*, 95 Ill. 203.

An injunction will lie, at the suit of one against another, his former copartner, restraining the continuance of the use of the signs containing the old firm name, without sufficient alterations or additions to give distinct notice of a change in the firm. *Peterson v. Humphrey*, 4 Abb. (N. Y.) Pr. 394.

A court of equity will not enjoin infringement of the plaintiff's firm name as a trade mark if it falsely implies that they are a corporation. *McNair v. Cleave*, 10 Phila. (Pa.) 155.

Name of a Town.—The name of a town or city cannot generally be exclusively appropriated as the trade mark of anyone. Thus where a corporation adopted the trade mark "Glendon" on their iron, and the locality of their furnaces was afterward made a borough by the name of "Glendon," held that a second company there located could lawfully use the same mark. *Glendon Iron Co. v. Uhler*, 75 Pa. St. 467. See *Newman v. Alvord*, 51 N. Y. 189; *Lea v. Wolf*, 13 Abb. (N. Y.) Pr., N. S. 391.

Line of Steamers.—The use of a well established denomination of a line of steamers will be protected in equity against infringement. *Winsor v. Clyde*, 9 Phila. (Pa.) 513.

Letters and Figures.—The letters "LL" were used by plaintiff, a cotton manufacturing company, in connection with the words "Lawrence Mills," and sometimes in connection with a figure. Defendant stamped upon its product the words "Cumberland LL. Sheeting 4-4." Plaintiff sought to enjoin de-

fendant from using the letters "LL." It appeared that these letters were commonly known to indicate a product of a particular grade and class, and that they had been used by others. *Held*, that the plaintiff was not entitled to the relief sought. *Lawrence Manuf. Co. v. Tenn. Manuf. Co.*, 31 Fed. Rep. 776.

Where a manufacturer of steel pens has adopted the figures "303" as an arbitrary trade mark to denote pens of a certain quality and pattern, he will be protected in the exclusive use thereof by injunction. *Gillott v. Esterbrook*, 48 N. Y. 374; s. c., 47 Barb. (N. Y.) 455.

Labels, Wrappers, etc.—Although the name adopted by a dealer for his article is not one to the exclusive use of which he is entitled, yet the peculiar style of the package in which he puts up the article and the combination constituting the label may be protected by injunction. *Cook v. Starkweather*, 13 Abb. (N. Y.) Pr., N. S. 392; *Lea v. Wolf*, 13 Abb. Pr. (N. Y.) N. S. 389.

The plaintiffs manufactured an article called "Sapolio," which had acquired a high reputation. The defendant, having ascertained by analysis the composition of the article, set about making one as nearly as possible like it, which he called "Sophia," and put up in wrappers closely resembling the plaintiff's externally and internally in color and size and partially in the inscription and directions for use. *Held*, that as it appeared that the imitation was intended to deceive purchasers, the defendant should be restrained from using such wrappers. *Enoch Morgan's Sons Co. v. Schwachofer*, 5 Abb. (N. Y.) N. Cas. 265. Compare *Enoch Morgan's Sons Co. v. Troxell*, 57 How. Pr. (N. Y.) 121.

Street Number.—If the man who uses the street or number as a part of his trade mark has the exclusive use of the building indicated by the number, he may use it as a part of his trade mark against persons who have no right to or interest in the building indicated by the number, but who use it as a part of their trade mark in order to pirate on the one justly entitled to use it. *Glen etc. Co. v. Hall*, 6 Lans. (N. Y.) 158.

But it is not every mark, letter or word which has been adopted by another will thereby become his exclusive property. Thus where such words, marks, etc., do not indicate the property, goods or particular place of

It is no defence to the suit that the simulated article is equal in quality to the genuine article, nor that the maker of the spurious goods, or the seller, informs the persons purchasing that the article is spurious or an imitation.¹

(c) *Imitations*.—An imitation is colorable, and will be enjoined when it requires a careful inspection to distinguish its marks and appearance from those of the manufacture imitated.²

(d) *When Trade Mark Protected*.—A trade mark will not be protected if it was adopted as part of a scheme to deceive the public.³

business of the person first using them, but merely the nature, kind, quality, etc., in which the person deals, he acquires no property therein. *Amoskeag Manfg. Co. v. Spell*, 2 Sandf. Ch. (N. Y.) 600.

1. *Coats v. Holbrook*, 2 Sandf. (N. Y.) Ch. 586. In *Taylor v. Carpenter*, 2 Sandf. Ch. (N. Y.) 603; 11 Paige, 292, the defendant answered in substance that the plaintiff was a nonresident of the United States, while he was a citizen thereof and a resident of Massachusetts; "that the thread so manufactured and put up and sold by him in imitation of the thread vended by the complainants, is in all respects as good as the thread vended by them, and each spool so put up by the defendant contains as many yards of thread as a spool of like appearance vended by the complainants." The court held the defences of no avail.

2. *Patridge v. Menck*, 2 Sandf. (N. Y.) Ch. 622; *McLean v. Fleming*, 6 Otto (U. S.) 245. In *Spottiswoode v. Clark*, 10 Lond. Jurist 1043, where it was sought to restrain the publication of an almanac on the ground that it was an imitation, the injunction was refused, the complainant's right not being entirely clear and the defendant undertaking to keep an account. The reasons for the refusal as given by the chancellor commend themselves.

An injunction will not be granted where the resemblance to the plaintiff's trade mark would not probably deceive the ordinary mass of purchasers, nor where there is a doubt in respect to the alleged piracy. *Patridge v. Menck*, 2 Sandf. (N. Y.) Ch. 622; s. c., 2 Barb. (N. Y.) Ch. 101; *How*, (N. Y.) App. Cas. 547; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599; *Merrimack Mfg. Co. v. Garner*, 4 E. D. Smith (N. Y.) 387; s. c., 2 Abb. Pr. (N. Y.) 318. But a colorable imitation calculated to deceive will be enjoined. *Clark v. Clark*, 25 Barb. (N. Y.) 76; *Brooklyn White*

Lead Co. v. Masury, 25 Barb. (N. Y.) 416; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599; *Williams v. Johnson*, 2 Bosw. (N. Y.) 1; *Brown v. Mercer*, 5 J. & Sp. 265; *Lockwood v. Bostwick*, 2 Daly (N. Y.) 521; *Pophan v. Wilcox*, 14 Abb. Pr. (N. Y.) N. S. 206; *Gail v. Wackerbarth*, 28 Fed. Rep. 286.

An imitation of the trade mark of a dealer with partial differences, such as the public would not observe, does him the same harm as an entire counterfeit and will be enjoined. *Clark v. Clark*, 25 Barb. (N. Y.) 76.

3. *Fettridge v. Wells*, 4 Abb. Pr. 144; *Hobbs v. Francois*, 19 How. Pr. 567; *Smith v. Woodruff*, 48 Barb. 43. *Curtis v. Bryan*, 2 Daly (N. Y.) 312; s. c., 36 How. Pr. (N. Y.) 33; *Hennessey v. Wheeler*, 51 How. (N. Y.) Pr. 457; *Tallcot v. Moore*, 13 N. Y. 106; *Laird v. Wilder*, 9 Bush (Ky.) 131; *Ford v. Foster*, L. R., 7 Ch. 611; *Frazier v. Frazer Lubricator Co.*, 18 Ill. App. 450; *New Haven etc. Co. v. Farren*, 51 Conn. 324; *Dreydoppel v. Young*, 14 Phila. (Pa.) 226; *Hurricane Lantern Co. v. Miller*, 56 How. (N. Y.) Pr. 234. But see *Fetridge v. Merchant*, 4 Abb. Pr. (N. Y.) 156.

The court will not interfere by injunction to restrain the imitation of a trade mark if there is false representation in the trade mark, or if the trade itself is fraudulent. And such false representation or fraud would be a good defence to an action at law for imitation of the trade mark on the ground that *ex turpi causa non oritur actio*. But a collateral misrepresentation by the owner of the trade mark will not disentitle him to relief either at law or in equity. In a case where the plaintiff, whose trade mark was "*Ford's Eureka Shirt*," had falsely represented in his invoices and in a few advertisements that he was a "patentee" of the shirt. Held, that such false representation was not sufficient to prevent him from sustaining an action at law; and

(e) *Violation*.—Where the simulation of a trade mark is such that it will probably deceive the public, it will be enjoined.¹

An injunction should not be granted at the commencement of a suit brought to enjoin the use of a trade mark, and to recover damages, etc., unless the legal right and the violation of it are very clear.²

(f) *The intention to deceive* is not material. Actual violation is sufficient to authorize an injunction.³

that his right at law being clear, he was entitled to an injunction in chancery. Decision of BACON, V. C., reversed. *Ford v. Foster*, 7 Ch. 611.

The use of the word "patent" as a part of the description in a label or trade mark of goods not protected by a patent is not such a misrepresentation as to deprive the owner of his right to be protected against an infringement of his label where the goods have, from the usage of many years, acquired the designation in the trade generally of patent. *Marshall v. Ross*; 8 Eq. 651.

The plaintiff being a thread manufacturer of repute, the defendant brought in the market thread, wound on spools, not made by the plaintiff, of inferior quality, and cheaper than his, and not bearing his name, but marked with the name of a firm of winders of thread who were known to be accustomed to purchase of the plaintiff thread in the hank for the purpose of winding, and selling it when wound. Defendant sold the goods to a wholesale customer, with the assurance (given, as he said, without knowledge of any misrepresentation) that they were of the plaintiff's make, and invoiced them to the customer under the description of certain numbers, which the plaintiff had adopted and exclusively used in order to designate his particular manufacture. The customer attached the plaintiff's name and numbers to the spools of thread, and retailed it to the public as of the plaintiff's make. *Held*, that there was not such a degree of wilful misrepresentation on the part of the defendant as would justify the court in granting an injunction, and bill dismissed, but without costs. The name of a manufacturer, or a system of numbers adopted and used by him in order to designate goods of his make, may be the subject of the same protection in equity as an ordinary trade mark. *Ainsworth v. Walmsley*, 1 Eq. 518.

Courts of equity refuse to interfere in behalf of persons who claim property in a trade mark, acquired by advertis-

ing their wares under representations which are false. *Seabury v. Grosvenor* 53 How. (N. Y.) Pr. 192; *Helmhold v. Helmhold Manuf. Co.*, 53 How. (N. Y.) Pr. 453.

A mere exaggerated recommendation of the article, however, will not deprive the proprietor of his right to protect against piracy. *Curtis v. Bryan*, 2 Daly (N. Y.) 312; s. c., 36 How. (N. Y.) Pr. 33; *Fetridge v. Wells*, 13 How. Pr. (N. Y.) 385; s. c., 4 Abb. Pr. (N. Y.) 144; *Hobbs v. Francois*, 19 How. (N. Y.) Pr. 567.

1. *Patridge v. Mench*, 2 Barb. (N. Y.) Ch. 101; *Walton v. Crowley*, 3 Blatchf. (U. S.) 340; *Newman v. Alvord*, 49 Barb. (N. Y.) 687; *Smith v. Woodruff*, 48 Barb. (N. Y.) 438; *Brooklyn White Lead Co. v. Masury*, 25 Barb. (N. Y.) 417; *Clark v. Clark*, 25 Barb. (N. Y.) 76; *Popham v. Cole*, 66 N. Y. 69; *Osgood v. Allen*, 1 Holmes (U. S.) 185; *Blackwell v. Wright*, 73 N. Car. 310. *American Grocer Publishing Assoc. v. Grocer Publishing Co.*, 51 How. (N. Y.) Pr. 402.

To entitle the owner of a trade mark to an injunction to prevent its use by another, there must be in the copy such a general resemblance of the form, words and symbols in the original as to mislead the public. *Rowley v. Houghton*, 2 Brewst. (Pa.) 303; s. c., 7 Phila. (Pa.) 39. And he must also clearly show a property right in himself. *Robertson v. Berry*, 50 Md. 591.

2. *Merrimack Mfg. Co. v. Garner*, 2 Abb. (N. Y.) Pr. 318; s. c., 4 E. D. Smith (N. Y.) 387; *Samuel v. Berger*, 4 Abb. (N. Y.) Pr. 88; s. c., 24 Barb. (N. Y.) 163; 13 How. Pr. (N. Y.) 342; *Patridge v. Mench*, 2 Barb. (N. Y.) Ch. 101.

3. *Coffeen v. Brunton*, 4 McLean (U. S.) 516; *Dale v. Smithson*, 13 Abb. (N. Y.) Pr. 237; *Millington v. Fox*, 3 Myl. & Cr. 338; *Rodgers v. Nowill*, 6 Hare 325; *Davis v. Kendall*, 2 R. I. 566.

Where a trade mark is not actually

(g) *Newspapers*.—The principles upon which equity enjoins a defendant from imitating the plaintiff's trade marks do not apply to the publication of newspapers, except so far as to protect the proprietor of a paper in the use of the name adopted by him for such paper.¹

(h) *Manufacturers*.—The infringement of a manufacturer's trade mark will be enjoined, though the article be composed of well known ingredients in general use for that purpose, which any person may combine and use at his pleasure.²

(i) *Continuance of Infringement*.—Where it appears that the party infringing a trade mark intends to continue the wrong, an injunction against such continuance will be granted.³

(j) *Laches*.—A long delay to commence proceedings to enjoin an alleged infringement of a trade mark is a good reason for refusing an injunction.⁴

37. Contracts.—An injunction will be granted to restrain the breach of a contract.⁵ Where a right is claimed under an agree-

mented, the existence of fraudulent intention is a necessary element in the consideration of a case of this description. The party complained of must be proved to have done the act with the fraudulent design of passing off his own goods as those of the plaintiff. It is not necessary, however, to show an exact resemblance between the original and the counterfeit—it is sufficient if there is such a resemblance as will mislead an unwary purchaser. A name may become a trade denomination, and as such the property of a particular person who first gives it to a particular article of manufacture. The employment of the name by another person for the purpose of describing an imitation of that article is an invasion of the right of the original manufacturer, who is entitled to protection by injunction. *Wotherspoon v. Currie*, 5 H. L. 508.

1. *Stephens v. De Conto*, 4 Abb. (N. Y.) Pr., N. S. 47; *Snowden v. Noah, Hopk.* (N. Y.) Ch. 347. See *Maxwell v. Hogg*, 2 L. R., Ch. App. 399.

Equity will protect the use of a name of a newspaper as a trade mark from imitation or simulation which is designed as such to mislead the public. *American Grocer Pub. Assoc. v. Grocer Pub. Co.*, 51 How. (N. Y.) Pr. 402.

2. *Williams v. Johnson*, 25 Bosw. (N. Y.) 1. And see *Comstock v. White*, 18 How. (N. Y.) Pr. 421; s. c., 10 Abb. (N. Y.) Pr. 264; *Williams v. Spence*, 25 How. (N. Y.) Pr. 366.

In order to constitute a ground for interference by a court of equity to pro-

tect a manufacturer against the use by another person of the particular name of his manufactured article, it is not necessary that there should be a *mala mens* towards the first purchaser of the article thus imitatively designated. The fault of the imitator is that the first purchaser may be enabled through this unwarranted designation to retail a simulated article at a lower price than would be demanded for the original article, and so the original manufacturer may be injured. *Wotherspoon v. Currie*, 5 H. L. 508.

The original inventor of a new manufacture, and persons claiming under him, are alone entitled to designate such manufacture as "the original," and if he or they have been in the habit of so designating their manufacture an injunction will be granted to restrain another manufacturer from applying the designation to his goods. *Cocks v. Chandler*, 11 Eq. 446.

If a manufacturer sell to another the right to use his name as a trade mark, a subsequent use of the same mark with the word "improved" affixed is a violation of the rights of the purchaser, which equity will enjoin. *Ayer v. Hall*, 3 Brewst. (Pa.) 509.

3. *Bradley v. Norton*, 33 Conn. 157.

4. *Amoskeag Mfg. Co. v. Garner*, 6 Abb. (N. Y.) Pr., N. S. 265; *Isaacson v. Thompson*, 41 L. J., Ch. 501; 20 W. R. 196.

5. *Singer Mfg. Co. v. Union etc. Co.*, 6 Fish Pat. C. (U. S.) 480; s. c., *Homes* 253; *Lumley v. Wagner*, 1 De Gex, M. & G. 604; affirming s. c., 5 De G. & Sm.

485; and overruling *Kemble v. Kean*, 6 Simm. 333; *Kimberly v. Jennings*, 6 Sim. 340; *Morris Canal etc. Co. v. The Society*, 5 N. J. Eq. (1 Hals.) 203; *Western Union Tel. Co. v. Philadelphia etc. R. Co.*, 9 Phila. (Pa.) 494; *Collins v. Plumb*, 16 Ves. 454; *Wason v. Sanborn*, 45 N. H. 169; *Jordan v. Woodward*, 38 Me. 423; *Burnham v. Kempton*, 44 N. H. 78; *Webber v. Gage*, 39 N. H. 182; *Pusey v. Wright*, 31 Pa. St. 387; *Wolfe v. Burke*, 56 N. Y. 115; *Taylor v. Gillies*, 5 Daly (N. Y.) 285; *Palmer v. Harris*, 60 Pa. St. 156; *Connell v. Reed*, 128 Mass. 477; *Dunlop v. Gregory*, 10 N. Y. 241; *Guerand v. Dandele*, 32 Md. 561; *Ropes v. Upton*, 125 Mass. 258; *Reece v. Hendricks*, 1 Leg. Gaz. (Pa.) Rep. 79; *Carroll v. Hickey*, 10 Phila. (Pa.) 308; *Grow v. Seligman*, 47 Mich. 607; s. c., 41 Am. Rep. 737; *Richardson v. Peacock*, 26 N. J. Eq. 40; *Harrison v. Gardener*, 2 Madd. 198; *Maxwell v. East River Bank*, 3 Bosw. (N. Y.) 124; *Spier v. Lambdin*, 45 Ga. 319; *Peabody v. Norfolk*, 98 Mass. 452; *Hubbard v. Miller*, 27 Mich. 15.

An injunction will be granted to restrain acts in violation of the spirit and intent of an agreement though not of its express terms. *Kelley v. Kelley*, 2 Phila. (Pa.) 380; *Richardson v. Peacock*, 26 N. J. Eq. 40.

In modern equity practice an injunction may be granted to restrain a violation of a contract, notwithstanding the contract is one of which specific performance cannot be enforced. And equity may enjoin a violation of an existing contract, notwithstanding it is terminable at the option of one only of the parties. *Singer Sewing Machine Co. v. Union Buttonhole etc. Co.*, 1 Holmes (U. S.) 253.

Where there is a verbal agreement between a vendor and his grantees that the premises shall be improved in a particular manner by receding a certain distance from the line of the street, and it is so improved in pursuance of the agreement, a remote grantee will be restrained from pulling down such building and building on the line of the street. *Maxwell v. East River Bank*, 3 Bosw. (N. Y.) 124.

Where a party has covenanted not to erect a building within a certain distance of a boundary line, he may be enjoined from erecting a fence that will have the same effect of excluding light Pr., N. S. 308; *Phoenix Ins. Co. v. Continental Ins. Co.*, 14 Abb. Pr. (N. Y.) 266.

One who invents or discovers and keeps secret a process of manufacture, whether patentable or not, has a property therein which the court will protect against one who, in violation of contract and breach of confidence, undertakes to apply it to his own use or to disclose it to a third person. *Peabody v. Norfolk*, 98 Mass. 452; *Kerr on Inj.* 181.

A right of re-entry reserved in a lease may not be so effectual a remedy for a breach of covenant as to deprive the lessor of a right to an injunction to restrain the breach. *Stees v. Kranz*, 32 Minn. 313.

But an injunction will not be granted at the suit of a property owner to restrain a contractor for the paving of a street from doing the work otherwise than according to his contract. *McCafferty v. McCabe*, 13 How. Pr. (N. Y.) 275; s. c., 4 Abb. (N. Y.) Pr. 57.

Written contract not necessary to entitle it to the protection of equity. Where one has sold the lease of a house with the good will of the business connected therewith, and has agreed orally that he will not renew the business in that street, he may be enjoined from violating such oral agreement. *Harrison v. Gardener*, 2 Madd. 198. See *Spier v. Lambdin*, 45 Ga. 319; *Hubbard v. Miller*, 27 Mich. 15.

Fraud.—An injunction to prevent the sale of mortgaged premises will be made perpetual, where it appears that the party executing the mortgage was rendered imbecile by habitual drunkenness, and reduced to a condition verging on insanity, by the mortgagee, who had obtained complete power over the mortgagor, the mortgagee not being able to show that he had given any valid consideration for the mortgage. *Van Horn v. Keenan*, 28 Ill. 445.

Mistake.—If, in making a contract of sale, a mistake has been made by one party, and a fraudulent advantage has been knowingly taken of the mistake by the opposite party, to his gain and the serious detriment and injury of the party making the mistake a court of equity will grant appropriate relief. *Shelton v. Ellis*, 70 Ga. 297.

Usurious Contracts.—The enforcement of a usurious contract by proceedings at law will be enjoined upon condition that the party aggrieved make actual payment or tender of the amount really due. *Miller v. Ford*, 1 N. J. (Sax.) Eq. 358; *Tupper v. Powell*, 1 Johns. (N. Y.) Ch. 439; *Morgan v.*

ment set forth, the right must be free from doubt, and the injury from a violation of it irreparable in damages, to authorize a preliminary injunction in aid of it.¹

Schermerhorn, 1 Paige (N. Y.) 544; Rogers v. Rathbun, 1 Johns. (N. Y.) Ch. 367; Turnpin v. Povall, 8 Leigh (Va.) 93.

If, however, the cause has been submitted to and decided at a trial at law, a court of equity will not afford relief against the judgment in the absence of fraud. Lansing v. Eddy, 1 Johns. (N. Y.) Ch. 49; Lindsley v. James, 3 Coldw. (Tenn.) 477; Morgan v. England, Wright (Ohio) 112; Buchanan v. Nolin, 3 Humph. (Tenn.) 63; McCoin v. Cooley, 3 Humph. (Tenn.) 559.

Award of Contract.—By virtue of ordinance No. 74 of 1876 of the mayor and city council of Baltimore, the city librarian, on the 10th of October, 1878, advertised for proposals for supplying the departments of the city government with stationery and printed matter from the 1st of January, 1879, to the 31st of December, 1879, inclusive. In answer to this three bids were presented, one by the appellants, one by the appellees, D, and one by J. W. S. They were laid before the mayor, who with the comptroller and register opened them. When they were opened they were examined by the city librarian, and the contract for both stationery and printed matter was awarded to the appellees, D, as being the lowest bidders therefor. In proceedings on a bill filed by the appellants, as printers and stationers and as tax payers of Baltimore City, alleging that the contract was fraudulently obtained by D, and that it should have been awarded to them as the lowest bidders therefor, and praying that the mayor and city council might be enjoined from executing the contract, it was *held* that the bill presented no claim to the exercise of the preventive power of the court. Kelly v. Baltimore, 53 Md. 134.

Injunction Restraining City Council from Incurring Indebtedness.—Where a city has already reached the limit of indebtedness permitted by its charter, and its council has passed an ordinance confirming a contract which may render it liable at any time to the payment of an additional annual sum equal to three-fourths of the limit of its indebtedness as fixed by its charter, and directing that warrants shall be issued to pay such sum monthly when the terms of

the contract are fulfilled, an injunction restraining the city council from carrying out the contract cannot be considered as improvidently or prematurely issued. Davenport v. Kleinschmidt, 6 Mont. 502.

County Subscription to Railroads.—If a railroad company fails to comply with the conditions on which a county subscription has been made to its stock, injunction will lie to prevent it receiving bonds agreed to be issued in payment, and to compel the surrender and cancellation of any already issued; and this remedy may be invoked by anyone who is a citizen and tax payer of the county. Wagner v. Meety, 69 Mo. 150.

1. Story's Eq. §§ 925, 926, 927; Webber v. Gage, 39 N. H. 182; Coe v. Lake Co., 37 N. H. 254; Burnham v. Kempton, 44 N. H. 78; Lake Co. v. Worster, 29 N. H. 433; Jordan v. Woodward, 38 Me. 423; Morse v. Machias Water Power Co., 42 Me. 119; Wason v. Sanborn, 45 N. H. 169; Morris Canal etc. Co. v. The Society, 5 N. J. Eq. (1 Hals.) 203; Niagara Falls etc. Co. v. Great Western R. Co., 39 Barb. (N. Y.) 212; Agate v. Lowenbein, 4 Daly (N. Y.) 62; reversed in 57 N. Y. 604. See Pusey v. Wright, 31 Pa. St. 387; Brown's App., 62 Pa. St. 17; Western Union Tel. Co. v. Phila. etc. R. Co., 9 Phila. (Pa.) 494; Elder v. Shaw, 12 Nev. 78; Florence Sewing Machine Co. v. Singer Mfg. Co., 8 Blatchf. (U. S.) 113; Collins v. Plumb, 16 Ves. 454; Munroe v. Wivenho R. Co., 11 Jur. (U. S.) 613; Singer Mfg. Co. v. Union Co., 6 Fish. 480; s. c., 1 Homes 253; Lumley v. Wagner, 1 De Gex, M. & G. 604; affirming s. c., 5 De G. & Sm. 485, and overruling Kemble v. Kean, 6 Sim. 333; Kimberley v. Jennings, 6 Sim. 340. Compare Akrill v. Seldon, 1 Barb. (N. Y.) 316.

"By the term 'irreparable injury' it is not meant that there must be no physical possibility of repairing the injury; all that is meant is that the injury would be a grievous one, or at least a material one, and not adequately repairable by damages at law; and by the term 'the inadequacy of the remedy by damages' is meant that the damages obtainable at law are not such a compensation as will, in effect, though not *in specie*, place the parties in the position in which they formerly stood."

The application for an injunction goes to the sound conscience of the court acting upon all the circumstances of each particular case, and it may refuse to exercise its extraordinary power by writ of injunction to restrain the violation of a contract where the bill itself fails to show such a contract.¹

Equity will not interfere with the operation of the statute of frauds at the instance of either party to a fraudulent conveyance.² So an injunction will not be granted to restrain a breach of contract which contains a provision liquidating the damages for a breach.³

Contracts must be certain, and the alleged violation of the contract must also be clear and well established.⁴ The breach must continue.⁵

(a) *Restrictive Covenants Not Implied.*—Where one has sold the good will of his trade without any express covenant preventing him from resuming the trade in that vicinity, he will not be enjoined from resuming it.⁶

. . . The fact that the amount of damage cannot be accurately ascertained may constitute irreparable damage.

. . . It is no objection to the exercise of the jurisdiction by injunction that a man may have a legal remedy. The question in all cases is whether the remedy at law is, under the circumstances of the case, full and complete." 1 Joyce on Inj. 75. "When the construction of a contract is clear and the breach clear, it is not a question of damage, but the mere circumstance of the breach of contract affords sufficient ground for the court to interfere by injunction. See also 1 Joyce on Inj. 503, 554; see also 2 Joyce on Inj. 852; Great Northern R. Co. v. Manchester R. Co., 5 De G. & Sm. 138; 2 Joyce on Inj. 1035.

A court of equity will grant an injunction where the contract is valid, and the mischief arising from a breach of it cannot be repaired nor well estimated. A suit at law would afford no adequate remedy, and the damages will be continuing and accruing from day to day; and furthermore the object of the contract can only be obtained by the parties conforming expressly and exactly to its terms. *Butler v. Bursleson*, 16 Vt. 176; *McClurg's App.*, 58 Pa. St. 51. *Manhattan etc. Co. v. New Jersey etc. Co.*, 23 N. J. Eq. 161. *Compare Manhattan Mfg. Co. v. Van Keuren*, 23 N. J. Eq. 251.

So where the plaintiff has an ample remedy at law for a breach of covenant and the damages can be exactly ascer-

tained, and no irreparable injury will be inflicted, and there is nothing which will give rise to a multiplicity of suits, the court will not interfere by injunction to compel the defendant to perform his contract specifically, but will leave him to his remedy at law. *Agate v. Lowenbien*, 4 Daly (N. Y.) 62.

1. *Canton Co. v. Northern R. Co.*, 21 Md. 383; *Fothergill v. Rowland*, L. R., 17 Eq. 132.

2. *Ellington v. Currie*, 5 Ired. (N. Car.) Eq. 21.

3. *Nessle v. Reese*, 29 How. Pr. (N. Y. 382; s. c., 19 Abb. Pr. (N. Y.) 240; *Barnes v. McAllister*, 18 How. Pr. (N. Y.) 534. *Contra*, *Phoenix Ins. Co. v. Continental Ins. Co.*, 14 Abb. Pr. (N. Y.) N. S. 266.

4. *South Yorkshire R. Co. v. Great Northern R. Co.*, 1 Sm. & Gif. 324; *Harkinson's Appeal*, 78 Pa. St. 196. And an agreement by defendants to "never tow vessels in competition with plaintiffs is not sufficiently definite or certain to warrant an injunction against its violation. *Caswell v. Gibbs*, 33 Mich. 331; *Trenwith v. Dealy*, 12 Phila. (Pa.) 386.

5. *Berger v. Armstrong*, 41 Iowa 447.

6. *Shackle v. Baker*, 14 Ves. 468; *Cruttwell v. Lye*, 17 Ves. 335; *Kennedy v. Lee*, 3 Meriv. 441; *Churton v. Douglas*, John. 174; *Bradford v. Peckham*, 9 R. I. 250; *Stephens v. Aulls*, 3 Thomp. & C. (N. Y.) 281. See *contra*, *Dwight v. Hamilton*, 113 Mass. 175.

In *Kennedy v. Lee*, 3 Meriv. 441,

(b) *Restrictive Covenants in Leases.*—The violation of restrictive covenants in leases may be prevented by injunction.¹

LORD ELDON was of opinion that upon a contract of sale by one partner to another, in the absence of any express or negative agreement or prohibition, the purchaser seeking an injunction and a receiver was not entitled "to claim any good will in the trade in addition to the partnership property which is the subject of it except what is the necessary effect of this acquiring the sole ownership in the property, certainly not such as to preclude the defendant from carrying on the same trade where and when and with whom he pleases." *So in Churton v. Douglas*, Johns. 174, VICE CHANCELLOR WOOD observes, p. 187: "The authorities, I think, are conclusive upon this point, that sale of the good will of a business, without more, does not imply a contract on the part of the vendor not to set up again a similar business himself. I use the expression similar business purposely, in order to distinguish the case I am supposing from one where, as here, the vendor seeks to set up again the identical business which he has professed to sell. Upon a sale of the good will of a business the vendor is not precluded from carrying on a precisely similar business with all the advantages he may be able to acquire from his own industry and labor and from the regard people may have for him, and that in a place next door, for example, to the very place where the former business was carried on. And upon the authorities it is settled that if the purchaser wishes to prevent that step from being taken, it is his fault if he does not take care to insert provisions to that effect in the deed."

Where upon the evidence it is doubtful whether the parties, at the time of the sale, had any distinct agreement or understanding that defendant should not resume the same business in opposition to plaintiff at the same place or within a given distance therefrom, it was *held* that the contract sought to be established was not of such a nature as to be aided by any intendment, and that the bill seeking to enjoin defendant from carrying on the business within the given limits should be dismissed, but without prejudice to plaintiff's right to sue at law. *Stephens v. Aulls*, 3 Thomp. & C. (N. Y.) 781. So where defendants had sold a millinery busi-

ness to plaintiff, who insisted upon a covenant that they would not carry on or permit another person to carry on the same business within a given locality for ten years, and would do their best to procure customers for plaintiff and to assist him, but defendants declined, to give such covenant, which was then waived by plaintiff upon the mere undertaking of defendants upon a bill seeking an injunction upon the ground that defendants were encouraging another person to undertake a rival business and recommending customers to such person, an interlocutory injunction was refused before answer to restrain proceedings at law under a judgment recovered, leaving the parties to their remedy at law for damages. *Shackle v. Baker*, 14 Ves. 468.

1. *Taylor's L. & T.* 691; *High on Inj.*, § 1143; *Hunt v. Brown*, San. & Sc. 178; *Cregan v. Cullen*, 161 Ch. Rep. 339; *Reade v. Armstrong*, *Drury Napier* 55; s. c., 7 Ir. Ch. 375; *Dodge v. Lambert*, 2 Bosw. (N. Y.) 570; *Steward v. Winters*, 4 Sandf. (N. Y.) Ch. 587; *Pugh v. Payne*, 17 Leg. Int. (Pa.) 149; *Howard v. Ellis*, 4 Sandf. (N. Y.) Ch. 369; *Trenor v. Jackson*, 46 How. Pr. (N. Y.) 389; s. c., 15 Abb. Pr. (N. Y.) 115; *Kerr on Inj.* 86. Where the lessee of a bridge permitted parties to use it in a manner contrary to the terms of the lease an injunction will be granted. *Niagara Bridge Co. v. Great Western R. Co.*, 39 Bar. (N. Y.) 212. So where a lessee covenanted to use a house for private purposes and began preparations for conducting a coach making business. *Bonnett v. Sadler*, 14 Ves. 526. And where a lessee covenanted to conduct a regular dry goods business instead. *Steward v. Winters*, 4 Sandf. Ch. 587. Where the lessee of a house covenanted not to carry on any business or trade and attempted to set up a school. *Kemp v. Sober*, 1 Sim., N. S. 520; *Johnstone v. Hull*, 2 Kay & J. 423. So where parties entered into covenants of like character they were restrained from carrying on the trade or business of a banker and confectioner. *Hodson v. Coppard*, 29 Beav. 4. *Hair dresser. Clements v. Welles*, L. R., 1 Eq. 200. *Auctioneer. Parker v. Whyte*, 1 Hun & M. 167. *Butcher. Doe v. Spry*, 1 Barn. & Ald. 617. *Keeping beer shop and spirituous liquors. Fielden v. Slater*,

(c) *Promissory Notes*.—Where a person has been induced, by threats of a groundless prosecution, to execute notes, a court of chancery will grant relief and restrain their collection;¹ or where notes have been obtained through any fraudulent or improper conduct, their negotiation will be enjoined.²

L. R., 7 Eq. 523; *Barron v. Richard*, 8 Paige (N. Y.) 357; *Seymour v. McDonald*, 4 Sandf. (N. Y.) Ch. 503. Soap boiling. *Clements v. Welles*, L. R., 1 Eq. 200. Where a tenant for life converted or tried to convert agricultural land into a cemetery an injunction was granted. *Hunt v. Brown, San. & Sc.* 178; *Cregan v. Cullen*, 161 Ch. Rep. 339. Where premises are leased under an express covenant on the part of the tenant that he will not convert meadow land, an injunction will be allowed to prevent him from breaking up meadow land and for the purpose of building, the relief being granted expressly because of violation of covenant, and not upon the ground of waste. *De Wilton v. Saxon*, 6 Ves. 106. So where there is a devise of realty to successive tenants for life, with a restriction against mowing the premises, an injunction may be had to prevent mowing in violation of the restriction. *Blagrove v. Blagrove*, 1 De G. & Sm. 252.

Chancery will restrain a lessee from using the demised premises for a purpose in violation of the covenants of his lease. *Steward v. Winters*, 4 Sandf. (N. Y.) Ch. 587; *Reade v. Armstrong*, *Drury Napier* 55; s. c., 7 Ir. Ch. 375; affirming s. c., 7 Ir. Ch. 266; *Dodge v. Lambert*, 2 Bosw. (N. Y.) 570; *Pugh v. Jayne*, 17 Leg. Int. (Pa.) 149.

Where a tenant has covenanted to use the demised premises for a certain business and no other, a breach of covenant will be restrained by injunction. *Steward v. Winters*, 4 Sandf. (N. Y.) Ch. 587; *Howard v. Ellis*, 4 Sandf. (N. Y.) 369.

A breach of covenant by a lessee will not be enjoined where the lessor has an ample remedy either by action or re-entry. *Trenor v. Jackson*, 46 How. Pr. (N. Y.) 389; s. c., 15 Abb. Pr. N. S. (N. Y.) 115.

Covenant in Deeds.—A preliminary injunction granted to prevent the alleged violation of a building covenant in a deed will be continued, in a case where the proper construction of such covenant cannot be judicially determined until the final hearing. *Pope v. Bell*, 35 N. J. Eq. 1.

In 1859 L conveyed a tract of land to S by a deed containing a covenant that L, his heirs and assigns, would thereafter keep open a private road, two rods wide, from the public road to the rear of the lands conveyed, and directly south thereof. L then also owned the land southward. S's land now belongs to complainant and L's to defendant, their respective conveyances containing the covenant. *Held*, that complainant could enjoin defendant from encroaching on the private road by erecting piazzas, fences, etc., and that he was not estopped by knowledge of defendant's intention to build the structures and of their subsequent erection, and offered no resistance; and that the statute of limitations was no defence. *Gawtry v. Leland*, 40 N. J. Eq. 323.

Conditions.—Equity will not enforce a forfeiture for breach of the condition in a deed; but if the remedy sought is the enforcement of the condition, it will interfere by injunction to restrain the breach thereof. And it will so interfere as against assignees of the persons originally bound by the condition, and notwithstanding the fact that forfeiture is prescribed as the penalty of the breach. *Watrous v. Allen*, 57 Mich. 362; *Tulk v. Moxhay*, 2 Phill. (N. Car.) 774; *Mann v. Stephens*, 15 Sim. 377; *Hills v. Miller*, 3 Paige (N. Y.) 254; *Barron v. Richard*, 8 Paige (N. Y.) 354; *Brouwer v. Jones*, 23 Barb. (N. Y.) 153; *Linzee v. Mixer*, 101 Mass. 512; *Gibert v. Peteler*, 38 N. Y. 165; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35. Even a parol agreement, if once executed, may be subsequently enforced in behalf of parties for whose benefit it was intended. *Tallmadge v. East River Bank*, 2 Duer (N. Y.) 614.

1. *James v. Roberts*, 18 Ohio 548; *Cowles v. Ragnet*, 14 Ohio 38; *Wooster v. Eaton*, 11 Mass. 375; *Roll v. Ragnet*, 4 Ohio 419; *Sackett v. Hillhouse*, 5 Day (Conn.) 451; *Rembert v. Brown*, 17 Ala. 667; *Robinson v. Jefferson*, 1 Del. Ch. 244.

2. *Sharp v. Arbuthnot*, 13 Jur. 219; *Green v. Pledger*, 3 Hare 165; *Hood v. Aston*, 1 Russ. 412; *Thurman v. Burt*, 53 Ill. 129.

(d) *Restraint of Trade*.—All contracts in general restraint of trade are against public policy and void; and those in partial restraint are also illegal, except when founded upon a valuable consideration, and when good reasons appear for entering into the contract.¹ To be lawful the restraint must be partial, be

Where a promissory note was given to one as the trustee of another, secured by a chattel mortgage, and the real owner became insolvent; *held* that the maker could by bill in equity restrain the payee from transferring the same before maturity, and from proceeding to foreclose on the ground of fraud and failure of consideration and might show the real character of the transaction by parol testimony. *Belohradsky v. Cuhn*, 69 Ill. 547.

Relief will be afforded in a court of equity against the payment of notes given for a void patent right. *Darst v. Brockway*, 11 Ohio 462.

Injunction will lie to restrain the collection of notes included in a settlement of accounts previously had between the parties. *Melcher v. Exchange Bank*, 85 Mo. 362. See *Spicer v. Hoop*, 51 Ind. 365.

A temporary injunction restraining the payment of a note by the makers and guarantor is no bar to a recovery upon the note. *Campbell v. Gilman*, 26 Ill. 120.

1. *Homer v. Graves*, 7 Bing. 743; *Ward v. Byrne*, 5 M. & W. 548; *Green v. Price*, 13 M. & W. 698; *Rannie v. Irving*, 7 M. & Gr. 976; *Lange v. Werk*, 2 Ohio St. 519. *Whittaker v. Howe*, 3 Beav. 383; *McClurg's App.*, 58 Pa. St. 51; *Morris v. Coleman*, 18 Ves. 437; *Butler v. Burleson*, 16 Vt. 176; *Rolfe v. Rolfe*, 15 Sim. 88; s.c., 1 Coop. & Cottenham 87; *Hubbard v. Miller*, 27 Mich. 15; *Nicholls v. Stretton*, 7 Beav. 42; *Baumgarten v. Broadway*, 77 N. Car. 8; *Williams v. Williams*, 2 Swanst. 253. As contracts in general restraint of trade have a tendency to discourage enterprise and competition and foster monopolies, and thus not only do injury to the party himself by prohibiting him from earning a livelihood, but also deprive the public of his services, the courts declare them void. *Mitchell v. Reynolds*, 1 P. Wms. 181.

Where Brewer, the proprietor of a medicine known as "Brewer's Lung Restorer," sold the same with the exclusive right to manufacture and sell it, surrendered his trade mark to the

purchaser, and agreed "never to use or permit my name to be used on any preparation which could be recommended and sold for the same purposes as Brewer's Lung Restorer is used and sold for," such contract is in partial, not general restraint of trade; and being for a valuable consideration, it is not unreasonable. Such contract does not limit the skill of the vender in compounding medicines for the cure of throat and lung diseases, but stipulates that his name shall not appear with his consent on such medicines. The publishing and offering for sale of "Brewer's Sarsaparilla Syrup, professing to be a permanent cure for all diseases of the lungs and throat," is a violation of the contract; and the vendor being insolvent, equity will enjoin such action. *Brewer v. Lamar*, 69 Ga. 656.

In the case of *Holmes v. Martin*, 10 Ga. 503, the court announced, in construing a contract involving this question: "A contract in general restraint of trade is void, but if in partial restraint of trade only, it may be supported, provided the restraint be reasonable and the contract founded on a consideration."

This distinction between such stipulations as are in general restraint of trade, and such as are in restraint of it only, "as to particular places and persons, or for a limited time," has long been recognized, both in England and America; the latter, if founded on a good and valuable consideration, are valid; the former are universally prohibited. The reason assigned for this difference is, that all general restraints tend to promote monopolies, and tend to discourage industries, enterprise and fair competition, which reason does not apply to partial restraints. This distinction between general restraints and partial restraints has also been recognized by this court, in the case of *Mell v. Mooney*, 30 Ga. 414; *Spier v. Lambdin*, 45 Ga. 319, and *Goodman v. Henderson*, 58 Ga. 567.

This question was elaborately discussed, and many cases reviewed and cited in the leading case of the *Morse*

founded upon a valuable consideration, and be reasonable and not oppressive.¹ A good reason must be shown for the contract as well as a valuable consideration. A person cannot, for money alone, when he has no other interest in the matter, purchase a

etc. *Co. v. Morse*, 103 Mass. 72, and reported in 4th Am. Rep. 513. In *Leather Cloth Co. v. Lorisant*, Law Rep., 9 Eq. 345, the plaintiffs purchased a right of a certain process of manufacture, with an agreement of the vendors that they would not directly or indirectly carry on, nor would they, to the best of their power, allow to be carried on by others in any part of Europe, any company or manufactory having such manufacture for its object, or in any way interfere with the exclusive enjoyment of the purchasing company of the benefits agreed to be purchased. It was held, the restraint was reasonable, and not greater—having regard to the subject matter of the contract—than was necessary for the protection of the purchasers, and it was enforced against the vendors.

When one who is engaged in any branch of business purchases the business and stock of another engaged in the same branch of business, on the condition that the vendor shall not further carry on this particular branch of business within a reasonable extent of territory, such restraint of trade, being reasonable and fair between the parties, will be enforced; and the fact that the price paid does not exceed the cost of the goods purchased does not affect the validity of the contract. *Hubbard v. Miller*, 27 Mich. 15.

A provision in a contract for the sale, upon a full and adequate consideration, of a printing and publishing establishment and business and good will, together with a newspaper and the copyright of certain books, that the vendor should not engage in business in the State so long as the vendee should continue in business at the place of sale, is held not an unreasonable restraint of trade where the business so sold extended over substantially the whole territory of the State and is sustained against objections that it was void as being against public policy. *Beal v. Chase*, 31 Mich. 490.

1. *Lange v. Week*, 2 Ohio St. 525; *Homer v. Graves*, 7 Bing. 743. In the latter case Ch. J. TINDAL says: "We cannot see how a better test can be applied to the question whether reasona-

ble or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive, and if oppressive, it is in the eye of the law unreasonable."

"Where a man has by skill or other means obtained something which he wants to sell, he should be able to sell it in the most advantageous way in the market, and in order to enable him to sell it advantageously in the market, it is necessary that he should preclude himself from entering into competition with the purchaser." Public policy "therefore enables him to enter into any stipulation, however restrictive it is, provided that restriction in the judgment of the court is not unreasonable, having regard to the subject matter of the contract." *Leather Cloth Co. v. Lorisant*, 39 L. J. (N. S.) Eq. 86.

In *Pierce v. Fuller*, 8 Mass. 223, which arose upon an agreement not to run a stage coach between Boston and Providence, it is said: "Therefore all contracts barely in restraint of trade, where no consideration is shown, are bad; and to make them valid the consideration and special circumstances inducing to arrangement must be shown to the court and approved of by it." *Williams v. Williams*, 2 Swanst. 253.

The question whether a restraint, which is to endure during the life of the promisor and covenantor, is reasonable or not, is an undecided question in New Jersey, and such a restraint is not, therefore, enforceable by injunction. *Western Union Tel. Co. v. Rogers et al.* Tel. Co., 42 N. J. Eq. 311; *Onondaga et al. Assoc. v. Wall*, 17 Hun (N. Y.) 494.

See *Leigh v. Hind*, 9 B. & Cr. 774; *Young v. Timmins*, 1 Cr. & J. 331; 1 Tyrw. 226; *Homer v. Graves*, 7 Bingh. 743; *Kemble v. Kean*, 6 Sim. 335; *Gale v. Reed*, 8 East 79; *Homer v. Ashford*, 3 Bingh. 328; *Stuart v. Nicholson*, 2 Bingh. (N. Car.) 113; *Chesman v. Nainby*, 3 Bro. P. C. 349; *Ward v. Byrne*, 5 M. & W. 548; *Green v. Price*, 13 M. & W.;

valid contract in restraint of trade, however limited may be the circle of its operation.¹ He must continue the business.

A contract in restraint of trade as to particular places, is valid, and an injunction will lie to restrain the breach of such a contract.² Before a covenant or contract not to practice medicine

Saniter v. Ferguson, 62 Eng. Com. Law 721.

1. *Chappel v. Brockway*, 21 Wend. (N. Y.) 157; *Mitchell v. Reynolds*, 1 P. Wms. 181. In *Lawrence v. Kidder*, 10 Barb. (N. Y.) 641, it was *held* in effect that unless the purchaser undertook to prosecute the business, the agreement to deprive the public of the services of the seller would be void.

2. *Smalley v. Greene*, 52 Iowa 243; *Hedge v. Lowe*, 47 Iowa 137; *McClurg's App.*, 58 Pa. St. 51; *Palmer v. Graham*, 1 Pars. (Pa.) 476; *Reece v. Hendricks*, 1 Leg. Gaz. (Pa.) 79; *Jenkins v. Temples*, 39 Ga. 655; *Chappel v. Brockway*, 21 Wend. (N. Y.) 157; *Wolfe v. Burke*, 56 N. Y. 115; *Taylor v. Gillies*, 5 Daly (N. Y.) 285; *Palmer v. Harris*, 60 Pa. St. 156; *Meriden Co. v. Parker*, 39 Conn. 450; *Connell v. Reed*, 128 Mass. 477; *Baker v. Pottmeyer*, 75 Ind. 451; *Diamond Match Co. v. Roeber*, 35 Hun (N. Y.) 421; *Thayer v. Younge*, 86 Ind. 259; *Eckart v. Garlach*, 12 Phila. (Pa.) 530; *Gompers v. Rochester*, 56 Pa. St. 194; *Guerand v. Dandelet*, 32 Md. 561; s. c., 3 Am. Rep. 164; *Dunlop v. Gregory*, 10 N. Y. 241; *Ropes v. Upton*, 125 Mass. 258; *Carroll v. Hickey*, 10 Phila. (Pa.) 308; *Baungarten v. Broadway*, 77 N. Car. 8. See *Berger v. Armstrong*, 41 Iowa 447; *Spicer v. Hoop*, 51 Ind. 365; *Hahn v. Concordia Society*, 42 Md. 460; *Harkinson's App.*, 78 Pa. St. 196.

A contract by a physician for the sale of his "practice and good will" in a specified town is not void as against public policy. *Dwight v. Hamilton*, 113 Mass. 175.

Where a person had established a business in the use of the name "Little Jake" and afterwards sold the business and stipulated not to make use of it in a rival business to that of his assignee, but that the latter might have the benefit of its use, *held* that there was no reason in public policy why the vendor should not be enjoined from violating his agreement. There is no necessary fraud upon the public in such a contract, and no necessary deception. *Grow v. Siligman*, 47 Mich. 607; s. c., 41 Am. Rep. 737.

10 C. of L.—60

Where P sold his business to B and C, and obligated himself to them, or either of them, never again to engage in the business in L, or to aid, encourage, or advise others so engaged, and C, having sold all his interest in the contract to B, engaged in the business in L, and was aided, encouraged and advised by P, adequate damages cannot be estimated for the breach of such covenant, and consequently injunction was B's proper remedy against both P and C, the one from giving and the other from receiving the aid. *Baker v. Pottmeyer*, 75 Ind. 451. See *Richardson v. Peacock*, 11 C. E. Green (N. J.) 40; s. c., 28 N. J. Eq. (1 Stew.) 151.

R, owning or controlling a hotel at Long Branch, made a written contract giving the complainants the exclusive right to have and operate a telegraph office therein during the season of 1884, with the same right for each succeeding season, unless a specified written notice to the contrary should be given. No such notice has been given. *Held*, that this court would enjoin R from allowing a rival telegraph company to operate a competing office in the same hotel during the season of 1885. *Western Union Telegraph Co. v. Rogers*, 42 N. J. Eq. 311. See *Doggett v. Ryman*, 17 L. T., N. S. 486; *Newling v. Dobell*, 19 L. T., N. S. 408; *Leather Cloth Co. v. Lorson*, 39 L. J., N. S., Eq. 86.

Dentists.—The plaintiff for a sufficient consideration bought of the defendant his business as a dentist, and the latter executed a contract not to practice dentistry within a radius of ten miles of Litchfield. *Held*, that its violation should be enjoined. *Cook v. Johnson*, 47 Conn. 175; *Mallan v. May*, 11 M. & W. 653; *Homer v. Graves*, 7 Bing. 735; *Clark v. Crosby*, 37 Vt. 188.

Druggists.—The plaintiff bought of defendant, who for a number of years had been engaged in the business of selling drugs and medicines and preparing prescriptions of physicians, his stock of drugs, etc., and the good will of his business, for \$1,500, then paid, and the defendant agreed in con-

sideration thereof not to carry on said business in the town while the plaintiff was engaged in it. The defendant was enjoined from violating his contract. And afterwards held guilty of contempt in disobeying the order of the court. *Baker v. Cordon*, 86 N. Car. 116; *State v. Yancey*, 1 Car. L. Rep. 133; *State v. Woodfin*, 5 Ired. (N. Car.) 109; *Moye v. Codgill*, 66 N. Car. 403; *Moore*, 63 N. Car. 397; *Isler v. Murphy*, 71 N. Car. 436; *Pain v. Pain*, 80 N. Car. 322, cited and approved. See *Hastings v. Whittley*, 2 Exch. 611; *Hitchcock v. Coker*, 6 Q. B. 438; *Hayward v. Young*, 2 Chit. 407; *Price v. Green*, 16 M. & W. 346; *Ward v. Hogan*, 11 Abb. N. Cas. (N. Y.) 478.

Dress Makers.—M, a married woman, engaged in carrying on the business of millinery and dressmaking with her separate property, and on her own account, in the town of F, sold her stock of goods, together with the good will of the business, and engaged not to carry on the business at any time in the future at the town of F, or at any place within such distance of said town as would interfere with such business, whether the same was carried on by the purchasers or their successors. *Held*, that such agreement in equity is binding, and that, in an action brought by the successors of the purchasers, M will be enjoined from carrying on such business in violation of the agreement. *Morgan v. Perhamus*, 36 Ohio St. 517; *Morris v. Moss*, 25 L. J. (N. S.) 194. See *Millington v. Foy*, 3 Myl. & Cr. 338; *Catt v. Tourle*, L. R., 4 Ch. App. Cas. 654; *Whittaker v. Howe*, 3 Beav. 383; *Hall v. Barrows*, 33 L. J., Ch. 204; *Harrison v. Gardner*, 2 Mad. 198; *Patridge v. Menck*, 2 Barb. (N. Y.) Ch. 101; *Leake's Digest of Law of Contracts*, 1133.

Attorneys.—A contract not to engage in the practice of law in a particular town is valid and enforceable. *Smalley v. Greene*, 52 Iowa 241. See *Hedge v. Lowe*, 47 Iowa 137; *Jenkins v. Temples*, 39 Ga. 655; *Holbrook v. Waters*, 9 How. (N. Y.) Pr. 335; *Bunn v. Guy*, 4 East 190 (criticised in *Bozon v. Farlow*, 1 Meriv. 471); *Nichols v. Stretton*, 10 Q. B. 346; 7 Beav. 42; *Dendy v. Henderson*, 11 Exch. 194; *Whitaker v. Howe*, 3 Beav. 383 (said to have been overruled, *Benj. on Sales*, § 525; *Tallis v. Tallis*, 16 Jur. 746, note; 1 *Smith's L. C.* (8th ed.) 766; *Wiley v. Baumgardner*, 97 Ind. 69); *Aubin v. Holt*, 2 K. & J. 66; *Howard v. Woodward*, 10 Jur. (N. S.)

1123; *Galsworthy v. Strutt*, 17 L. J. (Exch.) 226; *Smalley v. Greene*, 52 Iowa 241.

Innkeepers.—A stipulation in a deed of conveyance whereby the grantee, in part consideration for the conveyance, agrees for himself, his heirs and assigns that the premises conveyed shall not be used or occupied as a hotel so long as certain other property owned by the grantor shall be used for that purpose, binds both the grantee and all claiming under him and may, in equity, be enforced by injunction. *Stines v. Dorman*, 25 Ohio St. 580. See *Heichew v. Hamilton*, 3 Greene (Iowa) 596, 4 Green (Iowa) 317; *Evans v. Elliott*, 20 Ind. 283; *Harrison v. Lockhart*, 25 Ind. 112; *Studabaker v. White*, 31 Ind. 211; *McAlister v. Howell*, 42 Ind. 15; *Hatcher v. Andrews*, 5 Bush (Ky.) 561. See *Mossop v. Mason*, 16 Grant's Ch. 302; s. c., 17 Grant's Ch. 36; 18 Grant's Ch. 450; *Elliott's Appeal*, 60 Pa. St. 161.

Photographers.—The defendants having covenanted with the plaintiff on the dissolution of a firm for the manufacture of daguerreotype materials, of which they had been members, "not directly or indirectly to enter into or carry on or in any way be interested in or furnish to any person information in regard to" that business within certain limits. *Held*, that the defendants might be enjoined from establishing a new partnership. *Dean v. Emerson*, 102 Mass. 480; *Baumgarten v. Brodway*, 77 N. Car. 8.

Publishers.—A provision in a contract for the sale, upon a full and adequate consideration, of a printing and publishing establishment and business and good will, that the vendor should not engage in the business in the State so long as the vendee should continue in the business in the place of sale, was *held* not an unreasonable restraint of trade, and the restrictions of such a contract might be enforced by injunction. *Beal v. Chase*, 31 Mich. 490; *Tallis v. Tallis*, 1 El. & Bl. 391; *Ingram v. Stiff*, 5 Jur. (N. S.) 947; *Ward v. Beeton*, 23 W. R. 533; *Conrad v. Dowling*, 6 Blackf. (Ind.) 481; *Spicer v. Hoop*, 51 Ind. 365; *Presbury v. Fisher*, 18 Mo. 50; *Noah v. Webb*, 1 Edw. (N. Y.) Ch. 604; *Dakin v. Williams*, 11 Wend. (N. Y.) 67.

School Teachers.—A teacher who, by representations that if he could sell he would quit teaching in the locality, induced another to purchase of him the

lease of an academy, may be enjoined from teaching in the locality during the term of the lease. *Spier v. Lambdin*, 45 Ga. 319.

Undertakers.—Where a party has sold the good will of his business as undertaker to another for a valuable consideration, a court of equity will upon application restrain him from holding himself out to the public by advertisement or otherwise as continuing his former business, or as carrying on such business at another place. *Hall's Appeal*, 60 Pa. St. 458.

Resuming Business in Employ of Third Person.—A merchant who upon selling his stock in trade and business covenants not to carry on the same business at the same place, or within certain limits surrounding, and who thereupon gives up his place of business, will not be enjoined from afterwards soliciting and procuring orders within the specified territory, the question of whether this constitutes a breach of the covenant being regarded as too doubtful to warrant an injunction without bringing an action. *Turner v. Evans*, 2 De Gex, M. & G. 740; *Clark v. Watkins*, 9 Jur. (N. S.) 142; *Allen v. Taylor*, 18 W. R. 888; s. c., 22 L. T., N. S. 651; *Bird v. Lake*, 1 Hem. & M. 338. But where one agrees that he will not directly or indirectly, either alone or in partnership with or with the assistance of any other person, set up or follow or practice a particular business, he is regarded as violating his covenant by conducting the business in the capacity of assistant manager to another person. *Dales v. Weaver*, 18 W. R. 993; *Jones v. Havens*, 4 Ch. D. 636.

Publications.—A covenant on the part of a publisher that he will not publish in future a particular magazine is considered in the same light as a covenant by one selling a particular trade or business, that he will not again engage in that trade or business, and is not void as a general contract in restraint of trade. *Ainsworth v. Bentley*, 14 W. R. 630; *Barfield v. Nicholson*, 2 L. J., Ch. 90; s. c., 2 Sim. & St. 1; *Talcott v. Brackett*, 5 Bradw. (Ill.) 60.

Professional Employment.—"In all cases of this kind where an injunction is asked to restrain a party from exercising his professional employment, the court has always had some reluctance in acting, for not only is it to some extent a restriction on trade but it may also

have the effect of depriving third parties of the services of those in whom alone they have confidence. The question has arisen not only in the case of solicitors, but in that of medical men." *Nicholls v. Stutton*, 7 Beav. 42. "But the court has repeatedly exercised its jurisdiction in cases of this nature."

Where, however, a party has sold the good will of his business without any express agreement that he should not engage in business again in that locality, he will not be enjoined. *Cruftwell v. Lye*, 17 Ves. 335. But a verbal agreement not to carry on the business if upon a sufficient consideration is sufficient. *Pierce v. Woodward*, 6 Pick. (Mass.) 206. A contract, for a valuable consideration, not to practice medicine within twelve miles of a particular locality, is not unreasonable, and in such case the court will not enquire into the adequacy of the consideration. *McClurg's Appeal*, 58 Pa. St. 51; *Ligare v. Semple*, 32 Mich. 438. In *Butler v. Burleson*, 16 Vt. 126, the following observations of the court very clearly illustrate the grounds upon which the interference is based: "When there is an express covenant and an uncontroverted mischief arising from the breach of it, equity will grant an injunction to restrain the breach. In this case there is an express contract. The mischief arising from the breach of it cannot be repaired, nor can it well be estimated. A suit at law would afford no adequate remedy, and the damage will be continuing and accruing from day to day, and furthermore, the object of the contract can only be obtained by the parties conforming expressly and exactly to its terms." Injunction sustained. *Whittaker v. Howe*, 3 Beav. 383.

A Contract May be Valid in Part.—Thus where one agreed not to manufacture stearin or star candles in Hamilton county, Ohio, or anywhere else in the United States, the contract was held valid as to Hamilton county, but void as to the United States. *Lange v. Werk*, 2 Ohio St. 520; *Green v. Price*, 13 M. & W. 695.

Damages.—Where the parties in their contract have fixed a penalty as liquidated damages in case of a breach of the agreement, the party aggrieved cannot have both legal and equitable relief up to the same time. *Tainter v. Ferguson*, 1 M. & G. 286; *Carnes v. Nesbitt*, 7 H. & N. 158. And if after obtaining an injunction an action at law is brought to recover the penalty,

"in the neighborhood" can be enforced in equity, evidence must be given to show the extent of the practice sold.¹

(e) *Personal Services*.—A court of equity will not enjoin the violation of a restrictive covenant in an ordinary contract for work and labor, as the remedy at law is deemed sufficient. Where, however, the contract provides for special, unique or extraordinary personal services, such as those to be performed by an eminent singer, actor or artist and the like, while the court will not attempt to compel affirmative specific performance, because that remedy would be impracticable, yet it will restrain by injunction the violation of such contracts.²

the injunction will be dissolved. *Fox v. Scond*, 33 Beav. 327; *Mayall v. Higbey*, 1 H. & C. 148. Where defendant sold to plaintiff his business and the good will thereof, and entered into a bond in the penalty of \$100 not to engage in the same business at the same place, held that the \$100 was in the nature of stipulated damages for the breach of the bond; that defendant incurred the whole penalty by a single breach; that plaintiff's remedy was exhausted upon the receiving of that amount, and that he was not entitled to an injunction, under section 3386 of the code, to restrain a continuation of the breach of the contract, notwithstanding defendant was insolvent, so that the penalty of the bond could not be made of him. *Stafford v. Sportreed*, 62 Iowa 524. See *Howard v. Woodward*, 10 Jur., N. S. 1123.

1. *Gold etc. Co. v. Todd*, 17 Hun (N. Y.) 548.

A complaint by one physician against another to enforce by injunction an agreement of the latter to keep out of the practice, which does not show the amount of practice done by each, nor that the business of the plaintiff had been made less remunerative by reason of the breach of the agreement, is not good. *Thayer v. Younge*, 86 Ind. 259.

2. *Montague v. Flockton*, L. R., 16 Eq. 189; *Webster v. Dillon*, 3 Jur. (N. S.) 432; s. c., 6 Am. L. Reg. 174; *Fechter v. Montgomery*, 33 Beav. 22; *Lumley v. Wagner*, 1 De G. M. & G. 604; *McCaull v. Braham*, 16 Fed. Rep. 37; *Healy v. Allen*, 38 La. An. 867; *Caldwell v. Cine*, 8 Mart. N. S. (La.) 684; *Hayes v. Willis*, 11 Abb. Pr. N. S. (N. Y.) 167; *Fredericks v. Mayer*, 13 How. Pr. (N. Y.) 566. *Daly v. Smith*, 49 How. Pr. (N. Y.) 150. See also *Hahn v. Concordia Soc.*, 42 Md. 460; *Burton v. Marshall*, 4 Gill (Md.)

487; *W. U. Tel. Co. v. Union Pac. R. Co.*, 1 McCrary (U. S.) 558; *W. U. Tel. Co. v. St. Joseph etc. R. Co.*, 1 McCrary (U. S.) 565. Compare *Hamblin v. Dinneford*, 2 Edw. Ch. (N. Y.) 529; *Sanquirico v. Benedetti*, 1 Barb. (N. Y.) 315.

Where defendant, an opera singer or actor, has contracted to sing or play for plaintiff at his theatre, and not elsewhere without his permission, defendant may be enjoined from singing or acting elsewhere, the court thus preventing a breach of the negative covenant, although it cannot specifically enforce the affirmative agreement by compelling defendant to sing or act for plaintiff. *Lumley v. Wagner*, 1 De G. M. & G. 604, affirming; s. c., 5 De G. & Sm. 485; *Daly v. Smith*, 38 N. Y. Sup. Ct. 158.

A contract for the exclusive services of a singer in opera provided for "the forfeiture of a week's salary or the termination of the engagement at the manager's option, without debarring him from enforcing the contract as he might see fit." Held, that the damages were not liquidated by the use of the above language, and that an injunction might issue to restrain a threatened violation of the contract. *McCaull v. Braham*, 16 Fed. Rep. 37.

In the earlier case of *Kemble v. Kean*, 6 Sim. 333, an injunction was denied to the same effect. *Kumberly v. Jennings*, 6 Sim. 340. These cases have been overruled in England. *Lumley v. Wagner*, 1 De G. M. & G. 604. *Sanquirico v. Benedette*, 1 Barb. (N. Y.) 315; *Burton v. Marshall*, 4 Gill (Md.) 487. See *De Pol v. Sohlke*, 7 Robt. (N. Y.) 280; *Alleghany Base Ball Club v. Benett*, 14 Fed. Rep. 257.

No injunction will be granted where the services to be rendered are physical in their nature, as distinguished from purely intellectual. *Kemble v. Kean*,

38. Trade Secrets.—An injunction will be granted to restrain a party from disclosing secrets communicated to him during the course of a confidential employment, and it is not material whether the secrets relate to trade or other interests of the party.¹

39. A combination among carriers or others to regulate the charges for freight and passage, and divide the profits among themselves, may be enjoined.² So a combination among workmen and employers to pay only a stipulated price for labor may be enjoined.³

6 Sim. 333; *Lumley v. Wagner*, 1 De G. M. & G. 603. Where the contract upon its face is illegal an injunction will be denied. *Bennett v. Am. Art Union*, 5 Sandf. (N. Y.) 614.

1. *Cholmondeley v. Clinton*, 19 Ves. 261; *Morrison v. Moat*, 9 Hare 255; *Evitt v. Price*, 1 Sim. 483; *Williams v. Williams*, 3 Mer. 159; *Green v. Floghamb*, 1 Sim. & D. 398; *Yovatt v. Winyard*, 1 Jac. & Walk. 394; *Prince Albert v. Strange*, 1 Mac. & G. 25; *Lewis v. Smith*, 1 Mac. & G. 417; *Williams v. Prince of Wales*, 23 Beav. 340; *Davies v. Clough*, 8 Sim. 262; *Goodall v. Goodall*, 16 Sim. 316. Complainant in *Peabody v. Norfolk*, 98 Mass. 452, had built a mill and furnished it with machinery invented by himself for manufacturing cloth by a secret process. An engineer in his employ, who had contracted not to give information concerning the machinery, but to preserve the process a secret, was enjoined from violating his contract.

So a party may be enjoined from using a secret mode of compounding medicine not protected by a patent when he has acquired the knowledge by a breach of contract or faith on the part of his informant. *Morrison v. Moat*, 9 Hare 255.

An injunction will be granted against the use by the seller of a trade secret or secret recipe for manufacturing when the vendor has entered into an agreement not to use the same in his business. *Bryson v. Whitehead*, 1 Sim. & Stu. 74; *Benwell v. Inus*, 24 Beav. 307; *Vickery v. Welch*, 19 Pick. (Mass.) 523; *Peabody v. Norfolk*, 98 Mass. 452; *Salomon v. Hertz*, 40 N. J. Eq. 400; *Jarvis v. Peck*, 10 Paige (N. Y.) 118; *Taunton Mfg. Co. v. Cook*, Boston L. Rep. 547.

An injunction may be allowed to restrain defendants, who were lately employed by complainant, from using in their own factory or divulging to other persons certain secrets used by com-

plainant in manufacturing, which they, in consideration of their employment by complainant, had agreed not to divulge, and such injunction should be retained until the final hearing, although all the facts alleged in the bill are denied in the answer. *Salomon v. Hertz*, 40 N. J. Eq. 400.

An injunction to prohibit defendants from making known where or from whom complainant buys his materials, and to whom he sells his goods, or the prices at which he buys or sells, denied. An agreement by an employee to that effect may well be regarded, in the absence of anything to the contrary in its terms, as limited in its obligation to the term of his service. *Salomon v. Hertz*, 40 N. J. Eq. 400.

Fiduciary Trust.—An agent or sub-agent who uses the information he has obtained in the course of his agency as a means of buying for himself will be compelled to convey to the principal. Plaintiffs, as warehousemen, were occupying premises of which the lease was about to expire, and were negotiating with the lessor for a renewal at a reduced rental. Defendant, A, was their clerk or agent, and had access to their books and papers and knowledge of their business, and pending the plaintiffs' negotiation, without their knowledge, applied to the lessor and obtained a lease of the premises for himself and the defendant, R, who had notice of the facts. In an action to compel the transfer of the lease an application made upon the above facts for an injunction *pendente lite* to restrain the defendants from proceeding to recover the premises was refused. *Held*, that the injunction should have been granted. *Gower v. Andrew*, 59 Cal. 119; s. c., 43 Am. Rep. 242. See *Tozer v. Hutchinson*, 1 Hannay (N. Brunswick) 539.

2. *Stanton v. Allen*, 5 Den. (N. Y.) 434.

3. *Hilton v. Eckersley*, 32 Eng. L. & Eq. 198.

40. Injunctions Between Partners.—A court of equity will enjoin a partner, during the continuance of the partnership, from any act injurious thereto, as by endorsing notes to the injury of the firm, or violating the rights of his copartners in other respects, although a dissolution of the firm may not be intended.¹ But an injunction will not be granted upon slight or unimportant grounds. Therefore, mere infirmity of temper, disputes which, although vexatious, do not injure the business of the firm, will not be sufficient cause.² Nor will an injunction be granted where it would be of no avail, or would cause great injury or inconvenience beyond the exigence against which relief is sought.³

(a) *Granted.*—If, during the partnership, a partner engages in business injurious to the firm, he may be enjoined from continu-

1. *Cropper v. Coburn*, 2 Curt. (U. S.) 465; *Marble Co. v. Ripley*, 10 Wall. (U. S.) 339; *New v. Wright*, 44 Miss. 202; *Miles v. Thomas*, 9 Sim. 606; *Greatrex v. Greatrex*, 1 De G. & Sm. 692; 11 Jur. 1052; *Marshall v. Watson*, 25 Beav. 501; *Blackford v. Hawkins*, 1 L. J., Ch. 141; *Morison v. Moat*, 21 L. J., N. S. Ch. 248; 16 Jur. 321; *Hall v. Hall*, 12 Beav. 414; *Harrison v. Armitage*, 4 Madd. 143. *Charlton v. Poulter*, 19 Ves. 148; *Fairthorne v. Weston*, 3 Hare 387. A partner must act in good faith with his copartners; and courts of equity in enforcing this duty do not require the winding up of the partnership affairs. In the case last cited it is said: "If a bill would in no case lie to compel a man to observe the covenants of a partnership deed unless the bill seeks a dissolution of the partnership, it is obvious that a person fraudulently inclined might of his own mere will and pleasure compel his copartner to submit to the alternative of dissolving a partnership or ruin him by a continued violation of the partnership contract."

In *Mills v. Thomas*, 9 Sim. 609, the VICE CHANCELLOR said: "The court ought to interfere between copartners whenever the act complained of is one that tends to the destruction of the partnership property," although a dissolution was not sought.

Injunction was granted to restrain the defendant, who had removed the partnership books from the place of business, from keeping them at any other place. *Greatrex v. Greatrex*, 1 De G. & Sm. 692; 11 Jur. 1052. But see *Smith v. Jeyes*, 4 Beav. 503.

An injunction will not be granted to restrain the breach of a covenant in

articles of partnership which has not been infringed for any length of time, where the bill does not pray a dissolution of the partnership. Whether the court will in any case grant such an injunction, unless there is ground for and the bill prays a dissolution of partnership. *Marshall v. Coleman*, 2 Jac. & Walk. 266; *Forman v. Hombray*, 2 Ves. & B. 329; *Loscombe v. Russell*, 4 Sim. 8.

A partner who had been expelled under a provision in the articles of partnership, and has been repaid his share of the capital, will not be restrained from carrying on the business on his own account, and soliciting the old customers of the firm. *Walker v. Mottram*, 19 Ch. D. 355, followed; *Dawson v. Beeson*, 22 Ch. D. 504.

2. *Goodman v. Whitcomb*, 1 Jac. & W. 392; *O'Bryan v. Gibbons*, 2 Md. Ch. 9. And see *Drury v. Roberts*, 2 Md. Ch. 157; *Moises v. O'Neill*, 8 C. E. Green (N. J.) 207.

Injunction should not be granted when all the equities of the bill are denied. *Wellman v. Harker*, 3 Oreg. 253.

Mere temptations to the abuse of partnership effects is not sufficient to induce a court to grant an injunction. *Glassington v. Thwaites*, 1 Sim. & S. 124; 1 L. J., Ch. 113.

3. *Smith v. Fremont*, 2 Swanst. 330. As where two persons had a contract between themselves to run a coach from Bristol to London, one to provide horses for one part of the route and the other for the remainder, but in consequence of the horses of the latter party being taken on execution the former was required to furnish horses for the entire route and claimed all the proceeds. The party in default there-

ing the same, as it is inconsistent with his duty as a partner.¹

(b) *Misappropriation of Assets*.—The representatives of a deceased partner may enjoin the survivor from misapplying the funds of the firm, or from an abuse of his powers in the disposition of such property to the injury of the heirs.²

(c) *Against Third Parties*.—A partner may obtain an injunction against a copartner and a third party who are doing or about to do an act injurious to the credit of the firm, as fraudulently to accept, make or endorse negotiable paper in the firm name, but for the use of one of the members thereof.³

(d) *Where a partnership is formed for a definite period*, a member of the firm will not, before the expiration of that time, be permitted to sever his connection with the firm and enter into a new partnership.⁴

A partner who has agreed to conduct the business of the firm at a particular place will be enjoined from conducting the same business at that place for his own benefit.⁵

(e) *After the dissolution of a partnership*, a member of the late firm may be enjoined from misapplying the funds;⁶ or a member, not authorized to settle the business, from interfering with the partnership property.⁷

upon filed a bill to enjoin the other from using his own horses on the entire line, but the court refused to grant the relief as the default might again occur.

1. *Benton v. Wookey*, 6 Madd. 367; *Long v. Majestre*, 1 Johns. (N. Y.) Ch. 305; *Anderson v. Wallace*, 2 Wall. 540; *Marble Co. v. Ripley*, 10 Wall. (U. S.) 339; *New v. Wright*, 44 Miss. 202; *Crapper v. Coburn*, 2 Curt. (U. S.) 465; *Miles v. Thomas*, 9 Sim. 606; *Fairthorne v. Weston*, 3 Hare 387; *Marshall v. Watson*, 25 Beav. 501; *Greatrex v. Greatrex*, 1 De G. & Sm. 692; *Blackford v. Hawkins*, 1 L. J., Ch. 141; *Hall v. Hall*, 12 Beav. 414; *Morison v. Moat*, 21 L. J., N. S., Ch. 248; s. c., 16 Jur. 321.

The court will restrain a purchaser from doing acts of waste and destruction and will restrain a partner from doing an intentional serious injury to the partnership property. *Marshall v. Watson*, 25 Beav. 501.

A party was restrained from using the secret of compounding a medicine not protected by patent, it appearing that the secret was imparted to him, to his knowledge, in breach of faith or contract. *Morison v. Moat*, 21 L. J., N. S., Ch. 248; s. c., 16 Jur. 321; affirming 9 Hare 241; s. c., 20 L. J., N. S., Ch. 513; 15 Jur. 787.

Complainant and defendant formed a copartnership for the purpose of sawing

lumber from timber to be taken from the land of the complainant, the defendant to have the control and management of the business, it being the object of the complainant to convert his timber into active capital, and the managing partner ceased to procure timber from complainant's land, but obtained it elsewhere and from others; this was using the mill in a manner not authorized by the contract of partnership, and an injunction will be granted restraining him from such proceeding. *New v. Wright*, 44 Miss. 202.

2. *Marshall v. Colman*, 2 Jac. & W. 266; *Hartz v. Schroder*, 8 Ves. 317; *Deveau v. Fowler*, 2 Paige (N. Y.) 400.

3. *Hood v. Aston*, 1 Russ. 412; *Jervis v. White*, 7 Ves. 413; *Read v. Bowers*, 4 Bro. C. C. 441; *Williams v. Bingley*, 2 Vern. 278.

4. *England v. Cushing*, 8 Beav. 129; *Buxton v. Liste*, 3 Atk. 385.

5. *Marshall v. Johnston*, 33 Ga. 500.

6. *Deveau v. Fowler*, 2 Paige (N. Y.) 400.

7. *Smith v. Danvers*, 5 Sandf. 669; *Crawford v. Alexander*, 15 Ves. 138; *Smith v. Jeyes*, 4 Beav. 503; *Marshall v. Watson*, 23 Beav. 501; *Williams v. Bingley*, 2 Vern. 278; *Read v. Bowers*, 4 Bro. C. C. 441; *Van Rensselaer v. Emery*, 9 How. Pr. (N. Y.) 135; *Garretson v. Weaver*, 3 Edw. (N.

(*f*) *Covenants* made by one or more members, on the dissolution of a firm, not to carry on the firm business will be protected in equity by injunction.¹

(*g*) *Name of Firm*.—When the entire business is purchased, the name passes with the assets, and a surviving partner may be enjoined from using it.²

(*h*) *Receiver*.—Where either party has a right to dissolve the partnership, and the agreement between the parties makes no provision for closing up the concern, and they cannot arrange the matter between themselves, a receiver may be appointed by the court. The property being thus under the care of the court, an injunction may be granted to prevent a partner from participating in the winding up of the firm.³

Where an injunction is granted to preserve the property of a partnership from waste, until the application for a receiver can be heard, its continuance must depend upon the fate of the latter application; if the receiver be refused, the injunction must be dissolved.⁴

Y.) Ch. 385; *Sutro v. Wagner*, 8 C. E. Green (N. J.) 388; *Whitman v. Robinson*, 21 Md. 30. So one member of a firm after its dissolution may enjoin another member from publishing letters relating to the firm business and written to him by the complainant. *Roberts v. McKee*, 29 Ga. 161.

But where a partner is enjoined in general terms from intermeddling with the property and effects of the firm, it is not a breach of the injunction for him to give a confession of judgment for a debt *bona fide* due to a creditor of the firm for the purpose of enabling such creditor to obtain a preference in payment by levying upon the partnership effects. *McCredie v. Senior*, 4 Paige (N. Y.) Ch. 378.

1. *Whittaker v. Howe*, 3 Beav. 383.

A, B and C were wagoners between Boston and Somerville, having several stands in Boston. B and C sold to A their share of all the property used in the business, and the interest and good will in the business, and agreed in writing not in any manner to do anything which should in any wise impair or injure said interest and good will. B and C afterwards purchased two other stands, already used by other wagoners near the stands of A, and established wagons there, and engaged in the business of wagoners between Boston and Somerville, and carried merchandise for many persons who formerly employed A, B and C, but did not solicit such business otherwise than by having such stands and wagons and

holding themselves in readiness to do it, and on one occasion at least doing it for less than former prices. *Held*, that an injunction should issue to restrain B and C "from soliciting, doing or obtaining any work, trade, custom or teaming business for or from any of the customers or persons" who had formerly been customers of A, B and C, and from doing anything to impair or injure the said interest and good will in said teaming business. *Angier v. Webber*, 14 Allen (Mass.) 211.

2. *Banks v. Gibson*, 34 Beav. 566. See *Lewis v. Langdon*, 7 Sim. 422; *Bininger v. Clark*, 60 Barb. (N. Y.) 113; s. c., 10 Abb. Pr., N. S. (N. Y.) 264.

But where a firm is dissolved and the retiring partners sell and transfer to the other members of the firm all the real and personal property of the firm, but without mention of the good will, neither the continuing partners nor their assignees can so use the old firm name as to give third persons good cause to believe that the retiring partners are still associated therein, if such belief be injurious to them in their own business, and on application of the retiring partners the use of the firm name in such case will be enjoined. *McGowan etc. Co. v. McGowan*, 22 Ohio St. 370. See *Williams v. Wilson*, 4 Sandf. (N. Y.) Ch. 380.

3. *Van Rensselaer v. Emery*, 9 How. Pr. (N. Y.) 135; *Holden's Admrs. v. McMakin*, 1 Par. (Pa.) 270. See *Dunn v. McNaught*, 38 Ga. 179.

4. *Walker v. House*, 4 Md. Ch. 39.

41. Private Corporations.—The directors and managing officers of a private corporation are clothed with a double character, viz., agents and *quasi* trustees. Upon this trust relation depend the equitable remedies which may be invoked against them by the corporation or its stockholders.¹

(a) *When Enjoined.*—The duties of such officers being confidential, and also in the nature of a trust, a court of equity, in a proper case, will restrain them from an abuse of their powers or a violation of duty.²

See *Williamson v. Wilson*, 1 Bland (Md.) 418.

1. In *Ex Parte Chiffendale*, 4 De G. M. & G. 52, L. J. TURNER says: "Although directors undoubtedly stand in the position of agents and cannot bind their companies beyond the limits of their authority, they also stand in some degree in the position of trustees, and all trustees are entitled to be indemnified against expenses *bona fide* incurred by them in the due execution of the trust."

In *Ame v. Cary*, 82 N. Y. 79, it is said: "The trustees may be treated as agents of the bank. *In re German Mining Co.*, 27 Eng. L. & Eq. 158; *Belknap v. Davis*, 19 Me. 455; *Bedford R. Co. v. Bowser*, 48 Pa. St. 29; *Butts v. Wood*, 38 Barb. 181; *Austen v. Daniels*, 4 Den. (N. Y.) 299; *Ohio etc. R. Co. v. McPherson*, 35 Mo. 13. And for any misfeasance or malfeasance causing damages to the bank, they are responsible to it." See *Baptist Congregation v. Scannel*, 3 Grant (Pa.) Cas. 48.

2. *Hawes v. Oakland*, 14 Otto (N. S.) 450; *Colman v. Eastern Counties R. Co.*, 10 Beav. 1; *Atty. Gen. v. Great N. R. Co.*, 1 Dr. & Sm. 154; *Bagshaw v. Eastern R. Co.*, 7 Hare 114; *Sears v. Hotchkiss*, 25 Conn. 171; *Manderson v. Commercial Bank*, 28 Pa. St. 379; *Kean v. Johnson*, 1 Stock. (N. J.) 401; *Central R. Co. v. Collins*, 40 Ga. 582; *Fraser v. Whalley*, 2 Hem. & M. 10; *Frostburg Building Asso. v. Stark*, 47 Md. 338; *Mozley v. Alston*, 1 Ph. 798; *Simpson v. Westminster P. H. Co.*, 8 H. L. 717; *Stewart v. Erie etc. Transp. Co.*, 17 Minn. 372; *Gifford v. N. J. etc. Co.*, 2 Stock. (N. J.) 121; *Dummer v. Chippenham*, 14 Ves. 245; *Wisuree v. First Congregational Church*, 14 Ohio St. 31; *Atty. Gen. v. Mayor*, 1 Bligh, N. S. 321; *James etc. Co. v. Anderson*, 12 Leigh (Va.) 278; *Gartside v. East St. Louis*, 43 Ill. 47; *Ware v. Regents etc. Co.*, 3 De Gex 212; *Stewart v. Little*

M. R. Co., 14 Ohio 353; *Hill v. Parrish*, 14 N. J. Eq. 380; *Thompson v. Tammany Soc.*, 17 Hun (N. Y.) 305; *Webb v. Ridgely*, 38 Md. 364; *Brown v. Pac. etc. Co.*, 5 Blatch. (U. S.) 525; *Reed v. Jones*, 6 Wis. 680.

The general principle is well established that stockholders may protect their individual rights in corporate property and prevent by equitable action misappropriation of funds, unauthorized issue of shares, a refusal by directors or a majority of stockholders to defend suits, and, in fact, any departure from the chartered purposes of a corporation which is an injury to them. *Central R. Co. v. Collins*, 40 Ga. 582; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159; s. c., 12 Hun (N. Y.) 53; 17 Hun (N. Y.) 169; *Bronson v. Lacrosse etc. R. Co.*, 2 Wall. (U. S.) 302; *Dodge v. Woolsey*, 18 How. (U. S.) 331; *Chetlain v. Republic Life Ins. Co.*, 86 Ill. 220; *Faulds v. Yates*, 57 Ill. 416; *Terwilliger v. Great Western etc. Co.*, 59 Ill. 249; *Kelley v. Mariposa etc. Co.*, 14 Hun (N. Y.) 632; *Underwood v. New York etc. R. Co.*, 17 How. (N. Y.) Pr. 537; *Hazard v. Durant*, 11 R. I. 195; *March v. East R. Co.*, 40 N. H. 567; s. c., 43 N. H. 515; *Sears v. Hotchkiss*, 25 Conn. 175; *Pratt v. Pratt*, 33 Conn. 446; *Kean v. Johnson*, 1 Stock. (N. J.) 401; *Lauman v. Lebanon Valley R. Co.*, 30 Pa. St. 46; *Taylor v. Miami Exp. Co.*, 5 Ohio 162; *Platteville v. Galena etc. R. Co.*, 43 Wis. 493; *Tippecanoe Co. v. Lafayette etc. R. Co.*, 50 Ind. 86; *Rogers v. Lafayette etc. Works*, 52 Ind. 297; *Stewart v. Erie etc. Transp. Co.*, 17 Minn. 372; *Dodge v. Woolsey*, 18 How. (U. S.) 331; *Brewer v. Boston Theatre Co.*, 104 Mass. 378.

Where the injury about to be done an individual by the unlawful act of a corporation will be irreparable, injunction is the proper remedy, and this rule extends to acts outside of as well as within its ordinary business. *Big Moun-*

tain etc. Co.'s App., 54 Pa. St. 361; Bonaparte v. Camden etc. R. Co., Baldw. (N. J.) 231; Black v. Del. etc. Canal Co., 9 C. E. Green (N. J.) 455; Sandford v. Catawissa etc. R. Co., 24 Pa. St. 378; Frederick v. Groshon, 36 Md. 436.

English Authorities.—Atty. Gen. v. Great North R. Co., 6 Jur. N. S. 1006; Atty. Gen. v. Mayor etc., 1 Mylne & C. 171; Spencer v. London etc. Ry., 8 Sim. 193.

No person, natural or artificial, has a right, directly or indirectly, to cover his neighbor's land with mining debris, sand and gravel, or other material, so as to render it valueless. Robinson v. Black Diamond etc. Co., 57 Cal. 412; Potter v. Froment, 47 Cal. 165; Richardson v. Kier, 34 Cal. 63; Courtwright v. Bear River Ditch Co., 30 Cal. 573.

In a proper case an injunction may be granted to restrain the negligent exercise of the corporate powers in erecting works and in carrying on the corporate business. Biscoe v. Great East Ry., L. R., 16 Eq. 636; Prime v. Twenty-third St. R. Co., 1 Abb. N. Cas. (N. Y.) 63; St. Louis v. Weber, 44 Mo. 547. See Heyward v. Buffalo, 14 N. Y. 534; Susquehanna Bank v. Broome Co., 25 N. Y. 312; Dows v. Chicago, 11 Wall. (N. Y.) 108; Douglass v. Harrisonville, 9 W. Va. 162; Brooklyn v. Meserole, 26 Wend. (N. Y.) 132; Boyle v. Brooklyn, 71 N. Y. 1; Ewing v. St. Louis, 5 Wall. 413; Minn. Linseed Oil Co. v. Palmer, 20 Minn. 468; Miller v. Mobile, 47 Ala. 166; Hobbs v. Amandor etc. Co., 66 Cal. 161; s. c., 8 Am. & Eng. Corp. Cas. 249.

A dissenting stockholder may have injunction to restrain the corporation from using its powers or funds for an unauthorized purpose or from creating a monopoly. Stewart v. Erie etc. Transp. Co., 17 Minn. 372; Mozley v. Alston, 1 Ph. 798; Simpson v. Westminster P. H. Co., 8 H. L. 717; Kean v. Johnson, 1 Stock. (N. J.) 401; and see Gifford v. New Jersey R. & T. Co. 171.

If the managers of a corporation are about to engage in an enterprise not contemplated by the charter or to apply its funds to other purposes than those specified in it, a court of equity will interfere by injunction. Smith v. Bangs, 15 Ill. 399; Simpson v. Denison, 10 Hare 51; Benman v. Rufford, 6 Eng. L. & Eq. R. 106; Cherokee Iron Co. v. Jones, 52 Ga. 276; Cohen v. Wilkinson, 1 Mac. & G. 481; Bagshaw v. Eastern Union R. Co., 7 Hare 114; Beman v. Rufford, 6

Eng. L. & Eq. R. 106; Coleman v. Eastern Counties R. Co., 10 Beav. 1. So a court of equity will interfere by injunction where public officers under claim of right are proceeding illegally to impair the rights or injure the property of individuals or corporations, or when it is necessary to prevent a multiplicity of suits. Smith v. Bangs, 15 Ill. 399; Mohawk etc. R. Co. v. Artcher, 6 Paige (N. Y.) 83; Oakley v. Williamsburgh, 6 Paige (N. Y.) 262; Belknap v. Belknap, 2 Johns. (N. Y.) Ch. 463; Ferwin v. Lewis, 4 Myl. & C. 249.

A stockholder is entitled to an injunction to restrain the officers of a bank from the continued commission of acts contrary to law and which may endanger its charter, though the affidavits leave the truth of the charges in doubt. In such case the injunction can work no injury. Manderson v. Commercial Bank, 28 Pa. St. 379.

A bill praying for an injunction and a receiver must show absolute necessity therefor in order to the protection of property from an injury for which the subsequent restoration would afford no adequate compensation. Frostburg Building Assoc. v. Stark, 47 Md. 338; Hawes v. Oakland, 14 Otto (U. S.) 450.

Where a stockholder brings the suit there must be shown, first, some action or threatened action of the officers named beyond the authority conferred on them by the charter; or, second, such fraudulent transaction completed or contemplated by the managers, in connection with some other party or among themselves, or with other shareholders, as will result in serious injury to the corporation or to the interests of the other shareholders; or, third, where the board of directors or a majority of them are acting for their own interest in violation of the rights of other stockholders; or, fourth, where a majority of the stockholders themselves are unlawfully, in the name of the corporation, pursuing a course in violation of the rights of other stockholders. Hawes v. Oakland, 14 Otto (U. S.) 460.

Rule 94 of the supreme court of the U. S. requires each complaint filed by a stockholder for relief in such case to state that the plaintiff was a stockholder at the time of the transaction, etc., that the suit is not collusive, and must 'set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors,' etc.

Where the relief sought is purely

A board of directors or a majority of stockholders cannot deviate from the original undertaking against the dissent of the remaining stockholders, and where such deviation is attempted, a court of equity will restrain the wrong.¹

preventive a court of equity will not continue or make perpetual an injunction after the cause for which it was granted has been removed and damages to the rights of the plaintiff no longer exist. *Wiswell v. First etc. Church*, 14 Ohio St. 32.

An injunction will not be granted to stay the construction of a public thoroughfare unless it is manifest that both the company in constructing its works is transcending its charter and that the party injured cannot be adequately compensated in damages. *James etc. Co. v. Anderson*, 12 Leigh (Va.) 278; *Gartside v. East St. Louis*, 43 Ill. 47; *Ware v. Regents etc. Co.*, 3 De Gex & J. 212; *Stewart v. Little M. R. Co.*, 14 Ohio 353.

1. *Beman v. Rufford*, 1 Sim. (N. S.) 564; *Sears v. Hotchkiss*, 25 Conn. 171; *Wiswell v. First etc. Church* 14 Ohio St. 31; *Simpson v. Westminster P. H. Co.*, 8 H. L. 717; *Mozley v. Alston*, 1 Ph. 798; *Kean v. Johnson*, 1 Stock. (N. J.) 401; *Stewart v. Erie etc. Transp. Co.*, 17 Minn. 372; *Gifford v. New Jersey etc. R. Co.*, 2 Stock. (N. J.) 171; *World Mut. Ins. Co. v. Bund "Hand in Hand"*, 47 How. Pr. (N. Y.) 37; *Smith v. Bangs*, 15 Ill. 400; Ill. etc. R. Co. v. Cork, 29 Ill. 237; *Kean v. Johnson*, 1 Stock. (N. J.) 401.

In *Detroit v. Dean*, 106 U. S. 537; s. c., 1 Am. & Eng. Corp. Cas. 327, the court observes: "A single stockholder in a corporation has undoubtedly the same right to institute legal proceedings against the corporation for the protection of his individual rights that a third party not a stockholder possesses; but when he resorts to such proceedings to protect, not simply such interests, but the property and rights of the corporation against the action or threatened action of third parties, thus assuming duties properly devolving upon its directors, he must show a clear breach of duty on their part in neglecting or refusing to act in the matter, amounting to such grossly culpable conduct as would lead to irremediable loss to him if he were not permitted to bring the matter before the courts. And such neglect and refusal must not be simu-

lated, but real and persisted in, after earnest efforts to overcome it." *Hawes v. Oakland*, 104 U. S. 450; *Dodge v. Woolsey*, 18 How. (U. S.) 331; *Foss v. Harbottle*, 2 Hare 461; *Mozley v. Alston*, 1 Ph. 790; *Gray v. Lewis*, L. R., 8 Ch. App. 1035; *MacDougall v. Gardiner*, 1 Ch. Div. 13; *March v. Eastern R. Co.*, 40 N. H. 548; *Peabody v. Flint*, 6 Allen (Mass.) 52; *Brewer v. Boston Theatre*, 104 Mass. 378; *Hersey v. Veazie*, 24 Me. 9; *Samuel v. Holladay*, 1 Woolw. (U. S.) 400; *McAleer v. McMurray*, 58 Pa. St. 126; *Allen v. Curtis*, 26 Conn. 456; *French v. Gifford*, 30 Iowa 148; *Pratt v. Jewett*, 9 Gray (Mass.) 34; *Greaves v. Gouge*, 69 N. Y. 154; *Tuscaloosa Mfg. Co. v. Cox*, 68 Ala. 71. See further to the same effect, *Dimpfell v. Ohio etc. R. Co.*, 110 U. S. 209; *Merchants & Planters' Line v. Waganer*, 71 Ala. 581; s. c., 5 Am. & Eng. Corp. Cas. 102.

Where a corporation, by contract not impeached, acquires a majority of the capital stock of another corporation, and through the control thus acquired elects new directors, and the latter corporation fails to fulfil its part of the contract, the stockholders of the former company, on the sole ground that the acts of such directors are highly detrimental to the property and interests of the company, will not be entitled to an injunction against their further acting as directors and officers, and the appointment of a receiver of the property. *Converse v. Dimock* (N. Y.), 6 Am. & Eng. Corp. Cas. 418.

In *Kean v. Johnson*, 1 Stock. (N. J.) 401. It is said (p. 408): "Nothing is more certainly settled than that any fundamental alteration of a charter, or material deviation from or extension of a road in the case of road companies, interferes with the rights of the corporators, and no majority, however large, can compel any individual stockholder to submit."

The leading case on this subject is *Natusch v. Irving*, Appendix to *Gow on Partnership*, where the partners in a joint stock association had offered to pay back all that the plaintiff had paid, with interest, etc. The CHANCELLOR says: "It is the right of a partner to

The jurisdiction of equity over the property of corporations effected with a trust, applies to ecclesiastical as well as to lay corporations.¹

An injunction will be granted to prevent the franchise of a corporation from being destroyed, as well as to restrain a party from violating it by attempting to participate in its exclusive privileges.² Where a corporation have the power of doing an act, at their discretion, equity will not interfere with the lawful exercise of the discretion. It must infer fraud to interpose.³

A United States circuit court cannot interfere by injunction, at the instance of a corporation organized under the laws of another State, and prevent any necessary step from being taken, under the statute of the State in which such court is located, in the creation of a corporation bearing the same name as the foreign corporation.⁴

(b) *Expulsion*.—The chancellor may perpetually enjoin a corporation from expelling a member on account of particular acts of his, alleged to be in violation of its constitution;⁵ and where

hold his associates to the specified purposes while the partnership continues, and not to rest upon indemnities with respect to which he had not contracted to engage in."

If the managers of a corporation are about to engage in an enterprise not contemplated by the charter, or to apply its funds or credit to other purposes than those specified in it, a court of equity will interfere by injunction. *Smith v. Bangs*, 15 Ill. 400; Ill. etc. R. Co. v. Cook, 29 Ill. 237.

The directors of a trading corporation may be restrained from mismanaging the business of the corporation or wasting its funds. *Sears v. Hotchkiss*, 25 Conn. 170.

Where a mutual life insurance company had entered into a contract with the defendant, a social corporation, to insure all of its members, etc., and to grant to the defendant certain commissions and allowances for procuring business, the contract to continue as long as a single policy remained in force. After the defendant had effected insurance on about 1,500 of its members it sought to transfer its business to another insurance company, and under the facts set forth in the opinion was enjoined from doing so. *World Mut. etc. Co. v. Bund* "Hand in Hand," 47 How. (N. Y.) Pr. 37.

1. *Atty. Gen. v. St. John's Hospital*, 2 De G. J. & S. 621; *Parr v. Atty. Gen.*, 8 Cl. & Fin. 409. In the latter case it is said (p. 433): "Looking at the infor-

mation we find that it states that which beyond all doubt would constitute a great abuse of this property, and therefore a breach of trust. Nothing more is required to bring the case within the jurisdiction of the court of chancery."

2. *Osborn v. Bank of U. S.*, 9 Wheat. (U. S.) 738.

3. *Semmes v. Columbia*, 19 Ga. 471.

Notice.—Though the operations of large companies ought not ordinarily to be arrested by injunction without notice, yet it is a matter resting in the sound discretion of the court, and if a master allows such an injunction without notice, the chancellor will not, of course, dissolve it, though he might have exercised the discretionary power differently. *Perkins v. Collins*, 3 N. J. Eq. (2 Green) 482. See *Capner v. Flemington Mining Co.*, 3 N. J. Eq. (2 Green) 467.

4. *Lehigh Valley Coal Co. v. Hamblen*, 8 Am. & Eng. Corp. Cas. (Ill.) 201.

5. *Society of Italian Union etc. v. Montedonico (Ky.)*, 4 Am. & Eng. Corp. Cas. 22. *Telegraph Co. v. Dav-enport*, 97 U. S. 369; *Sloman v. Bank of England*, 14 Sim. 475; *Johnson v. Renton*, L. R., 9 Eq. 181; *Laylor v. Midland R. Co.*, 29 L. J., Ch. 731; s. c., 8 H. L. C. 751; *Cottam v. Eastern Counties R. Co.*, 1 J. & H. 243.

But an injunction will not usually be granted to restrain the unlawful dis-franchisement of a member of a corporation. *Fisher v. Board of Trade*, 80 Ill. 85; *Baxter v. Board of Trade*, 83

a corporation has been enjoined from expelling a member, but proceeds to expel him in disregard of the injunction, it is not only liable to the court for contempt, and to the injured member for damages, but the act of expulsion is also null and void.¹

(c) *Election of Officers*.—A bill in equity for an injunction cannot be maintained for the purpose of determining the question of the contested election of directors of a railroad company.²

Ill. 147; *Sturges v. Board of Trade*, 86 Ill. 441; *Gregg v. Massachusetts Medical Society*, 111 Mass. 185; *Thompson v. Tammany Soc.*, 17 Hun (N. Y.) 305; *Rorke v. Russell*, 2 Lans. (N. Y.) 244; *Van Ranst v. New York College*, 4 Hun (N. Y.) 620. But see *Fisher v. Keane*, L. R., 11 Ch. Div. 353.

1. *Society etc. v. Montedonico* (Ky.), 4 Am. & Eng. Corp. Cas. 22.

Hilliard on Inj., p. 176, says: "Where an injunction is issued to restrain individuals from particular acts *in pais* a violation of the order by them will render them liable for a contempt, and also render the act voidable as between all parties to the act, as well as those claiming under it who are chargeable with notice," citing *Taylor v. Hopkins*, 40 Ill. 442.

2. *New England Mut. Life Ins. Co. v. Phillips*, 13 Am. & Eng. Corp. Cas. (Mass.) 104.

Corporate Elections.—An election of directors of a corporation of less than one half of the shares of a corporation was held to be valid, where the other stockholders were enjoined from voting on their shares. *Brown v. Pac. etc. Co.*, 5 Blatchf. (U. S.) 525.

A stockholder may bring an action against a corporation to procure the cancellation of certain stock alleged to have been issued without lawful authority, and to restrain the holders of such stock from voting thereon. *Wood v. Church Building Ass'n*, 63 Wis. 9. But where no steps have been taken to declare the excess of stock void a preliminary injunction will not be granted to prevent a stockholder from voting thereon. *Reed v. Jones*, 6 Wis. 680.

Where the bill charged that transfers of stock had been fraudulently made for the purpose of fraudulently controlling an election to certain persons, "as appears from a list of the stockholders furnished" by the president (a defendant), and praying for an injunction against voting on said stock, the court held that injunction was the proper remedy, and the list above referred to need not be filed as an ex-

hibit. *Webb v. Ridgely*, 38 Md. 364.

Where an injunction was sought to prevent certain holders of stock from transferring their shares, or from voting thereon at the next election for directors, to be held three days after the bill was filed, the injunction was denied, as it might change the result of the election and consequent control of the company's business, and would deprive stockholders of the right to vote without giving them an opportunity to be heard. *Hilles v. Parrish*, 14 N. J. Eq. 380. Where it is not claimed that the plaintiff will be deprived of any pecuniary advantages by the admission of new members an injunction may be denied. *Thompson v. Tammany Soc.*, 17 Hun (N. Y.) 305.

Change of Corporate Powers.—An injunction will not be allowed to restrain a corporation from applying to the legislature for a change of its powers upon the ground that in the opinion of the complaining shareholders the proposed legislation is expedient. *In re London, Chatham & Dover Ry. Arrangement Act*, L. R., 5 Ch. 671. But where it is attempted to use corporate funds for defraying the expenses of such an application, and for procuring an extension of the business of the company beyond the legitimate objects for which it was constituted, an injunction may be allowed at the suit of the shareholders to prevent such improper diversion of the funds. *Stevens v. South Devon R. Co.*, 18 Beav. 48; *Munt v. Shrewsbury R. Co.*, 13 Beav. 1; *Simpson v. Denison*, 10 Hare 62; *Spackman v. Lattimore*, 3 Gif. 16; *Vance v. East Lancashire R. Co.*, 3 Kay & J. 50; *Great Western R. Co. v. Rushout*, 5 De G. & Sm. 290; *Atty. Gen. v. Commissioners of Kingstown*, 1 R. 7 Eq. 383; *Telford v. Metropolitan Board of Works*, L. R., 13 Eq. 574.

Merger.—The articles of association of a company prohibited the union or consolidation of the company with any other, without the consent of a majority of the stockholders. In such a case a merger of the company in another,

(d) *Ultra Vires*.—A court of chancery will interfere to prevent a disposition of the property of a corporation for other than corporate purposes, or in any way exceeding the legitimate scope of their authority.¹

(e) *Corporate Name*.—A corporation may acquire a property right to the use of a name, other than its original corporate name, as a trade mark, or as incidental to the good will of a business, as well as an individual; and if it has acquired such a right, it cannot be deprived thereof by the assumption of such name subsequently by another corporation, whether the latter selects its name by the act of incorporators who organize under the general laws of the State, or the name is selected for it in a special act by a legislative body.²

without the consent of the stockholders, is, as to those who do not agree, utterly beyond the powers of the executive committee and directors; and if the union has not been substantially executed by a transfer of property, and by a larger number of the stockholders, it will be enjoined until the final hearing of the case. *Blatchford v. Ross*, 54 Barb. (N. Y.) 42.

Diligence Required.—If a stockholder would have a remedy by injunction against a departure from the original objects of the incorporation, he must be prompt and vigilant in the assertion of his rights. *Chapman v. Mad River etc. R. Co.*, 6 Ohio St. 120; *Gray v. Chaplin*, 2 Russ. 126; *Gregory v. Patchett*, 33 Beav. 595; *Kent v. Jackson*, 14 Beav. 367; *Flooks v. South Western R. Co.*, 1 Sm. & Gif. 142. Or to entitle him to relief in equity against a wrongful diversion of corporate funds or other misconduct on the part of the company. *Kent v. Jackson*, 14 Beav. 367; *Gregory v. Patchett*, 33 Beav. 595; *Chapman v. Mad River etc. R. Co.*, 6 Ohio St. 119; *Goodin v. Cincinnati etc. Co.*, 18 Ohio St. 169; *Chapman v. Mad River etc. R. Co.*, 6 Ohio St. 136; *Watts's Appeal*, 78 Pa. St. 370.

An injunction will be refused in behalf of shareholders of a railway company, seeking to restrain its construction upon the ground that the time has expired within which it should be completed when there has been long acquiescence on the part of plaintiffs, and in such case a shareholder is bound by the acquiescence of one from whom he has purchased his shares, although he himself is chargeable with no delay. *Flooks v. South Western R. Co.*, 1 Sm. & Gif. 142.

Illegal Stock.—An injunction against

the directors of a corporation, who are charged with issuing illegal stock in excess of the actual capital, should not extend beyond the transaction in question and enjoin dealings in the genuine stock unless special necessity is shown. *Fisk v. Chicago etc. R. Co.*, 53 Barb. (N. Y.) 513; s. c., 4 Abb. Pr. (N. Y.) N. S. 378; 36 How. Pr. (N. Y.) 20.

1. *Kean v. Johnson*, 9 N. J. Eq. 1 Stock. 401; *Salomons v. Laing*, 12 Beav. 339; *Colman v. Eastern Counties R. Co.*, 10 Beav. 339; *Atty. Gen. v. Great N. R. Co.*, 1 Dr. & Sm. 154; *Pickering v. Stephenson*, L. R. 14 Eq. 322; *Hutton v. Scarborough, Cliff Hotel Co.*, 13 W. R. 631; affirming s. c., 13 W. R. 574; 2 Drew. & Sm. 514; *Kernahan v. Williams*, L. R., 6 Eq. 228; *McDonnell v. Grand Canal Co.*, 3 Ir. Ch. 578; *Mannsell v. Midland R. Co.*, 1 Hem. & M. 130; *Beman v. Rufford*, 6 Eng. Law & Eq. R. 106; *Cohen v. Wilkinson*, 1 Mac. & G. 481; *Simpson v. Denison*, 10 Hare 51; *Cherokee Iron Co. v. Jones*, 52 Ga. 276.

2. In *Goodyear Rubber Co. v. Goodyear Rubber Mfg. Co.*, 8 Am. & Eng. Corp. Cas. (N. Y.) 317, it was held that the "Goodyear Rubber Co." was entitled to an injunction restraining the defendant from using the name "Goodyear's Rubber Mfg. Co."

In *Newby v. Oregon etc. R. R.*, Deady 609, it was held that a corporate name is a necessary element of the existence of a corporation, and the right to its exclusive use will be protected to the same extent, and upon the same principles, that individuals are protected in the use of trade marks. *Ex parte Walker*, 1 Tenn. Ch. 97.

In *Holmes v. Holmes etc. Mfg. Co.*, 37 Conn. 278, it was held that courts of equity may afford relief in such cases,

(f) *Violation*.—Where an injunction is issued against a corporation, the officers, who neither do anything in violation of it, nor by concealment of the fact that it has been issued, conduce to such violation, cannot be held liable for a breach of it.¹

42. Municipal Corporations.—An injunction will not be granted to restrain the action of a municipal corporation, unless its officers be clearly acting in excess of the powers granted by law;² or exercising its authority over a district to which such

on the ground of the injury to the party aggrieved, and the imposition upon the public, independent of the question whether there is any fraud or evil intent.

An injunction will not lie at the suit of a corporation to restrain persons from adopting and using the same corporate name, if the complainant has a remedy at law. *London etc. Soc. v. London etc. Ins. Co.*, 11 Jur. 938. *Hinckley v. Breen*, 17 Am. & Eng. Corp. Cas. (Conn.) 294.

A suit for an injunction to save the equitable and beneficial rights of a school district, by preventing rival parties, each claiming to be committeemen, from making contracts in its name, should be brought by the district, or perhaps by a tax-payer of the district; but a suit for an injunction by individuals having no personal interest in the matter in controversy, except as the right to an office is involved, cannot be maintained. *Hinckley v. Breen*, 17 Am. & Eng. Corp. Cas. (Conn.) 294.

1. *Trimmer v. Penn. etc. R. Co.*, 36 N. J. Eq. 411.

2. *Sherlock v. Winnetka*, 59 Ill. 389; s. c., 68 Ill. 530; *Hill v. Kensington*, 1 Pars. (Pa.) 501; *West Phila. R. Co. v. Perkins*, 4 Brewst. (Pa.) 173; reversing s. c., 30 Leg. Int. (Pa.) 100; *Little v. Harrisburg*, 4 Leg. Opin. (Pa.) 431; *Ford v. West Pittston*, 6 Luz. L. Reg. (Pa.) 54; *Lutes v. Briggs*, 5 Hun (N. Y.) 67; *Roberts v. New York*, 5 Abb. (N. Y.) Pr. 41; *Patton v. Stephens*, 14 Bush (Ky.) 324; *Brown v. Concord*, 56 N. H. 375; *Agricultural Joint Stock Co. v. Barr*, 55 Ind. 30; *Dent v. Cook*, 45 Ga. 323; *Perry v. Kinnear*, 42 Ill. 160; *Colton v. Hanchett*, 13 Ill. 615. And see *English v. Smock*, 34 Ind. 115; *Schumm v. Seymour*, 9 C. E. Green (N. J.) 143; *Beauchamp v. Board of Supervisors*, 45 Ill. 274.

Jurisdiction.—Courts of equity have power to restrain the proceedings of municipal corporations at the suit of citizens. *Milhan v. Sharp*, 15 Barb. (N. Y.) 193; *Stuyvesant v. Pearsall*, 15

Barb. (N. Y.) 244; *Christopher v. New York*, 13 Barb. (N. Y.) 567; *Lumsden v. Milwaukee*, 8 Wis. 485; *Lutes v. Briggs*, 5 Hun (N. Y.) 67; *Dudley v. Frankfurt*, 12 B. Mon. (Ky.) 610.

Founded in Trust.—Where a complainant alleged that the mayor, aldermen and commonalty of the city of New York had granted to the defendants permission to construct a railroad commencing on the second avenue and thence running through other avenues and streets of said city, which grant was of great value; that it was obtained by the defendants without their paying anything therefor to the city, and that if the same had been offered for sale, or if the railroad had been made by the corporation and maintained and used for the benefit of the city, it would have produced large profits and returns to the corporation, which allegations were not denied; and it was admitted that the plaintiff was a property holder and tax payer in the city to a large amount.

Held, that the corporation in making the grant had been guilty of such a breach of trust as called for the interposition of the court, and that an injunction should be issued to prevent the construction of the railway. *Stuyvesant v. Pearsall*, 15 Barb. (N. Y.) 244; *Milhan v. Sharp*, 15 Barb. (N. Y.) 193.

Where an act is clearly illegal, and where the necessary effects of such act will be to injure or impose a burthen upon the property of any corporator, there is enough to warrant the interference of the court. *Christopher v. New York*, 13 Barb. (N. Y.) 567; *Hays v. Jones*, 27 Ohio St. 218. See *Linden v. Case*, 46 Cal. 171.

Instances.—A county board has no authority to make an appropriation of any sum out of the general fund of their county for the erection of a school building; and if made its payment may be enjoined in an action for that purpose by a tax payer of such county. *Rothrock v. Carr*, 55 Ind. 334; *Warren Co. etc. Co. v. Barr*, 55 Ind. 30; *Pope v. Halifax*, 12 Cush. (Mass.) 410.

jurisdiction has not been legally extended;¹ or doing an act in violation of a statute.² So a municipal expenditure, under a void ordinance, will be enjoined at the suit of tax payers.³

Mere irregularities in the assessment of a tax, however, do not warrant the issuing of an injunction to restrain the collection thereof.⁴

Notice of some kind must be given to a property owner, and an opportunity given him to be heard before an assessment upon

The common council has no authority to purchase lands, erect buildings and issue bonds pledging the corporate property and the faith of the corporation, for any but municipal purposes. Where the design in purchasing the land, erecting the buildings and issuing the bonds is for private, to the exclusion of corporate, purposes and for private gain, it is a gross breach of trust, a fraud upon the law and the tax payers of the municipality, and a court of equity will take cognizance of such a case. *Sherlock v. Winnetka*, 59 Ill. 390; s. c., 68 Ill. 530.

1. *Pittsburgh's Appeal*, 79 Pa. St. 317.

2. *Cummings v. Shable*, 1 Phila. (Pa.) 492; *Long v. Dickinson*, 31 Leg. Int. (Pa.) 36.

3. *Sank v. Phila.*, 4 Brewst. (Pa.) 133; s. c., 8 Phila. (Pa.) 117; *Roumfort v. Harrisburg*, 1 Leg. Opin. (Pa.) 101. *Crampton v. Sabriskie*, 101 U. S. 601; *Gifford v. N. J. R. Co.*, 10 N. J. Eq. 171; *Baltimore v. Gill*, 31 Md. 375; *Wade v. Richmond*, 18 Gratt. (Va.) 583; *Page v. Allen*, 58 Pa. St. 338; *Stevens v. Railroad Co.*, 29 Vt. 546; *Webster v. Harwinton*, 32 Conn. 131; *Terrett v. Sharon*, 34 Conn. 105; *Merrill v. Plainfield*, 45 N. H. 126; *Normand v. Otoe Co.*, 8 Neb. 18; *Oliver v. Keightley*, 24 Ind. 514; *Drake v. Phillips*, 40 Ill. 388; *Grant v. Davenport*, 36 Iowa 396; *Hooper v. Ely*, 46 Mo. 505; *Douglass v. Placerville*, 18 Cal. 643; *Patterson v. Bowes*, 4 Grant (Can.) 170; *West Gwillimbury v. Hamilton R. Co.*, 23 Grant (Can.) 383.

A court of equity, on the complaint of a tax payer, will enjoin the payment of and cancel county warrants illegally drawn on the treasurer by order of the board of supervisors. *Andrews v. Pratt*, 44 Cal. 309. See also *Colton v. Ilanckett*, 13 Ill. 615; *Perry v. Kinnear*, 42 Ill. 160; *Beauchamp v. Board of Supervisors*, 45 Ill. 274.

4. *Dodd v. Hartford*, 25 Conn. 232;

Greene v. Mumford, 5 R. I. 472; *Hughes v. Kline*, 30 Pa. St. 227; *Clinton etc. Co.'s App.*, 56 Pa. St. 315; *Jones v. Summer*, 27 Ind. 510; *Center etc. Co. v. Black*, 32 Ind. 468; *Ottawa v. Walker*, 21 Ill. 605; *Chicago etc. R. Co. v. Frary*, 22 Ill. 34; *Metz v. Anderson*, 23 Ill. 463; *State v. Bremond*, 38 Tex. 116; *Marklot v. Davenport*, 17 Iowa 379; *West v. Whitaker*, 37 Iowa 598; *O'Neal v. Virginia etc. Co.*, 18 Md. 1; *Mills v. Gleason*, 11 Wis. 470; *Mills v. Johnson*, 17 Wis. 598; *Lawrence v. Killam*, 11 Kan. 499; *Merrill v. Gorham*, 6 Cal. 41; *Savings & Loan Soc. v. Ordway*, 38 Cal. 679; *Albany etc. R. Co. v. Auditor General*, 37 Mich. 391; *Hallenbeck v. Hahn*, 2 Neb. 377; *Iowa etc. Co. v. Sac Co.*, 39 Iowa 124; *Rockingham Savings Bank v. Portsmouth*, 52 N. H. 17; *Brown v. Concord*, 56 N. H. 379; *Floyd v. Gilbrath*, 27 Ark. 675; *Murphy v. Harrison*, 29 Ark. 340; *Finnegan v. Ferdinand*, 15 Fla. 379; *Western R. Co. v. Nolan*, 48 N. Y. 513; *Huck v. Chicago etc. R. Co.*, 86 Ill. 352; *Chicago etc. R. Co. v. Siders*, 88 Ill. 320; *Wood v. Helmer*, 10 Neb. 211; *Burlington etc. R. Co. v. Seward Co.*, 10 Neb. 211; *Burt v. Auditor General*, 39 Mich. 126; *Powers v. Bowman*, 53 Iowa 359; *Burlington & M. R. R. Co. v. Saline Co.*, 12 Neb. 396; s. c., 7 Am. & Eng. R. R. Cas. 347; *Archer v. Terre Haute etc. R. Co.*, 102 Ill. 493; s. c., 7 Am. & Eng. R. R. Cas. 249.

Equity will not enjoin the assessment of taxes for mere irregularities in the exercise of a constitutional taxing power, or for excess in the amount of the tax unless it is alleged and proved that a tender has been made of all taxes which ought lawfully to be paid without demanding a receipt in full. *Gillette v. Denver (Colo.)*, 7 Am. & Eng. Corp. Cas. 234. See also *Crampton v. Zabriskie*, 101 U. S. 601; *Gifford v. N. J. R. Co.*, 10 N. J. Eq. 171; *Baltimore v. Gill*, 31 Md. 375; *Wade v. Richmond*, 18 Gratt. (Va.) 583; *Page*

his property becomes finally and irrevocably fixed.¹ But if he allows municipal improvement to be carried out in front of his premises without objection, he cannot obtain injunction to restrain collection of assessment for want of notice to him, without paying the amount by which his property is benefited.²

City councils must order and direct the making of street improvements by ordinance, and not by resolution merely. Proceedings taken and assessments laid in pursuance of such resolution are void, and cannot be ratified and confirmed by a subsequent ordinance regularly passed for the purpose. A party, against whose property assessments are levied for street improve-

v. Allen, 58 Pa. St. 338; *Stevens v. R. Co.*, 29 Vt. 546; *Webster v. Harwinton*, 32 Conn. 131; *Terrett v. Sharon*, 34 Conn. 105; *Merrill v. Plainfield*, 45 N. H. 126; *Normand v. Otoe Co.*, 8 Neb. 18; *Oliver v. Keightley*, 24 Ind. 514; *Drake v. Phillips*, 40 Ill. 388; *Grant v. Davenport*, 36 Iowa 396; *Hooper v. Ely*, 46 Mo. 505; *Douglass v. Placerville*, 18 Cal. 643; *Patterson v. Bowes*, 4 Grant (Can.) 170; *West Gwillimbury v. Hamilton R. Co.*, 23 Grant (Can.) 383.

1. *Santa Clara Co. v. Southern Pac. R. Co.* (Cal.), 13 Am. & Eng. R. R. Cas. 182; *Thomas v. Gain*, 35 Mich. 155; *Butler v. Saginaw Co.*, 26 Mich. 22; *Paul v. Detroit*, 32 Mich. 108; *Philadelphia v. Miller*, 49 Pa. St. 440; *Patten v. Green*, 13 Cal. 325; *Gatch v. Des Moines*, 63 Iowa 718; s. c., 3 Am. & Eng. Corp. Cas. 622.

2. *Barker v. Omaha*, 16 Neb. 269; s. c., 7 Am. & Eng. Corp. Cas. 293; *Hellenkamp v. Lafayette*, 30 Ind. 192; *Evansville v. Pfisterer*, 34 Ind. 36; *Lafayette v. Fowler*, 34 Ind. 140; *Sleeper v. Bullen*, 6 Kan. 300; *Motz v. Detroit*, 18 Mich. 495; *Kellogg v. Ely*, 15 Ohio St. 64; *Patterson v. Baumer*, 43 Iowa 483; *Weber v. San Francisco*, 1 Cal. 455; *Peoria v. Kidder*, 26 Ill. 351; *Warren v. Grand Haven*, 30 Mich. 24; *Tone's Exr. v. Columbus*, 39 Ohio St. 281; s. c., 3 Am. & Eng. Corp. Cas. 644. And see *Taber v. New Bedford*, 135 Mass. 162; s. c., 3 Am. & Eng. Corp. Cas. 678; *Wallace v. Orangeville*, 5 Ontario Rep. 37; s. c., 4 Am. & Eng. Corp. Cas. 354; *Landis v. Hamilton*, 77 Mo. 554; s. c., 4 Am. & Eng. R. R. Cas. 491.

Where the owner of a water power stands by, and, not objecting, permits a city, without first assessing and paying his damages, to erect works for a water supply by drawing water from the

stream, and thus diminishing his power, he creates an equitable estoppel, so that he will not be protected by injunction, but will be left to assert his rights at law. *Logansport v. Uhl*, 99 Ind. 531; s. c., 8 Am. & Eng. Corp. Cas. 621; *Goodin v. Cincinnati etc. Co.*, 18 Ohio St. 169; *Birmingham Canal Co. v. Lloyd*, 18 Ves. Jr. 514; *Rochdale Canal Co. v. King*, 2 Sim., N. S. 78; *Thomas v. Woodman*, 23 Kan. 217; s. c., 33 Am. Rep. 156; *Burden v. Stein*, 27 Ala. 104; *Morris etc. R. Co. v. Prudden*, 20 N. J. Eq. 530; *Jones v. Newark*, 3 Stock. (N. J.) 452; *Bowman v. Wathen*, 42 U. S. (1 How.) 189; *Blanchard v. Doering*, 23 Wis. 200; *McQuiddy v. Ware*, 20 Wall. (U. S.) 14; *Haight v. Price*, 21 N. Y. 241; *Logansport v. La Rose*, 99 Ind. 117.

In *Traphagen v. Jersey City*, 29 N. J. Eq. 206, it is laid down that where an injunction to restrain the completion of a public improvement is sought the plaintiff must not only show that some right secured to him has been violated, and that he has no other adequate remedy, but he must also apply promptly, and that where by his laches he has made it impossible for the court to enjoin his adversary without inflicting great injury upon him, an injunction will be refused, and he will be left to pursue his ordinary remedy at law. *State v. Paterson*, 40 N. J. L. 244; *Rettinger v. Passaic*, 45 N. J. L. 146.

In *Heilman v. Union Canal Co.*, 37 Pa. St. 100, it was held that where one had permitted the use of water in a certain manner for twenty years, and has recovered compensation for such use, he will be estopped from relief by injunction. In *Payne v. Paddock*, Walk. (Mich.) 487, the defendants, relying upon a verbal assurance that they would be allowed to draw water for a mill from a lake whose outlet ran through

ments made in pursuance of such resolution, is entitled to an injunction to restrain the collection of such assessments, notwithstanding the passage of the confirmatory ordinance.¹

An ordinance making an appropriation of the funds of a city, derived from taxation, for purposes wholly beyond the purview of municipal government, is a wrongful appropriation of the funds held in trust for the tax payers and people to pay the alimony and legitimate expenses of the city, and is, in short, *ultra vires*, illegal, null and void. Resident tax payers have the right to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of a municipal corporation, or the illegal creation of a debt which they, in common with other property holders, may otherwise be compelled to pay.²

complainant's land, have erected their mill without objection from complainant, he will not be allowed to enjoin the taking of water from the lake for the use of such mill. See also *Jacox v. Clark, Walk.* (Mich.) 249; *Blanchard v. Doering*, 23 Wis. 200; *Ricketts v. Spraker*, 77 Ind. 371; *Hume v. Little Flat etc. Assoc.*, 72 Ind. 499; *Houk v. Barthold*, 73 Ind. 21; *Grusenmeyer v. Logansport*, 76 Ind. 549.

The Indiana authorities mentioned in the principal case are either directly in point or furnish a strong analogy. In *Palmer v. Stumph*, 29 Ind. 329, it was held that a property holder cannot quietly permit money to be expended in work which benefits his land, under a contract with the city, and then deny the power of the city to make the contract. *Hellenkamp v. Lafayette*, 30 Ind. 102. In *Lafayette v. Fowler*, 34 Ind. 140, it was held that where the owner of real estate in a city stands by and sees a street improved adjoining said property, on a contract made under an order of the common council, without attempting by injunction to prevent such improvement, he cannot after the work is completed or nearly completed refuse to pay for it.

1. *Newman v. Emporia*, 32 Kan. 456; *n. c.*, 7 Am. & Eng. Corp. Cas. 263.

2. *Bayle v. New Orleans* (La.), 8 Am. & Eng. Corp. Cas. 329; *Crampton v. Zabriskie*, 101 U. S. 601; *Gifford v. N. J. R. Co.*, 10 N. J. Eq. 171; *Baltimore v. Gill*, 31 Md. 375; *Wade v. Richmond*, 18 Gratt. (Va.) 583; *Page v. Allen*, 58 Pa. St. 338; *Stevens v. Railroad Co.*, 29 Vt. 549; *Webster v. Harwinton*, 32 Conn. 131; *Terrett v. Sharon*, 34 Conn. 105; *Merrill v. Plainfield*, 45 N. H. 126; *Normand v. Otoe Co.*, 8 Neb. 18; *Oliver v. Keightley*, 24

Ind. 514; *Drake v. Phillips*, 40 Ill. 388; *Grant v. Davenport*, 36 Iowa 396; *Hooper v. Ely*, 46 Mo. 505; *Douglass v. Placerville*, 18 Cal. 643; *Patterson v. Bowes*, 4 Grant (Can.) 170; *West Gwillimbury v. Hamilton R. Co.*, 23 Grant (Can.) 383; *Hood v. Lynn*, 1 Allen (Mass.) 103; *Tash v. Adams*, 10 Cush. (Mass.) 252; *Clafin v. Hopkins*, 4 Gray (Mass.) 502; *Stetson v. Kemp-ton*, 13 Mass. 272; *New London v. Brainard*, 22 Conn. 553; *Booth v. Wood-bury*, 5 Am. L. R. (N. S.) 202; *Bergner v. Harrisburg* (Com. Pleas Dauphin Co.), 1 Pearson (Pa.) 291; *Murphy v. Jacksonville*, 18 Fla. 318; *Grant Co. v. Bradford*, 72 Ind. 455; *Cornell v. Guilford*, 1 Den. (N. Y.) 510; *Henderson v. Covington*, 14 Bush (Ky.) 312.

In *Clafin v. Hopkins*, 4 Gray (Mass.) 502, it was held that a vote of money to purchase uniforms for an artillery company was unauthorized and would be restricted by injunction even after the uniforms had been purchased upon the strength of the ordinance, and deposited in the armory of the company.

See Acts La. 1882, No. 20, pp. 20, 21, §§ 7, 8; 1 Dill. Corp., § 52 *et seq.*; *Hood v. Lynn*, 1 Allen (Mass.) 103; *Tash v. Adams*, 10 Cush. (Mass.) 252; *Clafin v. Hopkins*, 4 Gray (Mass.) 502; *Murphy v. Jacksonville*, 18 Fla. 318; *Grant Co. v. Bradford*, 72 Ind. 455; *Henderson v. Covington*, 14 Bush. (Ky.) 312; *Cornell v. Guilford*, 1 Den. (Ky.) 510; *Hodges v. Buffalo*, 2 Den. (N. Y.) 110; *Halstead v. New York*, 3 N. Y. 433; *New London v. Brainard*, 22 Conn. 552.

Ordinances Producing Injury to Individuals.—An injunction lies to restrain municipal corporations from adopting ordinances and acts which produce injury to individuals. *Gart-*

(a) *Bonds*.—Any citizen and tax payer may prevent the unauthorized making of subscriptions and the issuing and sale of the bonds of a municipal corporation.¹

(b) *Proper Parties*.—Generally speaking, any resident tax payer, who need not prove special damages, is a proper party in a suit to enjoin a municipal corporation for illegally disposing of corporate money, or illegally creating a debt.²

side *v. St. Louis*, 43 Ill. 47; *Smith v. Bangs*, 15 Ill. 400; *Ill. Central R. Co. v. McLean Co.*, 17 Ill. 291; *Chicago etc. R. Co. v. Frary et al.*, 22 Ill. 37; *Oakley v. Williamsburgh*, 6 Paige (N. Y.) 262.

1. *State v. Sabine Co. Court*, 51 Mo. 350; *Foster v. Kenosha*, 12 Wis. 616; *Chestnutwood v. Hood*, 68 Ill. 132; *Livingston Co. v. Weider*, 64 Ill. 427; *Marshall v. Silliman*, 61 Ill. 218; *Livingston Co. v. Weider*, 64 Ill. 427; *Allison v. Louisville etc. R. Co.*, 9 Bush. (Ky.) 247; *Bound v. Wis. etc. R. Co.*, 45 Wis. 543; *Wright v. Bishop*, 88 Ill. 302; *Colton v. Hanchett*, 13 Ill. 615; *Perry v. Kinnear*, 42 Ill. 160; *Drake v. Phillips*, 40 Ill. 388; *Beauchamp v. Supervisors*, 45 Ill. 274; *Marshall v. Silliman*, 61 Ill. 218; *Chestnutwood v. Hood*, 68 Ill. 132; *Springfield v. Edwards*, 84 Ill. 626. See *Jackson Co. v. Brush*, 77 Ill. 59; *McCoy v. Briant*, 53 Cal. 247; *McPike v. Pen*, 51 Mo. 63; *Curtenius v. Hoyt*, 37 Mich. 583; *Missouri River etc. R. Co. v. Miami Co.*, 12 Kan. 230; *Allen v. Jay*, 60 Me. 124; *List v. Wheeling*, 7 W. Va. 501; *Delaware Co. v. McClintock*, 51 Ind. 325; *Allison v. Louisville etc. R. Co.*, 9 Bush (Ky.) 247; *Campbell v. Paris etc. R. Co.*, 71 Ill. 611.

2. *McCoy v. Briant*, 53 Cal. 247; *Wilington v. Harvard*, 8 Cush. (Mass.) 66; *Baltimore v. Gill*, 31 Md. 375; *Merrill v. Plainfield*, 45 N. H. 126; *Frederick v. Groshen*, 30 Md. 436; *Baltimore v. Porter*, 18 Md. 284; *New London v. Brainard*, 22 Conn. 552; *Barr v. Deniston*, 19 N. H. 170; *Douglass v. Placerville*, 18 Cal. 643; *Drake v. Phillips*, 40 Ill. 388; *Rice v. Smith*, 9 Iowa 570; *Grant v. Davenport*, 36 Iowa 396; *Smith v. Magourich*, 44 Ga. 163; *Howell v. Peoria*, 90 Ill. 104. But see *Roosevelt v. Draper*, 23 N. Y. 318; *Doolittle v. Broome Co.*, 18 N. Y. 155.

The state is not a necessary party. *Sherman v. Carr*, 8 R. I. 431; *Newmeyer v. Missouri etc. R. Co.*, 52 Mo. 81; s. c., 14 Am. Rep. 394, and note.

On a motion for injunction by W, a

rate payer, against a town corporation, to restrain them from paying for a site for a postoffice, it was shown that a vote of the rate payers had been taken as to which of two sites (one owned by the town and the other by one McA), should be chosen, that W had taken an active part in support of the one owned by the corporation, and the majority of rate payers had voted for the other. It was contended that W was estopped by his conduct from maintaining the suit, and that McA and the individual members of the corporation should have been made parties. W having denied that he was aware that the site chosen was to be paid for by defendants, and no sufficient proof of that fact having been given. *Held*, that he was not estopped, and, for the purpose of the motion, that although McA and the members of the corporation might not, if joined, have been considered improper parties, still they were not necessary parties, and the injunction was granted. *Wallace v. Orangeville*, 5 Ont. 37; s. c., 4 Am. & Eng. Corp. Cas. 354.

Gross laches, however, on the part of tax payers which have involved innocent third persons in liability will prevent the granting of an injunction. *Tash v. Adams*, 10 Cush. (Mass.) 252; *People v. Maynard*, 15 Mich. 463; *Stewart v. Kalamazoo*, 30 Mich. 69. But those in whose favor the vote was made, though they incurred expenditures on the faith of it, are not third persons within the meaning of the principle. *Clafin v. Hopkinton*, 4 Gray (Mass.) 502; *cf. New London v. Brainard*, 22 Conn. 552; *Hodges v. Buffalo*, 2 Denio (N. Y.) 110.

Kansas.—A party seeking to restrain an alleged nuisance of the school house belonging to a school district, who alleges that he is a tax payer and resident of the district; that the school house has been built partially out of the tax he has paid; that he has children attending school in said school house; and that by the misuse complained of

(c) *Eminent Domain*.—An injunction will lie to restrain a town from opening streets and alleys through a person's land against his consent, without first having the same lawfully taken and condemned, and compensation to such person ascertained in the manner prescribed by law.¹

A city will not be enjoined from making drains and culverts on altering grade of streets, because a flow of surface water on abut-

the books of his children are torn, soiled, carried away, lost and misplaced, shows such a personal and private interest as entitles him to prosecute the action. *Spencer v. School Dist.*, 15 Kan. 259; *Leavenworth v. Norton*, 1 Kan. 405; *Burnes v. Atchison*, 2 Kan. 454; *Craft v. Jackson Co.*, 5 Kan. 518.

Illinois.—A bill to enjoin the levy and collection of a tax to pay a debt incurred by a city in excess of its authority, should not be dismissed because the creditor of the city is not a party to the suit. The bill should be retained in order that the proper parties may be made to it. *Howell v. Peoria*, 90 Ill. 104. See *Colton v. Hanchett*, 13 Ill. 615; *Mt. Carbon etc. R. Co. v. Blanchard*, 54 Ill. 240; *Sherlock v. Winnetka*, 59 Ill. 389; *Livingston Co. v. Weider*, 64 Ill. 427; *Perry v. Kinneer*, 42 Ill. 160; *Beauchamp v. Supervisors*, 45 Ill. 274; *Chestnutwood v. Hood*, 68 Ill. 132; *Marshall v. Silliman*, 61 Ill. 218; *Springfield v. Edwards*, 84 Ill. 626; *Wright v. Bishop*, 88 Ill. 301.

Iowa.—*Rice v. Smith*, 9 Iowa 570; *Grant v. Davenport*, 36 Iowa 396; *Fleming v. Mershon*, 36 Iowa 413; *Cornell College v. Iowa Co.*, 32 Iowa 520.

Missouri.—*Hooper v. Ely*, 46 Mo. 505; *Steines v. Franklin Co.*, 48 Mo. 167; *Newmeyer v. Missouri etc. R. Co.*, 52 Mo. 81; s. c., 14 Am. Rep. 394; *Railroad Co. v. McGuire*, 49 Mo. 483; *Rubey v. Shain*, 54 Mo. 207; *State v. Dowling*, 50 Mo. 134; *State v. Saline Co. Court*, 51 Mo. 352; *Dean v. Todd*, 22 Mo. 92; *Sayre v. Tompkins*, 23 Mo. 443; *Barrow v. Davis*, 46 Mo. 394; *Leslie v. St. Louis*, 47 Mo. 478; See also *Ranney v. Bader*, 67 Mo. 476, where the State decisions are reviewed.

Massachusetts.—*Hale v. Cushman*, 6 Met. (Mass.) 425; *Frost v. Belmont*, 6 Allen (Mass.) 152; *Carlton v. Salem*, 103 Mass. 141; *Atty. Gen. v. Salem*, 103 Mass. 138; *Atty. Gen. v. Boston*, 123 Mass. 460; *Drury v. Natick*, 10 Allen (Mass.) 160.

New York.—The decisions in this State seem to be conflicting. See *Dil-*

lon Munic. Corps., § 920; *Ketchum v. Buffalo*, 14 N. Y. 356; *Doolittle v. Broome Co.*, 18 N. Y. 155; *Roosevelt v. Draper*, 23 N. Y. 318; *Christopher v. Mayor*, 13 Barb. N. Y. 567; *Milbau v. Sharp*, 15 Barb. N. Y. 195; *Stuyvesant v. Pearsall*, 15 Barb. N. Y. 244; *De Baun v. New York*, 16 Barb. (N. Y.) 392; *Wood v. Draper*, 24 Barb. (N. Y.) 187; *Demarest v. Wickham*, 63 N. Y. 320; *Kilbourne v. St. John*, 59 N. Y. 21; s. c., 17 Am. Rep. 201; *Ayers v. Lawrence*, 59 N. Y. 192; *In matter of Mead*, 74 N. Y. 216.

Pennsylvania.—*Sharpless v. Phila.*, 21 Pa. St. 147; *Mercer Co. v. Pittsburgh etc. R. Co.*, 27 Pa. St. 404; *Moers v. Reading*, 21 Pa. St. 188; *Mott v. Pa. R. Co.*, 30 Pa. St. 9; *Page v. Allen*, 58 Pa. St. 338.

Other States.—*Place v. Providence*, 12 R. I. 1; *Follmer v. Nuckolls*, 6 Neb. 204; *Wade v. Richmond*, 18 Gratt. (Va.) 583; *Sherman v. Carr*, 8 R. I. 431; *Jager v. Coherty*, 61 Ind. 528; *Delaware Co. v. McClintock*, 51 Ind. 325; *Allison v. Louisville etc. R. Co.*, 9 Bush (Ky.) 247; *Bound v. Wis. etc. R. Co.*, 45 Wis. 543; *Elyton Land Co. v. Ayres*, 62 Ala. 413; *Corrothers v. Clinton Dist. Bd. of Ed.*, 16 W. Va. 527; *Wilkerson v. Walters*, 1 Idaho (N. S.) 564.

1. *Mason City etc. Co. v. Mason*, 23 W. Va. 211; s. c., 7 Am. & Eng. Corp. Cas. 426; *Pierpoint v. Harrisville*, 9 W. Va. 215, and cases cited by Judge GREEN, pp. 218, 219; *Anderson v. Harvey's Heirs*, 10 Gratt. (Va.) 389; and *McMillen v. Ferrell*, 7 W. Va. 223; *Sower v. Philadelphia*, 35 Pa. St. 231; *Eidemiller v. Wyandotte City*, 2 Dill. (U. S.) 376; *Gardner v. Newburg*, 2 Johns. Ch. (N. Y.) 162; *Lafayette v. Bush*, 19 Ind. 326.

A city acquires no title to bed of street until it has condemned the same and paid or tendered damages; and until it has acquired title all assessments for paving or grading of street are void, and collection thereof will be enjoined. *Baltimore v. Hook et al.*, 62

ting premises will be thereby increased.¹

A court of equity will not restrain by injunction the threatened violation of a city ordinance which attempts to regulate the erection of buildings for the purpose of greater security against damage by fire. To warrant the application of this restraining power, the act sought to be restrained must be a nuisance in fact, and not one created solely by statutory enactment or municipal ordinance.²

Md. 371; s. c., 6 Am. & Eng. Corp. Cas. 442.

1. *Heth v. City of Fond du Lac*, 63 Wis. 228; s. c., 7 Am. & Eng. Corp. Cas. 504.

The resident owner of a lot fronting upon a public street in a city cannot be permitted to restrain such municipality from constructing drains along the side or culverts across such streets, or other streets in the vicinity, or from grading or otherwise improving the same, merely because such acts, when completed, would greatly increase the flow of surface water upon his land. *Waters v. Bay View*, 61 Wis. 642; *Allen v. Chippewa Falls*, 52 Wis. 430; *Hoyt v. Hudson*, 27 Wis. 656; *Turner v. Dartmouth*, 13 Allen (Mass.) 291; *Barry v. Lowell*, 8 Allen (Mass.) 127; *Dickinson v. Worcester*, 7 Allen (Mass.) 19; *Flagg v. Worcester*, 13 Gray (Mass.) 601; *Parks v. Newburyport*, 10 Gray (Mass.) 28. The same is true with respect to an adjoining land owner changing the surface of his land, or placing obstructions or embankments thereon, to change the course of surface water thereon. *Hanlin v. Chicago* etc. R. Co., 61 Wis. 515; *O'Connor v. Fond du Lac* etc. R. Co., 52 Wis. 526; *Eulrich v. Richter*, 37 Wis. 226; *Fryer v. Warne*, 29 Wis. 511; *Gannon v. Hargadon*, 10 Allen (Mass.) 106. This is plainly the rule of the common law, as distinguished from the civil law. *Ramsdale v. Foote*, 55 Wis. 560. It makes no difference in the application of this rule that land is naturally wet and swampy. *Dickinson v. Worcester*, 7 Allen (Mass.) 22. In *Waters v. Bay View*, 61 Wis. 642, one of the principal grounds of the complaint was that the village had "permitted a culvert to become filled up, causing water to dam up and flow back upon" the plaintiffs' lands, but it was *held* that there was no liability. See also *Barry v. Lowell*, 8 Allen (Mass.) 127.

2. *Manchester v. Smyth*, 18 Am. & Eng. Corp. Cas. (N. H.) 474; *Hutchin-*

son v. State Board, 39 N. J. Eq. 569; s. c., 8 Am. & Eng. Corp. Cas. 345; *Ward v. Little Rock*, 41 Ark. 526; s. c., 8 Am. & Eng. Corp. Cas. 397; *Marini v. Graham*, 67 Cal. 130; s. c., 8 Am. & Eng. Corp. Cas. 401; *Barthet v. New Orleans* (La.), 9; Am. & Eng. Corp. Cas. 509.

A municipal corporation may undoubtedly prohibit the erection of wooden buildings within its limits, or any designated part thereof; and it may also regulate the construction of buildings, as to thickness of walls, or in other respects, provided it has received the power to do so by charter or other statute. Laws empowering cities to pass ordinances of this character are no unconstitutional interference with the rights of property owners. *King v. Davenport*, 98 Ill. 305; *Baumgartner v. Hasty*, 100 Ind. 575; s. c., 8 Am. & Eng. Corp. Cas. 353; *Wadleigh v. Gilman*, 12 Me. 403; *Vanderbilt v. Adams*, 7 Cow. (N. Y.) 349, 352; *Respublica v. Duquet*, 2 Yeates (Pa.) 493; *Knoxville v. Bird*, 12 Lea (Tenn.) 121; s. c., 5 Am. & Eng. Corp. Cas. 380.

In *Manchester v. Smyth*, 18 Am. & Eng. Corp. Cas. (N. H.) 474, it was *held* that these ordinances could not be enforced by injunction. Besides the authorities there cited. *St. John's v. McFarlan*, 33 Mich. 72; and *Hudson v. Thorne*, 7 Paige (N. Y.) 261, sustain this view. See *High on Injunctions*, section 748. In *St. John's v. McFarlan* the court said: "A court in chancery has no jurisdiction to restrain the threatened violation of a village ordinance, unless the act threatened to be done, if carried out, would be a nuisance. . . . If a proper ordinance was framed with an appropriate penalty for all violations of its provisions, we think the remedy at law would be found adequate. The fact that the remedy was not adequate in this particular case, on account of the ordinance not being sufficiently stringent in its provisions, cannot give the court

Nuisance.—A court of equity will not interfere to prevent an act merely because it is illegal; and will not abate a public nuisance at the suit of a private party unless he shows that he has sustained, and is still sustaining, individual damage. A nuisance, to give jurisdiction for an injunction, must actually exist or be imminent.¹

jurisdiction to interfere.” JUDGE DILLON, however (Mun. Corp., § 405, *n.*), seems to think that the law ought to be the other way, on the analogy of the Massachusetts cases regarding the carrying on of offensive trades and the use of buildings therefor.

The equity jurisdiction of the court undoubtedly includes, in proper cases, the restraining by injunction of the erection and maintenance of nuisances, public and private. To warrant the application of this restraining power, the danger of irreparable mischief or injury must be imminent, and clearly made to appear. *Wason v. Sanborn*, 45 N. H. 169; *Perkins v. Foye*, 60 N. H. 496. The act sought to be restrained must be one which, if performed or executed, will inevitably bring on the danger threatened by it. It must be a nuisance in fact, and not one created solely by statutory enactment or municipal ordinance. *Waupun v. Moore*, 34 Wis. 450.

Where the ordinance empowers the authorities to summarily tear down and remove buildings constructed of combustible materials, the owner of the property thus destroyed is without remedy. *King v. Davenport*, 98 Ill. 305. But if in point of fact he has not violated any ordinance, he may recover damages, or enjoin a threatened removal. *McKibbin v. Fort Smith*, 35 Ark. 352. A court of equity will not, at the instance of the wrong doer, enjoin the municipal authority from tearing down wooden buildings erected in violation of law, although their removal may be without authority. *Aronheimer v. Stokley*, 11 Phila. (Pa.) 283. And in *Hino v. New Haven*, 40 Conn. 478, the fact that the building, originally combustible, had been made substantially fire proof before and during the pendency of proceedings against the owner for violation of the ordinance, was held to give him no standing in a court of equity.

1. *Ward v. Little Rock*, 41 Ark. 526; *s. c.*, 8 Am. & Eng. Corp. Cas. 397.

Maynell v. Saltmarsh, 1 Keb. 847; *Hart v. Bassett*, T. Jones 156; *Chiches-*

ter v. Lethbridge, Willes 71; *Rose v. Miles*, 4 M. & S. 101; *Hubert v. Groves*, 1 Esp. 148; *Greasley v. Codling*, 2 Bing. 263; 9 Moore 489; *Sanders v. Fowler*, Cro. Jac. 446; *Marriott v. Stanley*, 1 M. & Gr. 568; *Goldthorpe v. Hardman*, 13 M. & W. 377; *Clark v. Lake*, 1 Scam. (Ill.) 229; *Martin v. Bliss*, 5 Blackf. (N. S.) 35; *Hughes v. Heiser*, 1 Binn. (Pa.) 463; *Brown v. Watson*, 47 Me. 161; *Enos v. Hamilton*, 27 Wis. 256; *Dudley v. Kennedy*, 63 Me. 465; *Pierce v. Dart*, 7 Cow. (N. Y.) 609; *Lansing v. Wiswall*, 5 Den. (N. Y.) 213.

In the following cases it was held that the damages were not of such a special nature as would entitle the plaintiff to an injunction. *Fineux v. Hovenden*, Cro. Eliz. 664; *Anon. Moore* 180, No. 321; *Paine v. Patrick*, Carth. 194; *s. c.*, 3 Mod. 289; *Winterbottom v. Lord Derby*, L. R., 2 Ex. 316; *O'Brien v. Norwich etc. R. Co.*, 17 Conn. 372; *Seeley v. Bishop*, 19 Conn. 128; *Mechling v. Kitanning Bridge Co.*, 1 Grant (Can.) 416; *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565; *Clark v. Saybrook*, 21 Conn. 314; *McCowan v. Whitesides*, 31 Ind. 235; *Johnson v. Stayton*, 5 Harr. (Del.) 362; *Hartshorn v. South Reading*, 3 Allen (Mass.) 501; *Brainard v. Connecticut River R. Co.*, 7 Cush. (Mass.) 511; *Carpenter v. Mann*, 17 Wis. 155; *Houck v. Wachter*, 34 Md. 265.

A board of health organized under the “Act concerning the protection of the public health, and the record of vital facts and statistics relating thereto,” approved March 11, 1880 (P. L. of 1880, p. 206), may file a bill in the court of chancery as relators, in the name of the State, for an injunction to restrain the continuance of any nuisance hazardous to the public health of the locality. In this respect the remedy to restrain such a nuisance, which formerly was required to be in the name and at the instance of the attorney general, has been extended so that a proceeding in equity for an injunction may be taken by such a board. *Atchinson v. State*, 39 N. J. Eq. 569; *s. c.*, 8 Am. & Eng. Corp. Cas. 245-

43. Franchises—Exclusive Franchises.—Where a corporation is vested with an exclusive franchise to operate a road between certain points, it is entitled to an injunction to restrain another corporation from constructing another road which shall interfere with its franchise.¹ But the right to the exclusive franchise must be clear, and also the fact that it is being interfered with, otherwise relief cannot be obtained by injunction.²

A court of equity will not grant an injunction where it would be, by indirection, decreeing a forfeiture of a charter; or, it being discretionary, when it would be inequitable.³

While a franchise may be adjudged forfeited upon proof of long continued and intentional non-user, it can be only in a court of law, and in a proceeding to test the right.⁴

Slaughter House.—Slaughter houses have long been regarded as *prima facie* such public nuisances as will authorize an injunction to restrain their use as such. Though a necessary evil, it is required that they should be maintained beyond the limits of populous localities, and this rule has been carried so far as to allow persons moving into the neighborhood of a slaughter house which has been encroached upon by the growth of such localities, to enjoin its further use as such. *Brady v. Weeks*, 3 Barb. (N. Y.) 157; *Sims v. Frankfort*, 79 Ind. 446; *State v. Louisville etc. R. Co.*, 86 Ind. 114; *Pruner v. Pendleton*, 75 Va. 516; *Peck v. Elder*, 3 Sandf. (N. Y.) 126; *Howard v. Lee*, 3 Sandf. (N. Y.) 281; *Cropsey v. Murphy*, 1 Hilt. (N. Y.) 126; *Dubois v. Budlong*, 15 Abb. (N. Y.) Pr. 445; *Atty. Gen. v. Steward*, 20 N. J. Eq. 415.

Eng.—*Swinton v. Pedie*, 1 Macq. 74; *Rex v. Cross*, 2 C. & P. 483; *Rex v. Watts*, 2 C. & P. 486; *Walter v. Selfe*, 4 Eng. L. & Eq. 20; *Rex v. Dixon*, 10 Mod. 335; *Regina v. Leech*, 6 Mod. 145; *Rex v. Niel*, 2 C. & P. 485; *Tipping v. St. Helen Smelting Co.*, L. R., 1 Ch. App. 66; *Bankart v. Houghton*, 27 Beav. 425.

1. *Boston etc. R. Co. v. Salem etc. R. Co.*, 2 Gray (Mass.) 1; *Boston Water P. Co. v. Boston R. Co.*, 16 Pick. (Mass.) 512; *Justices v. Griffin & W. P. P. R. Co.*, 11 Ga. 246; *Delaware etc. R. Co. v. Camden etc. R. Co.*, 1 C. E. Green (N. J.) 321; s. c., 3 C. E. Green (N. J.) 546; *Pennsylvania R. Co. v. National R. Co.*, 8 C. E. Green (N. J.) 441; *Central R. Co. v. Pennsylvania R. Co.*, 31 N. J. Eq. 475; *People v. Third Avenue R. Co.*, 45 Barb. (N. Y.) 63; *Camden Horse R. Co. v. Citizens' Coach Co.*, 31 N. J. Eq. 525.

Compare Hartford Bridge Co. v. East Hartford, 16 Conn. 149; *Enfield etc. Co. v. Hartford etc. R. Co.*, 17 Conn. 40; *Piscataqua Bridge v. N. H. Bridge*, 7 N. H. 335; *Thompson v. N. Y. etc. R. Co.*, 3 Sandf. (N. Y.) Ch. 625; *Niagara Bridge Co. v. Great Western R. Co.*, 39 Barb. (N. Y.) 212; *McRoberts v. Washburne*, 10 Minn. 23; *Midland T. & F. Co. v. Wilson*, 28 N. J. Eq. 537; *Micon v. Tallahassee Bridge Co.*, 47 Ala. 652.

2. *Norwich Gas Light Co. v. Norwich City Gas Co.*, 25 Conn. 19; *Delaware etc. R. Co. v. Camden etc. R. Co.*, 2 McCart. (N. J.) 13; *Brooklyn R. Co. v. Cooney Island R. Co.*, 35 Barb. (N. Y.) 364; *New York etc. R. Co. v. Forty-second Street R. Co.*, 50 Barb. (N. Y.) 285; *Savannah R. Co. v. Coast Line R. Co.*, 49 Ga. 202; *St. Louis R. Co. v. Northwestern St. L. R. Co.*, 69 Mo. 65; *Cory v. Yarmouth & N. R. Co.*, 3 Hare 593; *Enfield etc. Co. v. Conn. River Co.*, 7 Conn. 51; *President v. Trenton Bridge Co.*, 2 Beas. (N. J.) 46; *Fall v. Sutter Co.*, 21 Cal. 237; *Butt v. Colbert*, 24 Tex. 355; *Challiss v. Davis*, 56 Mo. 25; *National Docks R. Co. v. Central R. Co.*, 32 N. J. Eq. 755; *United N. J. R. Co. v. Standard Oil Co.*, 33 N. J. Eq. 123.

Any undue delay in applying for an injunction will prevent its being granted. *Fremont etc. Co. v. Dodge Co.*, 6 Neb. 18; *South Carolina R. Co. v. Columbia R. Co.*, 13 Rich. (S. Car.) Eq. 339.

3. *Ottacheechee Woolen Co. v. Newton*, 57 Vt. 451.

4. *King v. Armory & Monk*, 2 Tenn. 515; *King v. Pasmore*, 3 Tenn. 199; *King v. Saverton*, Yelv. 190.

The defendants were the owners of the stock and franchise of a corporation organized under a charter granted by

44. Officers.—(a) *National Officers.*—In the case of national officers, vested with certain discretionary powers by virtue of their office, the principle is well settled that such discretion cannot be interfered with by injunction. Such action amounts to an encroachment by one branch of government on another.¹

(b) *State Officers.*—It is well settled that, in certain cases, State officers will be restrained by injunction from the commission of a breach of trust which will affect public rights or franchises, or from committing some illegal act under color of right, which will injuriously affect individuals. But a clear case must be made out, otherwise no injunction lies.²

(c) *Municipal Officers.*—There is a very important line of cases deciding that municipal officers may be restrained by injunction from misappropriating municipal funds or other property. This is a breach of public trust, and, as such, calls for the interposition of a court of equity.³

the legislature, and by which the original corporators were authorized to, and had erected and maintained a dam for locking on certain falls in the Connecticut river for about fifty years in the place where it was proposed to build the new dam; and the court refused an injunction restraining an erection of the dam; and this, as it would indirectly work a forfeiture of the charter, in which there was no provision for its termination. Water had been used for many years from the old dam to propel the machinery of a saw mill. And the injunction was refused although the old dam had been carried away by a flood some twenty-five years ago, and nothing had been done under the charter since; and although the new dam was to be utilized for manufacturing purposes, instead of maintaining the locks, there being no necessity for them; and although the dam would cause the water to set back a little on the water wheel that propelled the orator's machinery. *Ottaquechee Woolen Co. v. Newton*, 57 Vt. 451; s. c., 12 Am. & Eng. Corp. Cas. 71.

1. *Marbury v. Madison*, 1 Cranch (U. S.) 137. The secretary of the interior cannot be restrained by injunction from cancelling an entry of land in the land office. *Gaines v. Thompson*, 7 Wall. (U. S.) 347.

2. *People v. Canal Board*, 55 N. Y. 394; *Ohio v. Chase*, 5 Ohio St. 528; *Atty. Gen. v. Forbes*, 2 Myl. & Cr. 123.

3. *Atty. Gen. v. Aspinwall*, 2 Myl. & Cr. 613; *Atty. Gen. v. Liverpool*, 1 Myl. & Cr. 171.

On the same principle a town council

may be restrained from abusing the statutory power given them to award compensation for the emoluments of political offices. *Atty. Gen. v. Poole*, 4 Myl. & Cr. 17.

But in such cases there must be a reasonable certainty of right to the relief asked, and it must appear that irreparable mischief will ensue; otherwise no injunction can be granted. *Atty. Gen. v. Liverpool*, 1 Myl. & Cr. 171. See upon this point the following authorities: *Atty. Gen. v. Brown*, 1 Swanst. 265; *Atty. Gen. v. Forbes*, 2 Myl. & Cr. 123; *Atty. Gen. v. Aspinwall*, 2 Myl. & Cr. 613; *Atty. Gen. v. Corp. of Poole*, 4 Myl. & Cr. 17; *Atty. Gen. v. Mayor of Liverpool*, 1 Myl. & Cr. 171, 210; *Atty. Gen. v. Corp. of Norwich*, 2 Myl. & Cr. 406; *Atty. Gen. v. Corp. of Litchfield*, 13 Sim. 546; *State ex rel. v. Callaway County*, 51 Mo. 395; *Dummer v. Corp. of Chippenham*, 14 Ves. 245; *Re Fremington School*, 11 Jux. 421; s. c., 10 Jux. 512; *Dean v. Bennett*, L. R., 6 Ch. 489; *Re Beloved Wilkes' Charity*, 3 Mac. & G. 440; *Dangars v. Rivaz*, 28 Beav. 333; *Atty. Gen. v. Mid. Kent R. Co.*, L. R., 3 Ch. 100; *Atty. Gen. v. Great Northern R. Co.*, 4 De Gex & Sim. 75.

In New York the doctrine is laid down that while equity will not ordinarily interfere with matters lying largely in the discretion of municipal authorities, nevertheless where the threatened action will produce irreparable injury and consists of an illegal grant or disposition of public property, by devoting it wholly or in part to the uses of a private corporation, or where

45. Railways.—As railways are common carriers and *quasi* public in their character, courts will not, for slight cause, grant injunctions to obstruct their operation and thereby occasion inconvenience and damage to the public.¹

(a) *Eminent Domain*.—Where a railway has been located across the lands of a party, but the amount of the appraiser has not been deposited as required by law, the land owner may enjoin the operation of the road until the payment of such award.²

the attempted action is corrupt and fraudulent, equity may intervene by injunction. It has been accordingly *held* that under such circumstances as above laid down a court of equity may restrain municipal authorities from granting to a railroad company the right of way for an elevated railroad along a public street. *People ex rel. Negus v. Dwyer*, 90 N. Y. 42.

The mayor of the city of New York, in appointing the commissioner of public works and the corporation counsel, does not act on behalf of the municipality, but as a public executive officer under the authority conferred upon him by statute. He cannot, therefore, be restrained by injunction from appointing certain persons to such offices upon the ground of an alleged corrupt combination. *People v. Edson*, 52 N. Y. Super. Ct. 53; s. c., 8 Am. & Eng. Corp. Cas. 135.

1. *Torrey v. Camden etc. R. Co.*, 3 C. E. Green Ch. (N. J.) 293; *Cook v. North etc. R. Co.*, 46 Ga. 618.

The open and acknowledged possession by a railway of its right of way is sufficient to prevent interference therewith forcibly or without its consent. *Northern etc. R. Co. v. St. Paul etc. R. Co.* (Minn.), 1 Am. & Eng. R. R. Cas. 12. But where other railways are authorized by statute to cross the track of the first railway, upon making just compensation therefor, an injunction will not be granted. *Northern etc. R. Co. v. St. Paul etc. R. Co.* (Minn.), 1 Am. & Eng. R. R. Cas. 12; *Greenhalgh v. Manchester & B. R. Co.*, 3 Myl. & Cr. 784.

2. *Ray v. Atchison etc. R. Co.*, 4 Neb. 440; *Menk v. O. & N. W. R. Co.*, 4 Neb. 21; *Spencer v. Point Pleasant etc. R. Co.*, 23 W. Va. 401; s. c., 20 Am. & Eng. R. R. Cas. 125; *Campbell v. Point Pleasant etc. R. Co.*, 23 W. Va. 448; s. c., 20 Am. & Eng. R. R. Cas. 157; *Smith v. Point Pleasant etc. R. Co.*, 23 W. Va. 451; s. c., 20 Am. & Eng. R. R. Cas. 160; *Hale*

v. Same, 20 Am. & Eng. R. R. Cas. 162; *Western etc. R. Co. v. Owings*, 15 Md. 199. And the fact that the condemnation proceedings that were instituted by a company which has since assigned to the defendant and gone out of existence will not affect the right. *Ray v. Atchison etc. R. Co.*, 4 Neb. 440. But an acceptance by the land owner of the amount of the award is an acquiescence therein and will preclude him from bringing an action against the company for such land. *Burns v. Milwaukee etc. R. Co.*, 9 Wis. 450.

Where a railroad company has illegally entered lands and built its road on them and fails to pay the damages adjudged, it is generally *held* that the operation of the road will be enjoined. *Cozens v. Bagnor Ry. Co.*, 1 Ch. App. 594; *Omaha etc. R. Co. v. Menk*, 4 Neb. 21; *Evans v. Missouri etc. R. Co.*, 64 Mo. 453; *Sturtevant v. Milwaukee etc. R. Co.*, 11 Wis. 62 (Statutory); *Bohlman v. Green Bay etc. R. Co.*, 40 Wis. 157; *Story v. New York Elevated R. Co.*, 11 Abb. (N. Y.) N. Cas. 236; s. c., 7 Am. & Eng. R. R. Cas. 596, 611; *Gammage v. Georgia Southern R. Co.*, 65 Ga. 614; s. c., 10 Am. & Eng. R. R. Cas. 371; *Kendall v. Missisquoi etc. R. Co.*, 55 Vt. 438; 14 Am. & Eng. R. R. Cas. 423; *Richards v. Des Moines Valley R. Co.*, 18 Iowa 259; *Hibbs v. C. & S. R. Co.*, 39 Iowa 340; *White v. Nashville etc. R. Co.*, 7 Heisk. (Tenn.) 518; *Murdock v. Prospect Park etc. R. Co.*, 73 (N. Y.) 579; *Williams v. New Orleans etc. R. Co.*, 60 Miss. 689; s. c., 20 Am. & Eng. R. R. Cas. 378; *Bohlman v. Green Bay etc. R. Co.*, 30 Wis. 105.

The following cases support the general rule that equity will enjoin the taking of land by a railroad company without first condemning the same. *Diedrichs v. Northwestern etc. R. Co.*, 33 Wis. 219; *Lumsden v. Milwaukee*, 8 Wis. 485, 495; *Northern Pac. R. Co. v. Barnesville etc. R. Co.* (Minn.), 1 Am. & Eng. R. R. Cas. 8; *Henderson v.*

New York Cent. R. Co., 78 N. Y. 423; Cobb v. Illinois etc. R. Co., 68 Ill. 233; Western Md. R. Co. v. Owings, 15 Md. 199; Armstrong v. Waterford etc. R. Co., 10 Ir. Eq. 60; Stevens v. Erie R. Co., 6 C. E. Green 259; Morris etc. R. Co. v. Hudson Tunnel R. Co., 10 C. E. Green (N. J.) 384; Harness v. Chesapeake etc. Co., 1 Md. Ch. 248. And see New Central Coal Co. v. George's Creek etc. Co., 37 Md. 537; Bonaparte v. Camden & A. R. Co., Baldwin v. S. 205. Commissioners v. Durham, 43 Ill. 86; Horton v. Hoyt, 11 Iowa 496; Richards v. Des Moines etc. R. Co., 18 Iowa 259; Ross v. Elizabethtown etc. R. Co., 1 Green (N. J.) Ch. 422; Powers v. Bears, 12 Wis. 214; Folley v. Passaic, 11 C. E. Green (N. J.) 216; Murdock v. Prospect etc. R. Co., 73 N. Y. 579; Bohlman v. Green Bay etc. R. Co., 30 Wis. 105; Bohlman v. Green Bay etc. R. Co., 40 Wis. 157; Browning v. Camden etc. R. Co., 3 Green (N. J.) Ch. 47.

In the case of Western M. R. Co. v. Owings, 15 Md. 199, an injunction was prayed to prevent a railroad company from making a railroad over complainant's lands. The bill alleged that the company had not paid nor tendered compensation for the use of the lands. JUDGE TUCK, in deciding the case, said: "We do not perceive how the court could have refused the injunction in the face of this averment in the bill. The clause of the constitution applicable to the point is too plain to admit of any doubt. *The nature of the damage, whether irreparable or not, has nothing to do with the question when thus presented* . . . We have no doubt of the jurisdiction of the court of equity in such a case as this. It has been frequently exercised, as shown by the authorities cited in the argument, and there are many others to the same effect, that corporations may be restrained from an abuse of their powers."

In Bird v. Wilmington etc. R. Co., 4 Am. Law Reg. 222-225, it was held that the mere fact that the railroad company had proceeded to take possession of complainant's land before instituting proceedings for condemnation, was a sufficient reason for granting an injunction.

In River Dun Nav. Co. v. North Midland R. Co., 1 Railway Cases 135, a bill for injunction had been filed to prevent a railroad company from taking land outside of the line in which it was

authorized by act of parliament to condemn. The VICE CHANCELLOR refused an injunction below on the ground that the bill did not aver that irreparable injury would result. On appeal, the chancellor held that the injunction would lie to restrain the company from proceeding beyond the powers given them by statute. The LORD CHANCELLOR says: "I am not at liberty (even if I were in the least disposed, which I am not) to withhold the jurisdiction of this court, as exercised in the first case in which it was exercised, that of Agar v. Regent's Canal Co., Cooper's Rep. 77, where LORD ELDON proceeds simply on this—that he exercised the jurisdiction of this court for the purpose of keeping these companies within the powers which the act give them. And a most wholesome exercise of the jurisdiction it is, because great as the powers necessarily are, to enable the companies to carry into effect works of this magnitude, it would be most prejudicial to the interests of all persons with whose property they interfere, if there were not a jurisdiction continually open and ready to exercise its power, for the purpose of keeping them within that limit which the legislature has thought proper to prescribe for the exercise of their powers." The injunction was refused, however, on another ground.

An attempt to take permanent possession of land for public use, without the assent of the owner, express or implied, and without payment or tender of damages in advance, would, if consummated, be in the nature of an irreparable injury, to prevent which an injunction would ordinarily be granted. Northern Pac. R. Co. v. Barnesville R. etc. Co. (Minn.), 1 Am. & Eng. R. R. Cas. 8.

The railroad company, in Jones v. New Orleans etc. R. Co., 70 Ala. 227; s. c., 14 Am. & Eng. R. R. Cas. 217, having entered on the lands without the consent of the owner, without condemnation by statutory proceedings, and without payment of compensation, was a trespasser; and the owner might have enjoined by bill in equity the construction of its road until compensation to him was ascertained and paid.

The defendant, M. & C. R. R. Co., constructed its road across the land of the oratrix, a married woman, without complying with the statute as to taking land for railroad purposes, without her consent, and without any action of hers that amounted to an estoppel. After the road was surveyed and located, but

Where it is sought by bill to enjoin the operation of a railroad over land which it has illegally taken, and where the enjoining the operation of the road would be a serious matter, and likely to cause public inconvenience and annoyance, the court will often withhold the injunction for a time in order to give an opportunity for the damages to be duly assessed and paid.¹

before the oratrix' land was taken, the M. & C. R. R. Co. was mortgaged to secure its bonds owned by the defendant, the Conn. & Pass. R. R. Co., and leased to the defendant, E. C. R. Co. The mortgage was foreclosed and the title established in the bondholders. A bill having been brought to enjoin the defendants from occupying the oratrix' land, *held*, that the defendants should be enjoined unless they pay the land damages. *Kendall v. Missisquoi etc. R. Co. et al.*, 55 Vt. 438.

Award Refused.—Where a railroad company institutes proceedings in a lawful manner and condemns the right of way and deposits the amount of the award as required by law, the land owner cannot maintain an action against the company whether he takes or refuses the money deposited to his use. *Hueston v. Eaton etc. R. Co.*, 4 Ohio St. 689.

But an injunction may be granted to prevent a railway from further occupancy of land for which it has not made compensation, even though the company has actually tendered the amount agreed upon by arbitrators chosen under a statute held to be unconstitutional. *Shepardson v. Milwaukee etc. R. Co.*, 6 Wis. 578.

Approval of the location of a railroad at a public meeting of the citizens called for that purpose, and acquiescence in by the public for fourteen years, are strong proofs of the propriety of the location, and an injunction will not be granted at the suit of a land owner who has permitted the road to be completed and operated without objection until all ordinary means of obtaining indemnity has failed. *Hentz v. Long Island R. Co.*, 13 Barb. (N. Y.) 646.

A written contract with a railroad company to sell and within a specified time to convey to such company a strip of ground for the road bed, and possession is given to the purchaser, who thereupon proceeds to construct the road through such land, the vendor cannot enjoin the use and possession thereof by the railroad company when the latter is not in default in performing the terms of the contract. By the

agreement to sell and convey the seller waives his constitutional right to have his damages assessed and tendered before possession can be taken by the railroad company. *Baltimore etc. R. Co. v. Highland*, 48 Ind. 381.

A land owner agreed to convey to a railway company a strip of land, part of which was to be occupied by its track and part used for a public street, but the whole to revert absolutely on breach of condition. He afterwards made a plat on which this strip was marked a street, and in acknowledging it provided that it should remain a street if the company performed its obligations, but if not it should instantly revert. After his death his estate was partitioned, except the railway strip, and one of the petitioners received certain premises abutting thereon, which he sold. This partitioner afterwards obtained grants from the rest of his heirs, and conveyed the strip to the railway company unconditionally. A subsequent grantee of the premises which he had previously sold claimed a right to use the street, where the track lay, as a private way appurtenant to his lots, and sought to enjoin the company from occupying it with another track. *Held*, that the bill for injunction would not lie; the plat had been made with reference to a way that had never been unconditionally dedicated, and the premises occupied by the way had afterwards been unconditionally conveyed to the railway company, and became its private property before complainant's title had passed out of a representative of the estate. *Tapert v. Detroit etc. R. Co.* (Mich.), 11 Am. & Eng. R. R. Cas. 413.

Where a judgment for the right of way has been recovered against a railway company and an injunction issued, the injunction will not be dissolved upon the sole ground that the action for damages has been reversed. *Sturtevant v. Milwaukee etc. R. Co.*, 11 Wis. 63. See also *Davis v. La Crosse etc. R. Co.*, 12 Wis. 16; *Pettibone v. La Crosse etc. R. Co.*, 14 Wis. 443; *Ford v. Chicago etc. R. Co.*, 14 Wis. 609.

1. *Story v. New York Elevated R.*

Where a party has conveyed a right of way, the company may be enjoined from condemning a route in a different place.¹

A separate action to enjoin a railway company from condemning real estate necessary for the purpose of its incorporation cannot be maintained on the ground that the statute under which the proceedings are had is unconstitutional where that question can be determined by the court in the proceedings themselves.²

Where a railroad company is authorized by statute to enter upon land for the purpose of surveying and locating its road, no injunction can issue to prevent an entry for such purpose.³

Co., 11 Abb. N. Cas. (N. Y.) 236; s. c., 7 Am. & Eng. R. R. Cas. 596; *Gamage v. Georgia Southern R. Co.*, 65 Ga. 614; s. c., 10 Am. & Eng. R. R. Cas. 371.

1. *Bentley v. Wabash etc. R. Co.*, 61 Iowa 229; s. c., 20 Am. & Eng. R. R. Cas. 365.

A deed for a right of way, as then located through the lands of the grantor, will not justify the subsequent location of the road in a different place. *Hall v. Pickering*, 40 Me. 548. If the owner tacitly consents to such a different location, the railroad company is not a trespasser. *Hosher v. Kansas City etc. R. Co.*, 60 Mo. 329. See also *Munkers v. Kansas City etc. R. Co.*, 60 Mo. 334.

When the owner of land granted to a railroad company the right to select a strip thereof for its right of way, and from the terms of the grant, and the circumstances under which it was made, it is clear that both parties understood that the right granted was to be exercised at the time of the final location and construction of the railroad, and not afterwards, a court of equity will, by injunction, restrain such railroad company from taking possession of any additional part of said land, after its railroad has been located and completed. *Warner v. Sandusky etc. R. Co.*, 39 Ohio St. 70; s. c., 11 Am. & Eng. R. R. Cas. 417.

When a party has conveyed right of way and afterwards the company condemns route, not varying but a few feet from that conveyed, the land owner cannot obtain injunction to restrain construction of road until award of commissioners is paid. *Bentley v. Wabash etc. R. Co.*, 61 Iowa 229; s. c., 20 Am. & Eng. R. R. Cas. 365.

The owner of a corner lot, for a valuable consideration, released to a railroad company the part of the streets adjoining his property, to the center line, for a right of way, "to be occupied

by one tract, as now located." In constructing a switch the company proposed to lay one rail thereof for a distance of nineteen feet in front of the lot and near the intersection of the streets, on the projecting ends of the ties on which the main track was laid, and fourteen inches from the main rail. *Held*, that in the absence of a showing that such occupation of the ties of the main track will impose any additional burden upon the plaintiff's soil, or will present any additional impairment or interference with his use of the street, the injunction will not lie. *Indianapolis etc. R. Co. v. Calvert*, 110 Ind. 555.

2. *Kip v. N. Y. etc. R. Co.*, 6 Hun (N. Y.) 24; *Aurora etc. R. Co. v. Miller*, 56 Ind. 88. But compare *Cal. Pac. R. Co. v. Cent. Pac. R. Co.*, 47 Cal. 549.

3. *Bonaparte v. Camden etc. R. Co.*, Bald. (N. Y.) 205; *Morris Canal etc. Co. v. Fagin*, 1 C. E. Gr. (N. J.) 419; s. c., 7 C. E. Gr. (N. J.) 430; *Vilas v. Milwaukee etc. R. Co.*, 15 Wis. 233; *Pettibone v. La Crosse R.*, 14 Wis. 443; *Lexington etc. R. Co. v. Ormsby*, 7 Dana (Ky.) 276; *Murdock v. Prospect Park etc. R. Co.*, 73 N. Y. 579; *Troy etc. R. Co. v. Boston etc. R. Co.*, 7 Am. & Eng. R. R. Cas. 49; *Gottschalk v. Lincoln etc. R. Co.*, 14 Neb. 389; s. c., 10 Am. & Eng. R. R. Cas. 118; *Cumberland etc. R. Co. v. Penna. R. Co.*, 57 Md. 267; s. c., 10 Am. & Eng. R. R. Cas. 351.

Property Damaged but Not Taken.—It is now the well settled law in England that an injunction will not lie for a protection of property which is damaged but not taken. *Bush v. Trowbridge W. Co.*, L. R., 19 Eq. 291; s. c., 44 L. J., Ch. 235; 32 L. T. 182; 23 W. R. 330; *Lancashire & Y. R. Co. v. Evans*, 15 Beav. 322; *Sutton Harbor Improvement Co. v. Hitchens*, 1 De G. M. & G. 161; s. c., 21 L. J., Ch. (N. S.) 73; *Duke of Norfolk v. Tennant*, 9 Hare 745; *Macey v.*

(b) *Conflicting Claims as to Right of Way*.—One railroad company cannot obtain an injunction to restrain another from grading and laying down its track through a gap where the complainant's route has also been surveyed, and to which it has an alleged prior right, when it appears that the work of construction on complainant's line has not reached the locality, and probably will not reach it for a long time to come, and it appears that no irreparable injury will follow from a failure to grant the injunction.¹

(c) *Unauthorized Occupation of Streets*.—The unauthorized

Metropolitan Bd. of Works, 33 L. J., Ch. 377; *London & N. W. R. Co. v. Bradley*, 3 McN. & G. 336; *E. & W. India Dock & B. J. R. Co. v. Gatlke*, 3 McN. & G. 155; *South Staffordshire R. Co. v. Hall*, 1 Sim. (N. S.) 373; *Glover v. North Staffordshire R. Co.*, 16 Q. B. 912; s. c., 5 Eng. L. & Eq. 335; *Monchet v. Great W. R. Co.*, 1 R. Cas. 367. *Compare Hutton v. London & S. W. R. Co.*, 18 L. J., Ch. (N. S.) 345; *London & N. W. R. Co. v. Smith*, 1 McN. & G. 216.

County commissioners will not be enjoined from proceeding with the construction of a bridge within the limits of a highway at the instance of one whose lands are not taken but only damaged, the complainant having no right to the prepayment of damages, and his remedy being by action upon the case. *Appeal of Delaware Co.*, 22 Am. & Eng. Corp. Cas. (Pa.) 381.

1. *Western etc. R. Co. v. Georgia etc. R. Co.*, 88 N. Car. 79; s. c., 17 Am. & Eng. R. R. Cas. 31; *Chicago etc. R. Co. v. Joliet etc. R. Co.*, 105 Ill. 389; s. c., 14 Am. & Eng. R. R. Cas. 62; *Fitchburg R. Co. v. New Haven etc. Co.*, 134 Mass. 547; s. c., 14 Am. & Eng. R. R. Cas. 95. But where one company has constructed its road through a canyon, another company will be restrained by injunction from taking the first company's right of way until the necessity thereof is shown. *Denver etc. R. Co. v. Denver etc. R. Co. (Colo.)*, 14 Am. & Eng. R. R. Cas. 83.

Where two railroad companies have each authority to build and operate a railroad between the same termini, and the company which first constructed its road permitted the second company to expend large sums of money in constructing its line and sold it part of its right of way, it will not be permitted to enjoin the operation of the road. *Erie etc. R. Co. v. Delaware etc. R. Co.*, 21 N. J. Eq. 283.

Where a railway company instituted proceedings to condemn the roadway and track of another *de facto* railway company, but gave the latter no notice and conceded its real purpose, which was to obtain possession of the right of way and road of the latter without compensation, an injunction was granted to restrain the company at fault from taking possession under such proceedings. *Cin. etc. R. Co. v. Danville etc. R. Co.*, 75 Ill. 113.

Where a railway company had abandoned its road for 17 years and taken up the rails, it cannot obtain a temporary injunction to restrain another company from constructing a railway on such line. *Troy etc. R. Co. v. Boston etc. R. Co.*, 13 Hun (N. Y.) 60.

One Road Interfering with Another About to Cross It.—An injunction granted to prevent one railway from interfering with another railroad laying its track across its right of way and tracks, without notice, and before the case is determined on its merits, and final decree, is illegal. The court say: "It needs no discussion to show that an injunction against a party's holding his own possession is the same thing as turning him out of possession, and is utterly illegal before final decree. Whatever right a complainant may have in other courts, or in other ways, a court of equity cannot change the possession of lands in conflict from one party to another until the merits have been finally passed upon. It seems singular that any officer of the law should undertake such a usurpation of power. It has been sufficiently settled by several decisions of this court, and is an elementary rule which needs no explanation. *People v. Simonson*, 10 Mich. 335; *Barry v. Briggs*, 22 Mich. 201; *Lewis v. Campau*, 14 Mich. 458; *Salling v. Johnson*, 25 Mich. 489; *Port Huron etc. R. Co. v. Judge of St. Clair*, 31 Mich. 456; *Arnold v. Bright*, 41 Mich. 207; *Tawas*

occupation of a street by a railroad track may be enjoined.¹ But an injunction will not lie to restrain the construction of a street railroad in an approved manner by authority of State, and with consent of municipal authorities.²

Where a city grants the right of way through one of its streets

etc. *R. Co. v. Judge of Iosco Co.*, 44 Mich. 479.

1. *Atty. Gen. v. Lombard etc. R. Co.*, 32 Leg. Int. (Pa.) 238; s. c., *W. N. C. (Pa.)* 489; *Metropolitan City R. Co. v. Chicago*, 96 Ill. 620; s. c., 2 Am. & Eng. R. R. Cas. 291; *State v. Dayton etc. R. Co.*, 36 Ohio St. 436; s. c., 5 Am. & Eng. R. R. Cas. 312; *Scioto Valley R. Co. v. Lawrence*, 38 Ohio 41; s. c., 7 Am. & Eng. R. R. Cas. 93; *Tapert v. Detroit etc. R. Co.*, 50 Mich. 267; s. c., 11 Am. & Eng. R. R. Cas. 413.

When a railway company is forbidden by statute to construct and operate its roads upon the streets of any incorporated city without the assent of the corporate authorities, and a right of way is granted on certain conditions to which the company agree, the authorities will not be enjoined from re-entering and taking possession of the grounds granted to the company when the privilege of re-entering was in case of a default on the part of the company reserved in the contract. *Pacific R. Co. v. Leavenworth*, 1 Dill. (U. S.) 392.

Where a railroad company entered upon a street, excavated it, built and maintained a railroad thereon without authority, a property owner on said street may recover damages arising from the nuisance complained of, both direct and consequential. If necessary to a complete and effectual abatement of the nuisance, an injunction against its continuance may properly be adjudged for that purpose. *Colstrum v. Minneapolis etc. R. Co.*, 33 Minn. 516.

Where the construction of a railroad in a street of a city will work material injury to the abutting property, such construction may be enjoined, at the suit of the owners, until the right to construct such road in the street shall first be acquired, under proceedings instituted against such owners as required by law for the appropriation of private property. *Scioto Valley R. Co. v. David Lawrence*, 38 Ohio 41; s. c., 7 Am. & Eng. R. R. Cas. 43. See *Faust v. Passenger R. Co.*, 3 Phila. (Pa.) 164.

2. *Randall v. Jacksonville*, 19 Fla. 409; s. c., 17 Am. & Eng. R. R. Cas. 184.

A court of equity will not take juris-

diction to restrain the laying of a railroad side track by a company in the public street in front of its own property, to connect with the main tract of a railway, under licence by the city council, by ordinance, on a bill by private individuals owning property in the vicinity but not abutting on the part of the street to be used. Any damages that may be sustained by property owners in a city by reason of the construction of a railroad track under the licence of the city holding the fee of the street must be sought in an action at law. *Truesdale et al. v. Peoria Grape Sugar Co.*, 101 Ill. 561.

Where a city council has granted to a railway company the right to lay down its track along an alley, under section 464 of the code, equity will not interfere to restrain the company from having the damages to abutting property owners assessed, as provided in said section, and from appropriating the alley upon the payment of such damages. The fact that the damages to abutting property will be very great can make no difference as to the right of the company to proceed under the law. The cases of *Chicago etc. R. Co. v. Newton*, 36 Iowa 299, and *Davis v. C. & N. W. R. Co.*, 46 Iowa 389, distinguished. *Health v. Des Moines etc. R. Co.*, 61 Iowa 11.

Where a municipality by ordinance grants to a railroad company the right to construct a switch upon a street owned by the municipality in fee, and further grants to the company the right to operate cars thereon either by horse power or steam, a bill in equity will not lie by the owner of property abutting on said street to restrain the company from operating its cars by steam. Chancery has no jurisdiction in such case. The remedy, if any, for the injuries complained of is by action at law. *Mills v. Parlin*, 106 Ill. 60; s. c., 14 Am. & Eng. R. R. Cas. 147.

When a railroad company by consent of a town council is building its road through the streets of a town, and the owner of an adjoining lot seeks an injunction till a court of equity ascertain the damages he will sustain, giving as a reason for such injunction that the

to a railway company, which grades the same at great expense, the city will be enjoined from revoking the conditions of the grant to the prejudice of such company.¹

(d) *Special Damages*.—Where a railroad company has violated its franchise, by reason of which the public sustains injury, an individual who sustains no greater damage than the public generally cannot sustain a bill for an injunction.²

(e) *Collection of Stock by Insolvent Company*.—An injunction will not be granted to restrain an insolvent railway company from collecting installments on subscriptions for stock upon the ground that the money may be expended in extending the road beyond the limits of the county, unless the contract expressly provides that the money shall be expended in the county.³

court of common law will furnish no adequate remedy, as the plaintiff would have to bring repeated suits to recover for the damages he might sustain, as he would recover in any one suit only the damages which he might have sustained prior to the institution of such suit, and on its termination would have to bring a like suit for his damages subsequently sustained, and so on for an indefinite period, this reason furnishes no ground for the interposition of a court of equity, as all damages of a permanent character may be recovered in such case in the first suit at law, and there is not only no necessity for such repeated suits at law, but after such first suit, in which the entire damages are recovered, no second suit could be brought, except to recover damages which did not necessarily result from the building and proper use by the railroad company of its track in such street. A second suit could only be brought for the careless running of cars in such street or for other wrongs done by the railroad company, not including the injury necessarily resulting from the running of its cars in such street, which is the right of the company. *Smith v. Point Pleasant etc. R. Co.*, 23 W. Va. 451, 20 Am. & Eng. R. R. Cas. 160.

1. *Southwestern etc. R. Co. v. Albany*, 45 Ga. 613; it is said (p. 615): "It can hardly be disputed that this attempt of the city of Albany to alter its contract with the Brunswick & Albany Railroad is a wrong to that company. Whether the contract is one which could have been enforced as a contract is not the question. After the Brunswick and Albany road had acted on it, done the work under the eye of the city, it is too late for the city to say, our contract does not bind us."

2. *Cumberland etc. R. Co.'s App.*, 62

Pa. St. 218, it is said (p. 226): "The rule is well settled that where the injury is no greater to a plaintiff than to the individuals at large, the remedy to redress the subject of complaint is with the public. *Bigelow v. Hartford Bridge Co.*, 14 Com. 565; *Buck Mountain etc. Co. v. Lehigh etc. Co.*, 14 Wright (Pa.) 91; *Sparhawk v. Union etc. R. Co.*, 4 P. F. Smith (Pa.) 401; *Peterson v. Railway Co.*, 5 Phila. (Pa.) 199; *Passenger Co. v. Phila.*, 33 Leg. Int. (Pa.) 264; *Passenger R. Co. v. Passenger R. Co.*, 1 W. N. C. (Pa.) 492; *Crowley v. Davis*, 63 Cal. 460; s. c., 20 Am. & Eng. R. R. Cas. 25; *Dwenger v. Chicago etc. R. Co.*, 98 Ind. 153; s. c., 20 Am. & Eng. R. R. Cas. 26, 30.

In *Coast Line R. Co. v. Cohen*, 50 Ga. 451, it was held that a court of equity will not entertain a bill in the name of one or more private citizens to restrain the obstruction of a public street, no private injury or threatened injury being alleged to such citizens or to their property. In such a case, the nuisance being purely a public one, can only be restrained by the public on information, filed by a public officer, to wit, by the solicitor general for the circuit. It is not sufficient that one of the parties is a lot owner on the street, no specific injury to the property being alleged, but only a general allegation that damage will result to said lot.

Where a township received special damages from obstructions in a stream placed there by the railway company by reason of which injury is occasioned to public bridges, it may bring an action to remove or restrain such obstructions. *Sheboygan v. Sheboygan etc. R. Co.*, 21 Wis. 667.

3. *Dill v. Wabash etc. R. Co.*, 21 Ill. 91. There was no condition attached to the contract of subscription, and it

Where a railway company has the right to proceed and construct and use its road, threats of personal violence to the agents of the company if they attempt the construction of the road will not give a court of equity the right to interfere by injunction to restrain the threatened violence.¹

(f) *Rights of Bondholders*.—A bondholder in a corporation cannot obtain an injunction to restrain the directors thereof from sacrificing its interests to another corporation, where the company is solvent and abundantly capable of responding in damages to the complainant.²

(g) *Rights of Stockholders*.—Where the legislature repeals the charter of a street railroad and transfers its franchises and track to another, and the corporation declines to seek redress, a stockholder may obtain an injunction on the ground that the repealing statute impairs the obligation of a contract.³

A single stockholder may obtain an injunction to restrain the purchase by one railroad of the majority of the stock, bonds and equipment of another, where such purchase would be *ultra vires* and opposed to public policy.⁴

(h) *Covenants*.—Injunctions to restrain breaches of negative covenants and mandatory injunctions to compel the observance of affirmative covenants are granted when the threatened breach of an existing contract is clearly shown, but only when the recovery of damages at law would inadequately redress the impending injury.⁵ Equity will restrain the violation of covenants by injunction, notwithstanding their nature is such that specific performance would not be decreed.⁶

was *held* that the insolvency of the company constituted no defence.

1. *Montgomery etc. R. Co. v. Walton*, 14 Ala. 207.

2. *Matthews v. Murchison* (N. Car.), 9 Am. & Eng. R. R. Cas. 693.

3. *Greenwood v. Union Freight R. Co.*, 105 N. S. 13; s. c., 9 Am. & Eng. R. R. Cas. 526.

4. *Elkins v. Camden etc. R. Co.*, 36 N. J. Eq. 5; s. c., 9 Am. & Eng. R. R. Cas. 639.

And where an insolvent canal company sold its property and franchises to a railway corporation for a sum greatly beneath their value, and the purchasing company thereupon built and equipped a railroad on such right of way; *held*, that the stockholders and creditors of the canal company could not restrain the railroad company from using the property, but could compel it to account for the additional value. *Goodin v. Cin. etc. Canal Co.*, 18 Ohio St. 169.

5. *Chicago etc. R. Co. v. New York etc. R. Co.* (New York), 22 Am. & Eng. R. R. Cas. 265.

6. In *Singer Sewing Machine Co. v. Union Buttonhole & E. Co.*, 1 Holmes (U. S.) 253, the court, after a careful review of the authorities, *held* that an injunction may be granted to restrain acts in violation of a lawful contract, although the nature of the contract is such that specific performance would not be enforced. LOWELL, J., said: "It is now firmly established that the court will often interfere by injunction when it cannot decree specific performance." To the same effect is *W. U. Tel. Co. v. Union Pac. R. Co.*, 3 Fed. Rep. 423, 429; *Wells v. Oregon R. & N. Co.* (Oregon), 16 Am. & Eng. R. R. Cas. 71; *Wells v. Northern Pac. R. Co.* (U. S.), 18 Am. & Eng. R. R. Cas. 441.

Wolverhampton & W. R. Co. v. London & N. W. R. Co., L. R., 16 Eq. 433, is a case where the defendant was restrained from a wrongful diversion of traffic on the plaintiff's road. The agreement between the two companies was that the defendant should work the plaintiff's line, and during the continuance of the agreement develop

(i) *Operating Contracts*.—Where two railway companies enter into an agreement for using, interchangeably, each other's roads upon certain prescribed terms, an injunction will be granted to restrain one of the companies from depriving the other of the use of its road under the contract.¹

(j) *Fraudulent Combination*.—A corporation formed by fraudulent combination will be restrained by injunction from exercising powers injurious to an individual by taking his land, when acting outside the scope of legislative intent.²

(k) *Highways*.—A town which has had imposed upon it by law duty to repair highways may maintain action for injunction to compel railway company, which has practically destroyed the highway, to restore it to its former state of usefulness.³

(l) *Parallel Roads*.—An injunction will not lie to restrain the construction of a road parallel with one already constructed, and between the same termini, nor to restrain crossing, by the road in question, of the main tracks and switches of the old road.⁴

(m) *Mill owners Flooding Track*.—Where a railway company is entitled to protection from overflow of water from a mill dam, its licencees are entitled to the same protection, and the defendant may be enjoined from increasing the height of his mill dam to the injury of plaintiff.⁵

(n) *Planting Trees*.—A railway company may be enjoined from planting trees so close to one's land as to overshadow it, and to cause the roots to spring up to the damage of the soil.⁶

46. Bridges.—An injunction will be granted to restrain the erection of a bridge across a navigable river where it is shown that such bridge will be an obstruction to navigation.⁷

and accommodate the local and through trade thereof, and carry over it certain specified traffic. The bill was filed to restrain the defendant from carrying a portion of the traffic which ought to have passed over the plaintiff's line by other lines of the defendant. The point was made by the defendant that the court could not undertake to enforce specific performance upon such a contract, because it would require a series of orders and a general superintendence to enforce the performance, which could not conveniently be administered by a court of justice; but the point was overruled and the injunction granted.

1. *Great Northern R. Co. v. Manchester R. Co.*, 5 De G. & Sm. 138. *Niemeyer v. Little Rock Junction R. Co.*, 43 Ark. 111; s. c., 20 Am. & Eng. R. R. Cas. 174.

2. *Niemeyer v. Little Rock Junction R. Co.*, 43 Ark.; 20 Am. & Eng. R. Cas. 174.

3. *Jamestown v. Chicago etc. R. Co.* (Wis.), 32 Am. & Eng. R. R. Cas. 263. On allowing an injunction against

the company from any further work on or obstruction of the highway, the court may, on final hearing, require the removal of the obstructions already placed thereon, in case the company refuse to restore such highway to its former usefulness. *Schroeder v. First Div. St. Paul etc. R. Co.* (Minn.), 5 Am. & Eng. R. R. Cas. 298.

4. *East St. Louis Connecting R. Co. v. East St. Louis Union R. Co.*, 108 Ill. 265; s. c., 17 Am. & Eng. R. R. Cas. 163.

5. *Longwood etc. R. Co. v. Baker*, 12 C. E. Green (N. J.) 166.

6. *Brock v. Connecticut etc. R. Co.*, 35 Vt. 373.

A railroad company was enjoined from planting willow trees on its right of way for the purpose of making a fence. *Brock v. Connecticut etc. R. Co.*, 35 Vt. 373.

7. *Northern Pac. R. Co. v. Barnesville etc. R. Co.*, 2 McCrary (U. S.) 224; *St. Louis R. Co. v. Northwestern St. L. R. Co.*, 69 Mo. 65.

Jurisdiction.—The power to regulate

Courts of equity do not require that the right of franchises be first established by law before extending relief by injunction. The creation of the franchise by legislative grant is considered sufficient to show legal right.¹

The lessee of a railway bridge may be enjoined from violating his agreement to the prejudice of the plaintiff, and may be compelled to carry into effect reasonable regulations necessary to prevent evasion of the plaintiff's rights.²

47. Toll Bridges.—Where one has a grant of a bridge, with the exclusive right of taking toll, the erection of another bridge so near it as to materially affect or take away its custom, the court will grant an injunction to protect the enjoyment of the franchise.³ But a railroad company, when authorized by the legislature, cannot be enjoined from erecting a bridge across a river by a toll bridge company on the ground that such railroad bridge would be an infringement upon their chartered rights, so long as the railroad company transport passengers in the ordinary course of business of conveying travellers upon the railroad.⁴

If the owner of an exclusive right to keep a bridge in a certain district stand by and, without objection, permit other parties to construct a bridge across the same river in that locality, or neglects to perform the conditions on which he receives his exclusive

commerce comprehends the control for that purpose of all the navigable waters of the United States which are accessible from another state than that in which they lie. This power confers upon congress the exclusive power to authorize the erection of bridges over navigable waters between two or more states. *Pennsylvania v. Wheeling etc. Co.*, 13 How. (U. S.) 518; *Gilman v. Philadelphia*, 3 Wall. (U. S.) 713.

In *Gilman v. Philadelphia*, 3 Wall. (U. S.) 713, the Supreme Court of the United States refused to grant an injunction to permit the erection of a bridge over the Schuylkill river. SWAYNE, J., in delivering the opinion of the majority of the court, says (p. 729): "The States have always exercised this power, and from the nature and objects of the two systems of government they must always continue to exercise it, subject, however, in all cases, to the paramount authority of congress whenever the power of the States shall be exerted within the sphere of the commercial power which belongs to the nation." In effect the court held that until congress had exercised its jurisdiction upon the subject the States might do so.

The charter granting the franchise constitutes a contract between the pub-

lic and the corporation, imposing certain burdens upon the corporation which, when fulfilled, entitle it to protection in a court of equity. 1 High on Inj., section 917; *Hartford Bridge Co. v. East Hartford*, 16 Conn. 149; *Enfield etc. Co. v. Hartford etc. R. Co.*, 17 Conn. 40.

1. *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35.

2. *Niagara Falls etc. Co. v. Great Western etc. R. Co.*, 39 Barb. (N. Y.) 212.

Equity will not, however, lend its aid in such cases for the protection of a right which was not intended to be exclusive. High on Inj., section 923; *Fall v. Sutter Co.*, 21 Cal. 237; *President v. Trenton Bridge Co.*, 2 Beas. (N. J.) 46.

3. *Newburg etc. Turnpike v. Miller*, 5 Johns. (N. Y.) Ch. 101; *Harrell v. Ellsworth*, 17 Ala. 576; *Smith v. Harkins*, 3 Ired. (N. Car.) Eq. 613.

4. *Mohawk Bridge Co. v. Utica etc. R. Co.*, 6 Paige (N. Y.) Ch. 554.

In *Charles River Bridge v. Warren Bridge Co.*, 11 Pet. (U. S.) 420, it was held that the grant of a charter to a bridge company for the erection of a toll bridge over a river did not prohibit the legislature from granting a charter to another company whereby the income

right, he will be deprived of the aid of equity for its protection.¹

48. Ferries.—The owner of a ferry franchise will be protected by injunction against infringement by a rival ferry operated without authority of law;² or the erection of a bridge in such close proximity as to endanger its profits and jeopardize the exclusive right of the proprietors of the ferry.³

The exclusive right to a ferry will be protected by injunction

derived from the tolls of the first bridge would be destroyed. It is said (p. 549): "In charters of this description no rights are taken from the public or given to the corporation beyond those which the words of the charter, by their natural and proper construction, purport to convey." * See also *Dyer v. Tuscaloosa Bridge Co.*, 2 Port. (Ala.) 296; *Oswego etc. Co. v. Fish*, 1 Barb. (N. Y.) Ch. 547; *Fort Plain etc. Co. v. Smith*, 30 N. Y. 44.

1. *Enfield etc. Co. v. Conn. River Co.*, 7 Conn. 51.

If a corporation which has the exclusive right to keep a ferry and wagon bridge across a river in a certain district stand by and without objection permit other parties to construct a bridge across the same river in that district, it will be estopped from controverting by injunction or otherwise the rights of such parties to use and retain said bridge. *Fremont etc. Co. v. Dodge Co.*, 6 Neb. 18.

2. *Midland etc. Co. v. Wilson*, 28 N. J. Eq. 537; *Chard v. Stone*, 7 Cal. 117; *McRoberts v. Washburne*, 10 Minn. 23; *Cory v. Yarmouth etc. R. Co.*, 3 Hare 593. See *Burlington etc. Co. Ferry v. Davis*, 48 Iowa 133; *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420; *Binghamton Bridge Co.*, 3 Wall. (U. S.) 51; *Bridge Proprietors v. Hoboken*, 1 Wall. (U. S.) 116; *Piatt v. Covington etc. Co.*, 8 Bush (Ky.) 37; *Glover v. Powell et al.*, 2 Stock. (N. J.) 211; *Hartford Bridge Co. v. Union Ferry Co.*, 29 Conn. 210; *Murry v. Menefee*, 20 Ark. 561; *Gates v. McDaniel et al.*, 2 Stew. (Ala.) 211; *Dyer v. Tuscaloosa Bridge Co.*, 2 Port. (Ala.) 296; *Trent v. Cartersville Bridge Co.*, 11 Leigh (Va.) 529.

In *Smith v. Hawkins*, 3 Ired. (N. Car.) 613, *RUFFIN, C. J.*, in delivering the opinion of the court, said: "Not only did the common law give redress for the invasion of the franchise of a ferry by an action, but upon its being found that such redress was not adequate, equity interposed the more effec-

tual remedy and restraint of injunction. It is obvious that from the difficulty of proving the extent of the injury from time to time, and from the constant litigation arising out of the repeated invasions of the right that must be naturally expected from a rival erection, the relief in equity is highly salutary, and indeed is the only remedy that has any pretensions to be deemed adequate. The cases are numerous of redress in that method."

3. *High on Inj.*, section 927; *Butt v. Colbert*, 24 Tex. 355.

In *Gates v. McDaniel et al.*, 2 Stew. (Ala.) 211, *Gates* had a public ferry established by law, and *McDaniel* and *Spurlin* built a bridge near it without authority, and suffered all persons to pass free of toll. It was held that it was a violation of the rights of *Gates*, and that equity would restrain *McDaniel* and *Spurlin* from using it except for their own families. *TAYLOR, J.*, in delivering the opinion of the court, quoted from the statute: "That no public ferry shall be established within less than two miles by water of any ferry already established, unless on any river at or within two miles of any town." And further, "that if any person or persons shall establish a public ferry, public road, toll bridge or causeway contrary to this act, he or they shall forfeit and pay \$500," etc., and then said: "What is the reason that persons are prohibited from establishing a public ferry within two miles of another? Clearly because the owner of the first has entered into onerous engagements, when he obtained the order to establish the ferry. . . Unless he has some such protection his ferry will become profitless, of course will be neglected, and travellers and others meet with great delays. But will the object of the general assembly in affording this protection be defeated by the erection of a bridge within the prohibited distance? Certainly much more effectually than by establishing a ferry, . . . apart from all statutory provi-

in the absence of a remedy at law.¹ But a party claiming an exclusive right to a ferry at a certain point is not entitled to an injunction against another person maintaining a ferry there when he is guilty of such neglect of duty as would warrant a court in declaring his franchise forfeited.²

Ferry privileges will be protected by courts of equity only against those whose conduct as regards the general public is such as to impair the right of the owner of the franchise.³ The owner of a chartered ferry may enjoin the laying out of a public road through grounds adjoining his creek, and used by him in connection with his business.⁴

A charter from one State authorizing the operation of a ferry upon a navigable river, which forms the boundary between two States, and no exclusive right upon the opposite shore is acquired, an injunction will not be granted to restrain the operation of a rival ferry.⁵

49. Streets and Public Roads.—The attempt to open a public road where there has been no provision made for paying the damages occasioned by the location of the road may be enjoined.⁶

sions, except those which relate to the establishment of the ferry, I am decidedly of opinion that the defendants had no right to build a public bridge within the immediate vicinity of the ferry, calculated to destroy the profits of the ferry."

1. *Long v. Merrill*, N. C., Term R. 112; *Power v. Athens*, 19 Hun (N. Y.) 165.

2. *Ferrel v. Woodward*, 20 Wis. 482. So where a ferry has been disused for more than three years. *Trent v. Cartersville etc. Co.*, 11 Leigh (Va.) 521.

So where the plaintiff filed a bill for an injunction to restrain the defendant from running a ferry on the ground that he had diverted business from the plaintiff's ferry to his great loss and damage, but gave no special details thereof, a preliminary injunction was denied. *Power v. Athens*, 19 Hun (N. Y.) 165.

3. *High on Inj.*, § 930; *Trent v. Cartersville B. Co.*, 11 Leigh (Va.) 529.

4. *Flanders v. Wood*, 24 Wis. 572.

5. *Challis v. Davis*, 56 Mo. 25.

6. 1 *Commissioners v. Durham*, 43 Ill. 86; *Powers v. Bears*, 12 Wis. 214; *Folley v. Passaic*, 26 N. J. 216; *Horton v. Hoyt*, 11 Iowa 496; *Carpenter v. Grisham*, 59 Mo. 247; *Eidermiller v. Wyandotte City*, 2 Dill. (U. S.) 376; *Norristown etc. Co. v. Burket*, 26 Ind. 53.

Where a road has been established or ordered to be opened and it is too late to comply with the statutory require-

ments as to assessment, tender of damages, etc., an injunction may be made perpetual. *Carpenter v. Grisham*, 59 Mo. 247. Pending an appeal the land owner is entitled to the possession of the land and to an injunction to protect his possession. *Kan. v. Kan. Pac. R. Co.*, 18 Kan. 331.

Where a public road has been duly laid out, a claim for damages made by a land owner and allowed, and no appeal taken, a court of equity will not enjoin the opening of the road upon the ground that the damages allowed such land owner were inadequate. *Hopkins v. Keller*, 16 Neb. 569.

Relief in equity by restraining the appropriation of private property for a public road for the non-payment of damages will not be granted where the owner of the land has failed to comply with the mode of relief pointed out by the statute. *Reckner etc. v. Warner*, 22 Ohio St. 275; See *Parham v. Justices*, 9 Ga. 341; *Nichols v. Salem*, 14 Gray (Mass.) 490; *Masters v. M'Holland*, 12 Kan. 23.

When a public road has been lawfully located and the damages assessed tendered to the land owner but refused by him, an injunction will not be granted to restrain the road overseer from tearing down the fences and opening the road. *Creanor v. Nelson*, 23 Cal. 465. But if the statute under which the condemnation proceedings are had is unconstitutional, or its provisions are

In counties under township organization, unless the statutory requirements are complied with by the commissioners, such as giving notice and the like, they will have no jurisdiction to act, and an order establishing a highway will be enjoined.¹

An injunction may be granted to restrain the opening of a highway pending an action at law testing the legal right to open such highway.² Where a complete and adequate remedy can be had at law, a court of equity will not interfere; but if the injury is likely to be irreparable, or if the defendant be insolvent, equity will interpose its power to protect a person from a threatened injury.³

The fact that a road has no outlet or egress at one end, and that it primarily and principally benefits only a single individual are not sufficient grounds for restraining the public from taking private property for it.⁴

Where the judgment of the circuit court, establishing a public road, has been reversed, and the proceedings held null and void by the supreme court, and after the rendition of its judgment and before its reversal, the circuit court dissolved a temporary injunction restraining the road overseer from opening the road in question, such judgment will also be reversed and the temporary injunction made perpetual.⁵

Equity will enjoin a party from erecting and maintaining ob-

not strictly pursued, or notice is not given to the land owner, or compensation is not tendered to him, an injunction will be granted. *Curran v. Shattuck*, 24 Cal. 427. And if the proceedings are void for want of jurisdiction, an injunction may be granted. *Frizzell v. Rogers*, 82 Ill. 110. The opening of a highway will not be enjoined unless the proceedings are so defective as to be a nullity. *McDonald v. Payne*, 114 Ind. 359. An injunction will not be granted where the road has been opened and used with the acquiescence of land holders adjoining, although there may be no record of the preliminary steps to secure the location. When the report, survey and plat have been recorded, the preliminary proceedings will be presumed to have been regular. *McClelland v. Miller*, 28 Ohio St. 488.

Where the land owner had notice of the time and place of the view and the location of the road and made no claim for damages, he will not be entitled to an injunction to restrain the opening of the road, there being no claim that the default was caused by inevitable accident or other circumstance beyond his control. *Reckner v. Warner*, 22 Ohio St. 275.

A perpetual injunction should not be granted upon the ground that the damages have not been assessed and their payment provided for. The restraint should continue only until the commissioners had complied with the statutory conditions. *Champion v. Sessions*, 2 Nev. 271-2.

1. *Frizzell v. Rogers*, 82 Ill. 109. But see *Frevert v. Finrock*, 31 Ohio St. 621.

2. *Champlin v. Morgan*, 18 Ill. 294.

3. *Champion v. Sessions*, 2 Nev. 271; *Holmes v. Jersey City*, 1 Beas. (N. J.) 299; *George v. Winkler*, 40 Ill. 179; *Jersey City v. Gardner*, 33 N. J. Eq. 622.

A petition which shows that defendants are about to open a road through plaintiff's premises, and for that purpose are about to cut plaintiff's timber and hedges and remove his fences, thereby exposing his crops and fruit trees, and his meadow and pasture lands, to the depredations of stock, states a good cause for injunction. It is not necessary to aver and prove in addition that the defendants are insolvent. Such injuries would be irreparable in a legal sense. *McPike v. West*, 71 Mo. 199.

4. *Cemetery Assoc. v. Meninger*, 14 Kan. 316; *Masters v. McHolland*, 12 Kan. 23.

5. *Rose v. Garrett*, 91 Mo. 65.

structions in an alley, street or public road, which destroy the right of way therein, and materially decrease the value of adjacent property.¹

1. *Schaidt v. Blane*, 66 Md. 141. See *Sergeant v. George*, 56 Vt. 627. But see *Bay State Brick Co. v. Foster*, 115 Mass. 431.

A deed of record described the lot conveyed as follows: "Situated on the corner of Pine and Peachtree streets, commencing on Pine and running north ninety-three feet on Peachtree street; thence west two hundred feet to a ten-foot alley; thence south ninety-three feet to Pine street; thence along the north of Pine street to the beginning, containing one-half acre." On a bill to prevent the closing, by subsequent purchasers of adjoining lands, of a portion of the alley claimed to lie beyond the lot of complainant, the evidence was conflicting as to whether or not complainant bought the lot with reference to a map on which the alley was marked as running through from Pine street to a certain avenue seventy feet in width: *Held*, that the deed of complainant did not give notice of any right to an easement in an alley through the entire tract, but only to the use of an alley running along her lot from Pine street north, the width of her lot. Nor was there any other evidence of notice, and the injunction was properly refused. *Kicklighter v. Rosenthal*, 74 Ga. 151.

In *Dunning v. Aurora*, 40 Ill. 481, the court *held* that ordinarily equity will not entertain jurisdiction of a bill where one citizen claims that another has erected buildings in the public streets, and seeks their abatement as a nuisance. To justify the interposition of equity in such cases, it should appear that the remedy at law is for some reason insufficient. *Higbee v. Camden etc. R. Co.*, 20 N. J. Eq. 435; *Morris etc. R. Co. v. Prudden*, 20 N. J. Eq. 530. Compare *Bechtel v. Carslake*, 3 Stockt. (N. J.) Ch. 500.

In *White v. Flannigain*, 1 Md. 525, however, the court sustained the equity jurisdiction, because it had regard to the nature and uses of a street in a populous place, and considered any obstruction which denied the exercise of the right to use it as working irreparable mischief to the street as a street. But the remedy by injunction would only be allowable where the plaintiff had set forth the facts showing the special injury, the situation of his property, etc.

Roman v. Strauss, 10 Md. 89; *Ameling v. Seekamp*, 9 Gill & J. (Md.) 468; *People v. Vanderbilt*, 26 N. Y. 287; s. c., 28 N. Y. 396; *Davis v. New York*, 4 Kern. (N. Y.) 506; *Milbau v. Sharp*, 27 N. Y. 611.

An obstruction of a public way will be enjoined. *Morris etc. Co. v. Fagan*, 18 N. J. Eq. 215.

Where a public way is obstructed by a fence set across the traveled path, though easily removable, and a continuance of such obstruction is threatened, an injunction will lie against the party making the obstruction. *Burlington v. Schwarzman*, 52 Conn.; s. c., 52 Am. Rep. 57, 181.

If, by reason of obstructions erected on a strip of ground alleged to be a public way, the applicant for an injunction for their abatement, claiming the use of the strip of ground as one of the public, and negating by the allegations of his bill and his testimony all mere private right in it, were obstructed or deprived of reasonable access to his buildings on his lot, and thereby subjected to loss and inconvenience, that would be such special and particular injury as would entitle him (if the allegations were well founded in fact) to remedy from a court of equity. But the applicant for such an injunction and the purchaser of the strip of ground having contracted with each other in respect to its use, and the manner of user, on failure of compliance, the remedy would be on the agreement. *Gore v. Brubaker*, 55 Md. 87.

An injunction bill filed by a township alleged that in 1876 one W, owning a lot fronting on a highway in the township, excavated a part of the lot adjoining the highway and also a part of the highway itself, for the purpose of obtaining pottery clay, and left the highway in a very unsafe condition; that, in 1880, W sold the premises to the defendant, who was afterwards notified to fill up the excavations. The bill also contained some allegations as to other excavations made by the defendant, but they were uncertain and insufficient. *Held*, that no ground for relief in equity was shown. *Woodbridge v. Inslee*, 37 N. J. Eq. 397.

Complainant moved back a fence along a public street, and threw out a

An encroachment upon a street or public highway cannot be legalized by mere lapse of time, and the widening of a street by the city authorities, and cutting down the sidewalk without pursuing the formalities prescribed in the charter, where the acts complained of do not constitute irreparable injury, will not entitle the lot owner to an injunction.¹

Where a city is about to take land for a street wrongfully, under color of right, without assessment and tender of compensation, the owner may have an injunction.²

50. Married Women.—In equity, a married woman may hold property to her sole and exclusive use without the intervention of a trustee, and will be protected therein against the claim of her husband and his creditors, where the deed is not made in fraud of their rights.³

strip of land six feet in width, thereby rendering the street more dangerous for travel, by throwing a ditch running along the fence nearer the centre of the street. Thereupon the street commissioners began to cut away part of the strip of land, in order to alter the ditch and render the passage of the street safer. *Held*, that complainant could not enjoin the acts of the commissioners in that matter, because, (1) If he had dedicated the strip of land, the commissioners had authority to improve it; and (2) if he had not dedicated it, such injury was not irreparable, and he could obtain adequate redress at law. *Held*, also, that since such commissioners had power to remove encroachments on highways only by resolution or ordinance, their threatened removal of complainant's fence so as to add to such highway an additional strip of land from five to nine feet wide because of an alleged encroachment to that extent, without any official direction by resolution or ordinance, and without first ascertaining whether there was an actual encroachment, the complainant and his grantors having been in quiet possession of the premises for thirty years, might be enjoined. *Doughty v. Somerville Comms.*, 33 N. J. Eq. 1.

1. *Cross v. Morristown*, 18 N. J. Eq. 305; *Tainter v. Mayor*, 19 N. J. Eq. 47; but the unlawful cutting down of fences, shade trees and ornamental shrubbery is an irreparable injury which will be enjoined. *Tainter v. Mayor*, 19 N. J. Eq. 46.

The maintenance for forty years of a fence on a public highway justifies under the statute its continuance, and public officers who wrongfully under-

take to remove it may be restrained by injunction. *Winslow v. Nayson*, 113 Mass. 411.

Where a party had been in possession of lands in a city for thirty years and was notified to remove his fence as an encroachment upon the street in five days, the land not having been dedicated, occupied or used as a street, an injunction was granted. *Shields v. Mayor etc.*, 55 Ga. 150. But see *Oliphant v. Atchison Co.*, 18 Kan. 386.

2. *New Albany v. White*, 100 Ind. 206.

A suit in equity will lie in favor of a land owner against a municipal corporation to restrain it by perpetual injunction from entering upon and taking possession of the land and opening a street thereon, where the claim of the corporation is apparently valid upon the face of the proceedings, and it is necessary to aver and prove an extrinsic fact in order to establish the invalidity of the proceedings; as for example, that the commissioners have only awarded to the plaintiff one dollar for property worth \$1,200. *Baldwin v. Buffalo*, 29 Barb. (N. Y.) 396.

3. *Holthaus v. Hornbostle*, 60 Mo. 439; *Brevard's Exrs. v. Jones*, 50 Ala. 221; *Green v. Green*, 5 Hare 399, note b; *Johnson v. Vail*, 1 McCart. (N. J.) 423; *Hill v. Bowman*, 35 Mich. 191; *Patterson v. Fish*, 35 Mich. 209; *Lewis v. Winston*, 26 La. An. 707; *Deville v. Hayes*, 23 La. An. 550. But see *Bell v. Francke*, 23 La. An. 599.

It is against equity to sell the wife's property for a debt of her husband's and the creditor may be restrained. *Lyon's Appeal*, 61 Pa. St. 15. But a creditor will be restrained only where he is clearly and indisputably proceeding

Where a husband, by a post-nuptial deed, settles a house and business to the separate use of his wife to be managed by her for the benefit of herself, as if a *feme sole*, he can be restrained from in any way interfering with the business, and even from entering the house.¹

against right and justice to use the process of the law to the injury of another. Winch's Appeal, 61 Pa. St. 424.

In Missouri a married woman may hold personal property to her sole and exclusive use, without the intervention of a trustee, and will be protected therein against the claim of the husband and his creditors when the deed is not made in fraud of their rights, and her right is not in any wise limited to stocks, etc., and such gift from a third party will not be affected by the insolvency of the husband. Holthaus v. Hornbostle, 60 Mo. 439.

A married woman may file a bill to enjoin the sale of her lands upon execution against her husband, though the husband occupy the lands jointly with her as a home, and a general demurrer to such a bill cannot be sustained. Patterson v. Fish, 35 Mich. 209; Hill v. Bowman, 35 Mich. 191.

A wife is entitled to a preliminary injunction to restrain an execution creditor of her husband from selling her real estate in satisfaction of the husband's debt. Hunter's Appeal, 40 Pa. St. 194; Calhoun v. Cozens, 3 Ala. 458.

A husband as administrator of his deceased wife cannot enjoin a sale of his wife's real estate under a trust deed without showing that at her death some interest in the land descended to him. Stringham v. Brown, 7 Iowa 33.

An injunction was granted to restrain the sale of certain real estate conveyed by a husband to his wife on an execution against the husband. Hill v. Bowman, 35 Mich. 191.

An injunction may be granted to restrain a creditor of the husband from selling the proceeds of the wife's real estate, although such proceeds may have been the result of the labor of the wife and minor children of the husband. Johnson v. Vail, 1 McCart. (N. J.) 423.

Where the legal title of real estate belonging to the wife is held in the name of the husband, and such real estate is about to be sold under an execution against the husband, the sale may be enjoined. Smith v. Bank of Wadesborough, 4 Jones (N. Car.) Eq. 303.

In Meddleton v. Meddleton, 1 Jac. & W. 94, it was held that in a proper case an injunction would be granted to restrain the husband from excluding from the presence of his wife a solicitor whom she desired to consult. The injunction in that case was denied because the facts upon which it was sought were insufficient.

Chattels.—An injunction may be granted to protect the enjoyment by the wife of specific chattels, as family pictures furniture and other articles of a peculiar nature and value, purchased by a wife through the medium of a trustee from the husband, although the husband was indebted at the time and the object of the purchase was to preserve the property from creditors. Arundell v. Phipps, 10 Ves. 139.

Personal chattels bequeathed to a woman while single for her separate use cannot after her marriage be taken upon an execution against her husband. Newlands v. Pazuter, 4 Myl. & Cr. 408. Compare Shirley v. Shirley, 9 Paige (N. Y.) 363.

Forcible Entry and Detainer.—An injunction will not be granted to restrain the enforcement of a judgment in forcible entry and detainer against the husband for land claimed by the wife as her separate estate upon the ground that she was not made a party to the action or that she is a sole trader. Saunders v. Webber, 39 Cal. 287.

Entireties.—While a husband and wife hold real estate by entireties, an execution creditor of the husband and the officer holding the execution may be enjoined from selling such real estate. Hulett v. Inlow, 57 Ind. 412; Chandler v. Cheney, 37 Ind. 391.

1. Wood v. Wood, 19 W. R. 1049.

On a marriage a leasehold house was settled upon the usual trusts for the wife for life, for her separate use, and the husband and wife continued to reside in the house. Differences arose between them. They ceased to cohabit and the wife instituted proceedings for divorce or judicial separation. The husband claimed the right to go to and to use the house when he thought fit, not for the purpose of consorting with his wife, but for his own purposes.

An injunction may be obtained by a wife against her husband pending an action for divorce, which will prevent him from encumbering or conveying his property,¹ or interfering with the custody of the children.²

A court will not grant a writ of *ne exeat* against the husband, or an injunction to restrain him from alienating his property upon the mere apprehension of an abandonment.³

51. Libel and Slander.—The jurisdiction of a court of equity does not extend to cases of libel and slander, or of false representations as to the character or quality of the plaintiff's property, or as to his title thereto, which involves no breach of trust or of contract.⁴

In an action by the wife against the trustees and her husband, claiming administration of the trusts of the settlement and an injunction to restrain the husband from entering the house; *held*, that under the circumstances the wife was entitled to an interim injunction. *Symonds v. Hollett*, 24 L. R., Ch. D. 346; s. c., 53 L. J., Ch. 60; 49 L. T. 380; 32 W. R. 103.

1. *Vanzant v. Vanzant*, 23 Ill. 485; *Ricketts v. Ricketts*, 4 Gill (Md.) 106, or from changing the character of his estate or securities. *Questel v. Questal*, Wright (Ohio) 492.

An injunction will not be granted to restrain a widow from prosecuting her claim for dower in all the lands of which her husband died seized and possessed upon the ground that after possessing the assets of said estate to a large amount in excess of her legal dower, she had wasted the same, which charge was denied. *Kenan v. Johnson*, 48 Ga. 28.

Where in the decree for divorce it was directed that the defendant be perpetually enjoined from selling his property, and that he be imprisoned until he gave bond, etc., and that the decree should operate as a lien on his real estate to be secured by mortgage, etc., it was *held* that the perpetual injunction should be dissolved. *Errissman v. Errissman*, 25 Ill. 119.

In case of divorce a court of equity may enjoin the husband from receiving gifts or legacies of the wife, and has power to restore to her her property. *Holmes v. Holmes*, 4 Barb. (N. Y.) 295.

Where a husband, after a charge of adultery against him, secured one half of his property to his wife she will not be entitled to an injunction and to alimony without surrendering such property. *Rose v. Rose*, 11 Paige (N. Y.) 166.

2. *Wilson v. Wilson*, Wright (Ohio) 129; *Edwards v. Edwards*, Wright (Ohio) 388; *Johnston v. Johnston*, Wright (Ohio) 454; *Bascom v. Bascom*, Wright (Ohio) 632.

3. *Anshutz v. Anshutz*, 16 N. J. Eq. 162; *Draper v. Draper*, 68 Ill. 17; *Higgins v. King*, 57 N. H. 224. Nor will the defendant be enjoined from using property necessary to support himself and children, or from using the tools of his trade. *Rose v. Rose*, 11 Paige (N. Y.) 166.

4. *Prudential Assurance Co. v. Knott*, L. R., 10 Ch. 142; s. c., 7 Chicago Leg. N. 405; overruling *Springfield Spinning Co. v. Riley*, L. R., 6 Eq. 551; and *Dixon v. Holden*, L. R., 7 Eq. 488; *Mulkern v. Ward*, L. R., 13 Eq. 619; s. c., 4 Chicago Leg. N. 440; *Clark v. Freeman*, 11 Beav. 112; *Hammersmith Co. v. Dublin Co.*, 1 R., 10 Eq. 235; *Brandreth v. Lance*, 8 Paige (N. Y.) 24; *Life Assoc. v. Boogher*, 3 Mo. App. 173; *Thorley's Cattle Food Co. v. Mas-sam*, 6 Ch. D. 582; *Seeley v. Fisher*, 11 Sim. 582. See LORD CHANCELLOR HARDWICKE, 2 Atkyns 469. *The Emporia of Austria v. Day*; 3 De Gex, F. & J. 238; s. c., 30 L. J., Ch. 690, 706; *Huggonson's Case*, 2 Atk. 469, 488; *Gee v. Pitchard*, 2 Swanst. 402, 413; *Fleming v. Newton*, 1 H. L. Cas. 363.

Nor will an injunction be granted against a person falsely representing that the plaintiff's patent infringes on a patent owned by himself and thereby deterring others from purchasing the invention. *Boston Deatite Co. v. Florence etc. Co.*, 114 Mass. 69; *Whitehead v. Ketson*, 119 Mass. 484. But compare *Rollins v. Hinks*, L. R., 13 Eq. 355; *Axman v. Lund*, L. R., 18 Eq. 330. See *Clover v. Royden*, 43 L. J., Ch. 665.

An injunction will not be granted to restrain the publication and sale of the

The utmost extent to which a court of equity will go in restraining a publication by injunction is to protect the rights of property.¹

52. Mandamus Indictment, etc.—A court of equity has no jurisdiction to stay proceedings on *mandamus* indictment, information or writ of prohibition.²

Mandamus will not lie to compel an inferior court or judge to grant or dissolve an injunction.³ Nor will a court of equity enjoin proceedings for a writ of *mandamus* when all defences against such proceedings may be properly argued in that action, and when it is not shown that the rights of the person seeking the injunction cannot be fully protected in the suit for *mandamus*.⁴

So when an injunction has been granted against the prosecution of an action at law, *mandamus* will not lie to compel the court to proceed with the trial of the cause.⁵ A tax sale cannot be enjoined pending a proceeding for *mandamus* compelling an appeal from a judgment for the sale of lands for delinquent taxes.⁶ An injunction is not an appropriate remedy for enforcing or executing a judgment awarding a peremptory writ of *mandamus* against a public officer.⁷

defendant's book containing alleged libelous paragraphs in relation to the plaintiff's business. *Mulkem v. Ward*, 13 L. R., Eq. 619.

A court of equity has no jurisdiction to restrain the publication of a libel upon the complaint of the party whose character or business will be injured by the publication. *Brandreth v. Lance*, 8 Paige (N. Y.) 24.

But in *Bell v. Singer Mfg. Co.*, 65 Ga. 452, it was held that a court of equity has the power to enjoin the publication and circulation of a libel. This principle is applicable to equitable rights arising under the patent laws of the United States, where the legality of the patent is not the subject of enquiry, but is only collateral to the relief sought. Under the facts of this case the discretion of the chancellor in refusing the injunction was not abused.

1. *Brandreth v. Lance*, 8 Paige (N. Y.) 28. Upon this principle LORD ELDON placed his decision in *Gee v. Pritchard*, 2 Swanst. 403 continuing the injunction which restrained the defendant from publishing copies of certain letters written by him to the plaintiff.

The successful party at an agricultural fair is not entitled to an injunction to restrain a competitor from publishing in a newspaper that *he* and not the successful party received the premium. *Singer etc. Co. v. Domestic etc. Co.*,

49 Ga. 70. The court will not enjoin the publication of a libel even if injurious to property. *Prudential etc. Co. v. Hurst*, 10 L. R., Ch. App. 142.

2. *Montague v. Dudman*, 2 Ves. Sr. 398; *Cumberland etc. R. Co. v. Washington Co. C. Judge*, 10 Bush (Ky.) 564; *Quasi* criminal proceedings on the part of a municipal corporation by repeated violations of an alleged invalid ordinance will not be enjoined. *Burnett v. Craig*, 30 Ala. 135.

3. *McMillen v. Smith*, 26 Ark. 613; *Hayes ex parte*, 26 Ark. 510; *Ex parte City Council of Montgomery*, 24 Ala. 98; *State v. Judge of Sixth District Court*, 28 La. An. 905.

See *contra*, *Port Huron etc. R. Co. v. Judge of St. Clair*, 31 Mich. 456.

4. *People v. Wasson*, 64 N. Y. 167.

Where a petition for an injunction against the execution of an order of the court for the commitment of the petitioners for a contempt in disobeying a peremptory writ of *mandamus*, prayed merely that the State's attorney be enjoined from praying out, and the clerk of the court from issuing, any process for their commitment, it was held that the petition, even if otherwise good, could not be entertained. *Tyler v. Hamersley*, 44 Conn. 419.

5. *People v. Circuit Judge*, 40 Mich. 63.

6. *Andrews v. Rumpsey*, 75 Ill. 598.

7. *Citizens' Bank of Louisiana v.*

Mandamus will not lie to compel the dissolution of an injunction, where the dissolving of injunctions are left to the discretion of the court.¹

If the court below refuses to allow an appeal from its order refusing an interlocutory injunction, when such appeal should be granted, *mandamus* will lie to compel the court to grant an appeal.²

53. Injunction Bonds.—To obtain a preliminary injunction, the plaintiff, in nearly all cases, is required to give a bond or undertaking to the defendant, conditioned to pay him all costs and damages he may sustain in case the injunction should not be sustained.³

(a) *Statutes.*—This matter is regulated by statute in the several States, and the conditions must conform to the tenor of the statute. And where the bond is to be given before the injunction is granted, the court or judge is not at liberty to disregard this provision.⁴ And the injunction bond must be construed with reference to the statute in force when it was executed.⁵

The statutory rule that, to stay the collection of a judgment, the injunction bond must be for double the amount of the judgment, has no application where only the sale of certain property is sought to be enjoined.⁶

(b) *Sufficiency of Bond.*—An injunction should not be dissolved in the first instance on the ground of the insufficiency of the bond. If the injunction bond is defective, the better practice is to retain the injunction, subject to the filing of a new bond, within a reasonable time to be fixed by the court.⁷

Dubuclet, 26 La. An. 81; Cumberland etc. R. Co. v. Washington Co. C. Judge, 10 Bush (Ky.) 564.

1. State v. Judge of Eighth District Court, 23 La. An. 768.

2. State v. Judge of the Superior District Court, 26 La. An. 550; s. c., 28 La. An. 902.

3. Myers v. Block, 120 U. S. 206. See Russell v. Farley, 105 U. S. 433; Newell v. Partee, 10 Humph. (Tenn.) 325; Foste v. Sheppard, 33 Tex. 687.

4. Miller v. Parker, 73 N. Car. 58.

5. Mix v. Vail, 86 Ill. 40.

Where the statute does not prescribe the conditions of the bond the judge or court may fix the terms on which the order will be granted. Newell v. Partee, 10 Humph. (Tenn.) 325. See Foste v. Sheppard, 33 Tex. 687; Russell v. Farley, 105 U. S. 433.

A statute passed before the execution of an injunction bond, but which does not take effect until afterwards, is as to such undertaking no statute, and can have no effect on the bond. Mix v. Vail, 86 Iowa 40.

Where the giving of a bond is a condition precedent an order of injunction will be ineffectual until the bond is given. Pell v. Lander, 8 B. Mon. (Ky.) 554. But compare Chesapeake R. Co. v. Patton, 5 W. Va. 234. The bond becomes effective from the time it is filed. Lothrop v. Southworth, 5 Mich. 436. If the bond is insufficient, the injunction should not therefore be dissolved in the first instance, but an opportunity should be given to file a new one. Gamble v. Campbell, Fla. 347; Beauchamp v. Supervisors, 45 Ill. 274.

6. Hardin v. White, 63 Iowa 633.

7. Beauchamp v. Supervisors, 45 Ill. 274; Gamble v. Campbell, 6 Fla. 347. See North Carolina etc. Co. v. North Carolina etc. Co., 79 N. Car. 468.

Penalty Insufficient.—Where the writ has been properly granted the fact that the penalty in the bond is too small does not injure the party against whom the writ is allowed, and the decree will not be reversed for that reason. Drake v. Phillips, 40 Ill. 388.

Surplusage.—A bond will not be

Where an injunction is allowed on condition that the petitioner therefore give the defendants a bond to indemnify them for any damage which the injunction may cause them, the bond remains valid, and will sustain a recovery, even though the injunction bill is dismissed for want of jurisdiction.¹

(c) *Action on Bond*.—Upon an injunction being dissolved, if the obligors fail to comply with the conditions of the bond, a cause of action accrues in favor of the obligees.²

vitiated by the insertion of conditions which, although not required by law, are nevertheless not contrary to law, such conditions being regarded merely as surplusage. So although the condition of the bond is less extensive than as required by the statute, yet if it contains a material part of the conditions required it will be held obligatory to the extent of such conditions. High on Inj., § 1622; *Holloway v. Myers*, 11 W. Va. 276.

G, on 2nd December, 1871, obtained judgment in the court of common pleas against H. On the bill of H, filed the same day in the circuit court of Baltimore City against G, and S L and A R, to whose use the judgment had been entered, and L C J, a partner of H, for an injunction against G, A R and S L to enjoin them from further prosecuting said suit, and also a suit then pending, which had been instituted by G against the firm of H & J, the circuit court ordered that the injunction issue "as prayed in said bill," on H filing a bond with approved surety, which was duly given by H and N as surety, and the writ was issued against G, A R and S L. Answers being filed and testimony taken, the injunction was dissolved on 23rd April, 1872. In a suit on the injunction bond, it appeared that the *narr.* described the proceedings for the injunction as brought by H against G, A R, S L and L C J, while the injunction bond recited that it was a suit in which H was complainant and G, A R — L were defendants, and its condition was to save the "defendant" harmless; it further appeared that the bond was filed in the equity case of H v. G, A R, S L and L C J in the circuit court, and that there was no other case pending in said court between the same complainant and the same defendants or either of them, and that the bond was prepared and the blanks filled up by H's solicitor in the equity case, who was his attorney in this section against him and N. On objection by H and N to the admission of the injunc-

tion bond in evidence, it was held that there was no insufficiency of the injunction bond, nor of the writ of injunction, nor variance between the bond and the writ, and between the *narr.* and the bond, and that recovery could be had on the bond. *Hopkins v. State*, 53 Md. 502.

In the case of *Frantz v. Smith*, 5 Gill (Md.) 285, an appeal bond recited that the judgment was for the sum of twenty-five dollars, when, in fact, it was for twenty-five dollars and interest. The bond was filed in the suit in question. There was no other suit between the same parties, and the bond had been prepared by the obligors, and it was held that the judgment was sufficiently described and that, if there was any variance, the obligors could not be permitted to avail themselves of errors in the bond, which they themselves had prepared.

In 1 Term Repts. 239, the declaration stated that the precept was directed to the mayor, and the precept produced was directed to the mayor and Burgess, and it was held sufficient. In 2 Camp. R. 525, the declaration stated that the *fi. fa.* was directed to A B and C D, sheriffs of Middlesex, and the writ produced was directed to the sheriff of Middlesex generally, and it was held to be no variance.

An injunction bond, the condition of which is that, if the obligors shall pay the obligee "all damages they may sustain by the suing out of said injunction, if the same is dissolved, *then this obligation to remain in full force and effect,*" though awkwardly expressed, is not void. *Washington v. Timberlake*, 74 Ala. 259.

An injunction bond may be sufficient although not signed by the plaintiff. *Peirce v. Durbin*, 1 Idaho, N. S. 550.

The approval of the court need not be endorsed upon an injunction bond, nor need the name of the surety appear in the body of the bond. *Griffin v. Wallace*, 66 Ind. 410.

1. *Kimm v. Steketee*, 44 Mich. 527.
2. *Tallahassee R. Co. v. Hayward*,

But such cause of action upon an undertaking for an injunction does not ordinarily accrue until the final determination of the action in which the injunction was obtained.¹

In an action upon an injunction bond, given upon enjoining the

4 Fla. 411; *Sizer v. Anthony*, 22 Ark. 465; *Loehner v. Hill*, 19 Mo. App. 141; *Parish v. Reeve*, 63 Wis. 315.

1. *Dougherty v. Dore*, 63 Cal. 170; *Monroe Bank v. Gifford*, 65 Iowa 648; *Dorriss v. Carter*, 67 Mo. 544; *Brown v. Galena Mining & Smelting Co.*, 32 Kan. 528; *Vanderbilt v. Schreyer*, 28 Hun (N. Y.) 61; *Bennett v. Pardini*, 63 Cal. 154; *Pugh v. White*, 78 Ky. 210.

In *Clark v. Clayton*, 61 Cal. 634, it was held that an action brought upon an undertaking for an injunction after the dissolution of the injunction, but before the final determination of the action in which the injunction was obtained, was prematurely brought. *Gray v. Veirs*, 33 Md. 159; *Penny v. Holberg*, 53 Miss. 567; *Bemis v. Gannett*, 8 Neb. 236; *Fowler v. Frisbie*, 37 Cal. 34; *Thompson v. McNair*, 64 N. Car. 448.

Section 1919 of the Code (Miss.) of 1880 does not change the rule announced in *Penny v. Holberg*, 53 Miss. 567, that an action cannot be maintained on an injunction bond until final determination of the case. *Goodbar v. Dunn*, 61 Miss. 624.

In a suit brought for a perpetual injunction, a right of action does not accrue on an undertaking given on the issue of a temporary injunction, or restraining order, until a final judgment in the suit in which it was issued is rendered; and a suit commenced on such undertaking, before such entry of judgment, is prematurely brought, and cannot be maintained. A final judgment is one which finally decides and disposes of the whole merits of the case, and reserves no further question, or direction, for the future or further action of the court. The voluntary dismissal by the plaintiff of the suit in which the injunction is issued is a final determination of that suit, and determines the right to sue on the undertaking given on the issuing of a temporary injunction as effectually as a final judgment on a trial. *Brown v. Galena Mining & Smelting Co.*, 32 Kan. 528; *Bemis v. Gannett*, 8 Neb. 236; *Gray v. Veirs*, 33 Md. 159; *Penny v. Holberg*, 53 Miss. 567; *Thompson v. McNair*, 64 N. Car. 448; *Weeks v. Southwick*,

12 How. Pr. (N. Y.) 170; *Dowling v. Polack*, 18 Cal. 625, 629.

But see *Sizer v. Anthony*, 22 Ark. 465; *Tallahassee R. Co. v. Hayward*, 4 Fla. 411; *White v. Clay*, 7 Leigh (Va.) 68; *Dunkin v. Lawrence*, 1 Barb. (N. Y.) 447.

Although a preliminary injunction may be dissolved upon motion before the final hearing upon the merits, an action for damages upon the bond will not lie until after the final hearing, because it may be that on the hearing upon the merits an injunction may yet be ordered, and thus it may appear that, notwithstanding the interlocutory dissolution, the injunction was not wrongfully sued out and that there is no ground for an action on the bond. *Monroe Bank v. Gifford*, 65 Iowa 648; *Tallahassee R. Co. v. Hayward*, 4 Fla. 411; and *Sizer v. Anthony*, 22 Ark. 465; *Hicks v. Compton*, 18 Cal. 206; *Grinter v. Compton*, 18 Cal. 210; *Bentley v. Joslin*, *Hempst.* (U. S.) 218; *Fanning v. Dunham*, 4 Johns. (N. Y.) Ch. 36; s. c., 9 Am. Dec. 283; *James v. Downes*, 18 Ves. Jr. 522.

One Grondona brought an injunction suit against John D. Bennett, the plaintiff herein. An undertaking was given, and a preliminary injunction issued as prayed for in the complaint. Bennett moved to dissolve the injunction on the ground that the complaint did not state facts sufficient to constitute a cause of action, and the motion was granted. He also demurred to the complaint on the same ground, and the demurrer was sustained, and notice thereof duly given. Twenty-one days after the service of the notice, the complaint not having been amended, and nothing further done in the case, an action was commenced on the undertaking. The defendants objected that the action was prematurely brought. Held, that the proceedings in the injunction suit amounted to a final determination that Grondona was not entitled to the injunction, and that the objection made by the defendants was untenable. *Bennett v. Pardini*, 63 Cal. 154.

Suit upon an undertaking given on the issuance of an injunction in the action of *Nichol v. Littlefield*, 60 Cal. 238. The

collection of a judgment, it is no defence to show that, after the dissolution of the injunction in respect to which the bond was given, another injunction was obtained against the collection of

undertaking, as required by § 529, Code Civil Procedure, contained the condition that Nichol would pay, etc., if the court finally decided that the plaintiff was not entitled to the injunction. On the coming on of the case for trial, and after some evidence had been introduced, but before any judgment was rendered, the court, on motion of the defendant, the plaintiff making no opposition, dissolved the injunction, and thereupon, by consent of the parties, continued the case for the term. After the dissolution, and during the time the case was so continued, the present action was commenced on the undertaking. *Held*: The action was prematurely brought. *Clark v. Clayton*, 61 Cal. 634; 2 High on Inj., § 1649; *Bemis v. Gannett*, 8 Neb. 236; *Gray v. Veirs*, 33 Md. 159; *Penny v. Holberg*, 53 Miss. 567; *Thompson v. McNair*, 64 N. Car. 448; *White v. Clay*, 7 Leigh (Va.) 68; *Anderson v. Coleman*, 56 Cal. 124, concurring opinion.

Where a plaintiff, on commencing a suit and obtaining a temporary injunction, gives an undertaking to secure to the party injured the damages he may sustain if it be finally decided that the injunction ought not to have been granted, and subsequently appears in court and dismisses the action without prejudice to a future action, and the court enters judgment dismissing the action, such judgment is equivalent to a final decision by the court that the plaintiff was not entitled to the temporary order of the injunction, and after the judgment an action lies upon the injunction undertaking. *Mitchell v. Sullivan*, 30 Kan. 231.

The court in which the injunction suit is tried must determine whether the injunction was properly or improperly issued; and after such determination, and not before, does an action lie on the bond. *Dowling v. Polack*, 18 Cal. 626; *Gelseston v. Whitesides*, 3 Cal. 309, overruled.

In *Kennedy v. Hammond & Hall*, 16 Me. 341, the court, speaking of an injunction bond, said: "Now, before suing on this bond, after dissolution, 'the damage must be adjudged,' and the nonpayment of the amount adjudged forms the breach of the bond, so far as damages are concerned." See also

Corder v. Martin, 17 Mo. 41. In an action for damages on an injunction bond, it was error to render judgment for plaintiff in the absence of evidence that the injunction suit had been disposed of, and the judge's minutes upon his calendar that the suit had been dismissed are not the proper evidence of that fact. Such minutes do not constitute the judgment of the court. *Towle v. Leacox*, 59 Iowa 42.

Where the final decree in a proceeding to enjoin a sale under a deed of trust provides that the injunction shall be continued until a collateral security held by the *cestui que trust* is delivered to the complainant, no suit can be sustained on the bond until this condition is performed, although the decree declares that the injunction is dissolved and remits the parties to the law court to settle the question of damages. *Shackeford v. Smith*, 61 Miss. 5.

The dismissal of a petition upon which an injunction has been obtained is a judicial determination that the injunction ought not to have been granted, and a cause of action at once arises against the obligors in the injunction bond. *Pugh's Admr. v. White*, 78 Ky. 210; *Richardson v. Allen*, 74 Allen (Mass.) 719.

In *Hibbard v. McKindley*, 28 Ill. 255, the condition of the bond was to pay all such costs and damages as should be awarded against the complainant, but none were awarded, the order reciting only that the bill was dismissed at complainant's costs. It was *held* that damages could be recovered.

Brown v. Gorton, 31 Ill. 417, also decides that it is not necessary to allege or prove that damages were awarded on the dismissal of the complaint.

The case of *Ashbrook v. Tureman*, 3 Litt. (Ky.) 7, was to recover the judgment as well as the damages and costs awarded on the dissolution of the injunction. The conditions of the bond were not to pay the judgment, but such damages and costs as the court might award. It was *held* that as the terms of the bond did not embrace the judgment, the recovery should be restricted to the costs and damages awarded in the judgment dissolving the injunction.

the same judgment, and that the last injunction is still in force and not dissolved.¹

(d) *Additional Security*.—An injunction may be continued on the complainant's application, upon the terms of giving a new bond with new security, and if such be the terms of the order, the first bond is discharged.²

(e) *Sureties*.—The liability of a surety on an injunction bond must be strictly construed, and he cannot be *held* liable beyond the precise terms of his undertaking.³

1. *Weaver v. Poyer*, 73 Ill. 489. But it was *held* on appeal that it was inequitable to allow in such cases the plaintiff to enforce payment of the latter judgment, and that it should be enjoined. *Weaver v. Poyer*, 79 Ill. 417. See *Swan v. Timmons*, 81 Ind. 243.

2. *Kent v. Bierce*, 6 Ohio 336, where the court order a second injunction bond to be given, which order is not substantially complied with, the first bond is not discharged. *Kent v. Bierce*, 7 Ohio, pt. 2, 209.

3. *Ovington v. Smith*, 78 Ill. 250; *Anderson v. Falconer*, 34 Miss. 257; *United States v. Boyd*, 15 Pet. (U. S.) 208; *Miller v. Stewart*, 9 Wheat. (U. S.) 702; *Dobbin v. Bradley*, 17 Wend. (N. Y.) 422; *Hunt v. Smith*, 17 Wend. (N. Y.) 180; *Arlington v. Merrick*, 2 Saund. 403; *Liverpool Water Works Co. v. Harper*, 6 East 507; *Wardens etc. v. Bostock*, 2 Bos. & Pull. 175; *Lochner v. Hill*, 19 Mo. App. 142. The sureties are entitled to stand on the precise terms of the contract, and there is no way of extending their liability beyond the stipulation to which they have chosen to bind themselves. *Tarpey v. Shillenberger*, 10 Cal. 391; *Hall v. Williamson's Admrs.*, 9 Ohio St. 17; *Webber v. Wilcox*, 45 Cal. 301; *Ashbrook v. Tureman*, 3 Lit. (Ky.) 6; *Ferguson v. Tipton*, 1 B. Mon. (Ky.) 28.

In a suit against a surety upon an injunction bond, conditioned to pay all moneys due or to become due upon a judgment "for the sum of \$2,300 and costs" in favor of the obligee against the principal in case the injunction should be dissolved under a plea of the general issue. *Held*, that the surety was only liable according to the express terms of the bond. *Hall v. Williamson's Admrs.*, 9 Ohio St. 17.

By a bill seeking in the alternative to be subrogated to a supposed lien on certain goods, the complainants prayed that the sheriff and constable, who had levied on the goods certain executions

in their hands to which the complainants were not parties, be enjoined from selling or disposing of the goods; the judge granted the injunction as prayed upon complainant's giving bond, with good security, conditioned as the law directs, and the clerk took a bond in double the amount of all the defendants' judgments, conditioned to abide by and perform such orders and decrees as the court might make in the cause, and pay such costs and damages as the court might order, or as might be recovered in a suit brought for wrongfully suing out the injunction. *Held*, that the obligors in the bond were only liable for the costs and damages occasioned by enjoining the sale of the goods. *Hubbard v. Fravell*, 12 Lea (Tenn.) 304.

The condition of an injunction bond in some states, is provided for by statute in two cases, one where the execution of a judgment is enjoined, and the other where, before judgment, the litigation is brought into chancery by injunction. It is competent, however, in cases not provided for by statute, for the judge to order, and the clerk to take a bond with such conditions of liability as the judge may deem proper. *Black v. Caruthers*, 6 Humph. (Tenn.) 87; *Newell v. Porter*, 10 Humph. (Tenn.) 325; *Ranning v. Reeves*, 2 Tenn. Ch. 263; *Foster v. Shephard*, 33 Tex. 687; *Russell v. Farley*, 105 U. S. 433. Where the statute prescribes the condition of a bond, the surety will not be liable beyond the statutory requirements, although the conditions may be broader and express. *Horton v. Cope*, 6 Lea (Tenn.) 155, 160. So, if the fiat of the chancellor prescribe a penalty not justified by the nature of the case. *Moore v. Hallum*, 1 Lea (Tenn.) 511. And a clerk clearly has no power to insert in an injunction bond conditions not prescribed by law or the fiat of a judge. *Coltart v. Ham*, 2 Tenn. Ch. 356; *Enochs v. Wilson*, 11 Lea (Tenn.) 228.

Nor can evidence be admitted to vary or extend the liability of the defendant from the expressed condition and terms of the injunction bond.¹

The obligation of the sureties in a statutory injunction bond is simply to pay such damages as the court on dissolving the injunction shall adjudge against the plaintiff.²

Sureties in an undertaking to procure an injunction may be liable for counsel fees for services rendered in procuring the dissolution of the injunction, but this liability, however, does not extend to all the services rendered in the suit.³

The trustee sold the trust property for the benefit of the bondholders, and complainant became the purchaser, executing his notes on time for the purchase money. About the time the first of his notes fell due he filed this bill, on behalf of himself and all other bondholders and beneficiaries, to enjoin the collection of his notes, to obtain a credit thereon for his proportion of the trust assets on the bonds held by him, and for the share of certain other bonds attached, and for a settlement of the trust. The complainant obtained a fiat for an injunction, restraining the trustee from taking any steps to collect complainant's notes except in this cause, unless authorized by order of the court, upon giving bond with security in the sum of five thousand dollars as required by law. He gave bond with security in the prescribed penalty, conditioned to prosecute the bill of injunction with effect, or in case he should fail therein, or the same be dismissed, to abide by, perform and fulfil the judgment or decree of the court, and pay all costs and damages that may be sustained for wrongfully suing out of the injunction. No injunction was in fact issued, and the complainant was declared entitled to the credits, and a decree rendered against him for the residue of his purchase notes. He became insolvent between the suing out of the injunction and the final hearing of the cause. *Held*, upon motion for judgment against the surety on the injunction bond, that the surety was not liable. *Baxter v. Washburn*, 8 Lea (Tenn.) 1.

1. *High on Inj.*, section 1638. In an action against a surety upon an injunction bond, it was *held* that it was incompetent for the plaintiff to give in evidence an exemplification of a record showing the amount of the judgment and costs, although in other respects answering to the judgment mentioned in the condition of the bond, and that it

was incompetent for the plaintiff to give in evidence a copy of the petition for the injunction, when the terms of the bond were clearly expressed. *Hall v. Williamson's Adms.*, 9 Ohio St. 17.

2. *Dorriss v. Carter*, 67 Mo. 544.

3. *Bolling v. Tate*, 65 Ala. 417; s. c., 39 Am. Rep. 5. See also *Corcoran v. Judson*, 24 N. Y. 106; *Brown v. Jones*, 5 Nev. 374; *Derry Bank v. Heath*, 45 N. H. 524; *Fitzpatrick v. Flagg*, 12 Abb. (N. Y.) Pr. 189; *Littlejohn v. Wilcox*, 2 La. An. 620; *McRae v. Brown*, 12 La. An. 181; *Murray v. Munford*, 2 Cow. (N. Y.) 400; *Andrews v. Glenville Woollen Co.*, 50 N. Y. 282; *Trapnall v. McAfee*, 3 Metc. (Ky.) 34; *Pettit v. Mercer*, 8 B. Mon. (Ky.) 51; *Burgen v. Sharer*, 14 B. Mon. (Ky.) 500; *Transit Co. v. McCerren*, 13 La. An. 214; *Phelps v. Coggeshall*, 13 La. An. 440; *Sedg. Dam.* 397, marg. and note. Sureties in an undertaking to procure an injunction are not liable for the costs of an unsuccessful motion to dissolve the injunction. *Langdon v. Gray*, 22 Hun (N. Y.) 511.

In *Andrews v. Glenville Woollen Co.*, 50 N. Y. 282, a motion to dissolve an injunction was made, and the motion refused, the court deeming it more advisable to defer the enquiry into the merits until the final hearing. On final hearing the motion was granted and the injunction dissolved. The question was, whether the services of counsel in making the motion to dissolve could be recovered as damages in a suit on the bond. The court said: "It was proper that the defendant should move, at the earliest opportunity, to dissolve the injunction. His motion did not fail through any fault on his part, or any defects in the merits of his case. The court simply deferred its decision upon the merits until the trial. The result which must, for the purposes of this application, be assumed to be correct, shows that, if the decision had not thus

(f) *Action Against Sureties*.—It is no defence, in mitigation of damages or otherwise, in an action against the securities on an injunction bond, that the principal is solvent and able to pay his own debts.¹

A court of equity has not jurisdiction, upon the dissolution of an injunction, to render a judgment for damages against the sureties in the injunction bond. The proper mode of enforcing the liability of a surety is by an action at law, unless otherwise provided by statute.²

The parties to an injunction suit cannot vary or extend the liability of the sureties in the injunction bond by stipulation.³

Sureties on an injunction bond are bound to take notice of the answer in the original suit, and of amendments made to the answer.⁴ It is error to render judgment, upon the dissolution of an injunction, against the sureties in the injunction bond, but the judgment will not be reversed upon the appeal of the principal alone.⁵

(g) *Assessment of Damages*.—The equity practice in the courts.

been deferred, the motion should have been granted when made. Under these circumstances, I think the expenses of the motion were reasonably and properly incurred, as a direct consequence of the injunction, and were properly allowed by the referee."

1. *Hunt v. Burton*, 18 Ark. 188.

A suit against the principal is not necessary to determine the liability of the sureties upon an injunction bond. The plaintiff is not obliged to exhaust other remedies before proceeding against the surety. *Dangel v. Levy*, 1 Idaho, N. S. 722.

2. *Clayton v. Martin*, 31 Ark. 217; *Bailey v. Gibson*, 29 Ark. 472; *Randall v. Carpenter*, 47 N. Y. 205; *Howell v. Cronan*, 31 La. An. 247; *Scott v. Sheriff*, 30 La. An., pt. 1, 580. Such statutes have, however, been held unconstitutional and void. *Hughes v. Hughes, Admr.*, 4 Mont. 43.

In Louisiana the surety on the bond is a party to the suit, and is bound by the allegations in the petition, the affidavit, etc., equally with the principal. *Green v. Huey*, 24 La. An. 704. See *Mora v. Avery*, 22 La. An. 417; *Frantz v. Waggaman*, 28 La. An. 514.

In New York, if the sureties undertake, in effect, that their principal shall pay whatever amount of damages shall be adjudged against him on a reference to be ordered by the court in the injunction suit, that amount, when thus ascertained, is the measure of their liability by the very terms of the con-

tract. *Methodist Churches v. Barker*, 18 N. Y. 463; *Poillon v. Volkenning*, 11 Hun (N. Y.) 385.

The report of a referee assessing the damages in consequence of an injunction, when duly confirmed, is, in the absence of fraud, conclusive upon the sureties to the undertaking given on the granting of the injunction, although they had no notice of the proceedings. *Jordan v. Volkenning*, 72 N. Y. 300.

A surety desiring to show fraud in the execution of the bond can only do so in an action upon the bond itself. *Bray v. Poillon*, 4 Thomp. etc. (N. Y.) 663.

A surety in an injunction bond is concluded by the decree assessing damages according to the statute, on dissolution of the injunction. *McAllister v. Clark*, 86 Ill. 236.

After dissolution of an injunction, the damages sustained by the defendants and recoverable under an injunction bond, wherein the parties obligated themselves "pursuant to the statute," may be ascertained by reference under section 243 of the code S. Car., and the assessment thus reached may be enforced by order of the court, and by execution against all the obligors, provided they have all been notified of the reference, and thus made parties to such proceeding. *Hill v. Thomas*, 19 S. Car. 230.

3. *Mix v. Vail*, 86 Ill. 40. See *Hall v. Livingston*, 3 Del. Ch. 348.

4. *Sharp v. Schmidt*, 62 Tex. 263.

5. *Daniel v. Daniel*, 39 Ark. 266.

of the United States is regulated by the laws of congress, and, according to these rules, a court of equity cannot, when it dissolves an injunction, give judgment at the same time against the obligors. It can merely order the dissolution, leaving the obligee to proceed at law against the sureties, if he sustains damage from the delay occasioned by the injunction.¹ The practice and mode of procedure in the States for assessing damages upon an injunction bond, after a dissolution, is regulated largely by statute.²

And in the absence of such statutes, a court of equity will not enforce payment of damages in the original cause, but will leave the parties aggrieved to their action upon the bond.³

Where the practice prevails of decreeing damages upon the dissolution, the limit of the liability upon an undertaking, given upon the issuing of an injunction, is the amount specified therein.⁴

Where neither the bond given, nor the statutes, nor any rule of court, prescribes a specific mode of assessing damages, and the condition of the bond is simply to pay such as the adverse party may sustain by reason of the injunction, if the court finally decides that the party to whom it was granted is not entitled thereto, the court may, as an incident to its jurisdiction, cause them to be assessed under its own direction, or leave the party to his action at law.⁵

On the dissolution of an injunction on reversal by the supreme court of the order granting it, no damages can be assessed de-

1. *Bein v. Heath*, 12 How. (U. S.) 168. An injunction bond in an action in the District Court of the United States for the District of Louisiana, conditioned that the obligors "will well and truly pay the" obligee, "defendant in said injunction, all such damages as he may recover against us in case it should be decided that the said writ of injunction was wrongfully issued," which bond was made under an order of court "that the injunction be maintained on the complaining creditors giving bond and security to save the parties harmless from the effects of said injunction," is a sufficient compliance with the order of the court, and when construed with reference to the rule prevailing in the federal courts (contrary to that prevailing in the State courts of Louisiana), that without a bond and in the absence of malice no damages can be recovered in such case, means that the obligors will pay such damages as the obligee may recover against them in a suit on the bond itself, whether incurred before or after the giving of the bond. *Meyers v. Block*; *Meyers v. Levi*, 20 U. S. 206. But see *Lea v. Deakin*,

11 Biss. (U. S.) 40; *Russell v. Farley*, 105 U. S. 433.

2. *Parish v. Reeve*, 63 Wis. 315; *Loveland v. Burnham*, 1 Barb. (N. Y.) Ch. 65; *Leavitt v. Dabney*, 40 How. (N. Y.) Pr. 277; *Johnson v. Devens*, 60 Miss. 200.

An action upon the bond required by Gen. St. 1878, c. 66, § 203, to be filed by plaintiff on the allowance of a writ of injunction, is the sole remedy of a defendant for the recovery of his damages by reason of the issuance of such writ, if the court finally decides the plaintiff not entitled thereto, unless the writ was sued out maliciously, and without probable cause. *Hayden v. Keith*, 32 Minn. 277.

3. *Lawton v. Green*, 64 N. Y. 326; *Garcie v. Sheldon*, 3 Barb. (N. Y.) 232; *Bein v. Heath*, 12 How. (U. S.) 168; *Merryfield v. Jones*, 2 Curt. (U. S.) 306; *Easton v. New York & L. B. R. Co.*, 11 C. E. Green (N. J.) 359; *Phelps v. Foster*, 18 Ill. 309.

4. *Lawton v. Green*, 64 N. Y. 326; modifying s. c., 5 Hun (N. Y.) 157; *Sturgis v. Knapp*, 33 Vt. 486.

5. *Russell v. Farley*, 105 U. S. 433.

fendant where no bond therefor has been given by plaintiff.¹

(h) *Measure of Damages.*—In assessing damages, upon the dissolution of an injunction, the general rule is that no damages

1. *St. Louis v. St. Louis Gas Light Co.*, 82 Mo. 349.

Colorado.—Damages caused by an injunction must be sought in an independent proceeding, not in the original proceeding on the dissolution of the injunction. *Sartor v. Strassheim*, 8 Colo. 185.

Illinois.—After the dissolution of an injunction the defendant may file his suggestions and claim damages at any time before the decree is signed and filed, and the court may dispose of the suggestions even after the decree is filed. It is error to refuse leave to file them before the decree is filed. *Wing v. Dodge*, 80 Ill. 566; *Albright v. Smith*, 68 Ill. 181; *Wilson v. Haecker*, 85 Ill. 349; *Hamilton v. Stewart*, 59 Ill. 330; *Forth v. Xenia*, 54 Ill. 210.

Evidence cannot be heard and damages assessed upon the dissolution of an injunction where no suggestion in writing has been filed. *Driggers v. Bell*, 8 Ill. App. 254; *Steele v. Boone*, 75 Ill. 457; *Palmer v. Gardner*, 77 Ill. 143; *Spring v. Olney*, 78 Ill. 101; *Wilson v. Haecker*, 85 Ill. 349; *Hamilton v. Stewart*, 59 Ill. 330; *Albright v. Smith*, 68 Ill. 181; *Forth v. Xenia*, 54 Ill. 210.

Kentucky.—Only when an injunction enjoining a judgment is dissolved does the Kentucky code, section 295, empower the chancellor immediately to render judgment for the damages; in all cases the remedy is on the injunction bond. *Logsdon v. Willis*, 14 Bush (Ky.) 183; *Crawford v. Woodworth*, 9 Bush (Ky.) 745.

Louisiana.—Damages cannot be granted in the same judgment which dissolves an injunction in a case of executory process. A separate suit for damages must be brought on the injunction bond. *Hodgson v. Roth*, 33 La. An. 941; *Tistart v. Belot*, 33 La. An. 1469.

Only when a judgment for money has been enjoined can damages be awarded on dissolution of an injunction. *Morris v. Bienvenu*, 30 La. An., pt. 2, 878. See *Crescent City etc. Co. v. Larrieux*, 30 La. An., pt. 1, 740.

Missouri.—The court, upon dissolving an injunction, enter judgment against the obligors in the bond for

damages occasioned by the injunction. *Dorriess v. Carter*, 67 Mo. 544.

New York.—Damages are assessed upon the dissolution of an injunction by reference or otherwise, as the court may direct, in the original cause. *Jacobs v. Miller*, 11 Hun (N. Y.) 441. See *Waterbury v. Bouker*, 10 Hun (N. Y.) 262; *Palmer v. Foley*, 2 Abb. N. Cas. (N. Y.) 191.

The proper practice is to give the sureties in an injunction bond notice of the referee's report assessing the damages. The report when duly confirmed is, in the absence of fraud, conclusive upon them. *Jordan v. Volkenning*, 72 N. Y. 300.

When judgment is rendered for defendant in an injunction suit from which plaintiff appeals, giving the necessary bond, defendant is not entitled, pending such appeal, to an order assessing his damages by reason of the jurisdiction, as there has been no final decision that plaintiff was not entitled thereto. *Musgrave v. Sherwood*, 76 N. Y. 194. See also *Benedict v. Benedict*, 76 N. Y. 600.

South Carolina.—After dissolution of an injunction the damages recoverable on the bond may be ascertained by reference and the assessment enforced by the proceeding. This practice is authorized by S. C. Code, § 243, however irregular possibly it might be in the absence of the code provision. *Hill v. Thomas*, 19 S. Car. 230.

Tennessee.—An action at law may be brought upon an injunction bond, notwithstanding the provision of section 4443 of the code, that damages may be ascertained by the court trying the cause. *White v. Bowman*, 10 Lea (Tenn.) 55.

Texas.—One seeking damages to the amount of an injunction bond can bring an original action on the bond, or, in the pending suit wherein it was given, plead in reconvention, setting up the grounds of his claim for damages. *Avery v. Stewart*, 60 Tex. 154.

Wisconsin.—Under Wis. Rev. St., § 2778, if the court decides that the party obtaining a preliminary injunction was not entitled to it, the other party may have a reference to assess damages sustained by reason of such injunction. *Parish v. Reeve*, 63 Wis. 315.

will be allowed which are not the natural, proximate and actual result of the wrongful issuing of the injunction.¹

The defendants are not, on the one hand, necessarily limited to the benefit which the orator has derived from the injunction, nor, on the other hand, extended to all which the defendant has improvidently or imprudently expended because of the injunction. The defendant, when enjoined from exercising what eventually is established to be his right, must conduct himself with prudence, and in such a manner as to receive as little damage as the circumstances will admit of, in the exercise of ordinary care and prudence.² This is the rule where the injunction is

1. *Carondelet Canal etc. Co. v. Touchi*, 38 La. An. 388; *Kerngood v. Gusdorf*, 5 Mackey (D. C.) 161; *Streeter v. Marshall Silver Mining Co.*, 4 Colo. 535.

2. *Collins v. Sinclair*, 51 Ill. 328; *Morgan v. Negley*, 53 Pa. St. 152; *Stewart v. State*, 20 Md. 97; *Hotchkiss v. Platt*, 8 Hun (N. Y.) 46; *Chicago City R. Co. v. Howison*, 86 Ill. 215; and see *Brown v. Jones*, 5 Neb. 374. *Center v. Hoag*, 52 Vt. 401; *Lillie v. Lillie*, 55 Vt. 470. See *Livingston v. Exum*, 19 S. Car. 223.

In an action on an injunction bond, proof was offered that the plaintiff was engaged in supplying his customers with milk, and kept a number of milch cows. His frame stable, having become somewhat out of repair, was partially torn down in the summer of 1877, and he began to erect a brick stable in its place. In August of that year he was stopped by the injunction, which continued till the 6th day of December following. After it was dissolved he went on to complete the building, and had it finished about the 25th of the same month. While the injunction was in force the plaintiff's cows were deprived of their accustomed and proper shelter, and were more exposed to the weather. The following question was then propounded to the witness: "What was the effect upon the cows, if any, in consequence of being exposed to the wet and cold weather, because you could not finish the brick stable while the injunction suit was pending?" On objection by the defendants it was *held* that the question was pertinent and legal. One of the grounds of special damage stated in the plaintiff's *narr.* was "the injury done to his cattle by exposure to the weather, requiring extra care and food, and causing their flow of milk to greatly decrease." *Held*, that such damage was one of the direct con-

sequences of the injunction, for which the plaintiff was entitled to recover. *Lange v. Wagner*, 52 Md. 310; s. c., 36 Am. Rep. 380.

The injunction was obtained to restrain the plaintiff, who was the defendant in the injunction suit, from prosecuting certain street work in San Francisco under a contract with the superintendent of streets. The court found in substance that the plaintiff had procured materials for the work of the value of twelve hundred dollars, and that by reason of the injunction these materials were lost and destroyed without any fault on the part of the plaintiff. Damages were awarded in accordance with this finding. *Held*, that the damages were sufficiently proximate to warrant their recovery. *Dougherty v. Dore*, 63 Cal. 170.

The plaintiff having a life estate, the defendant a reversionary interest, in certain woodlands, the latter procured the former to be enjoined by injunction "from cutting down any timber, trees, or wood standing or growing upon the premises, . . . or in any way disposing of the same (except what may be cut in a husbandlike manner for firewood and timber for fencing and ordinary repairs upon the premises)" and from committing waste or spoil. In an action on the bond, *held*, that the plaintiff was not merely restrained from committing waste; that he was prohibited from cutting timber for any purpose save those noted in the exception, although it would not be in violation of the rules of good husbandry; and that he was entitled to such damage as he may have suffered in not cutting such wood as he had a right to cut. *Lillie v. Lillie*, 55 Vt. 470.

When an injunction is ended by the appointment of a receiver, damages arising from the act of the receiver in

applied for, obtained and continued in good faith, in the assertion of an honestly claimed right. It applies to cost as well as other damages.¹ Doubtless, the court might be warranted in awarding greater damages, and sufficient to make the defendant whole, if the injunction was obtained and used *mala fides*, and for the purposes of oppression.²

On the dissolution of an injunction, and the filing of the re-

selling at a sacrifice the property, the sale of which was enjoined, are not recoverable in an action on the injunction bond. *Kerngood v. Gusdorf*, 5 Mackey (D. C.) 161.

The expense incurred in hiring a special train to reach a judge to make an application to dissolve an injunction may be allowed as damages on the undertaking, where large interests would have suffered from delay. *Crounse v. Syracuse etc. R. Co.*, 32 Hun (N. Y.) 497.

Where the injunction defendant, anticipating an injunction, made extraordinary efforts and accomplished the object sought to be enjoined before the writ was served, he cannot claim that he was delayed by the injunction, and recover damages for such delay. *Ford v. Loomis*, 62 Iowa 586.

In an action upon an injunction bond, after dissolution of injunction, there being no express proof of damage, the plaintiff claimed that they were entitled to judgment for nominal damages; but *held*, that however the general rule might be, the case was a fitting one for the application of the maxim "*De minimis non curat lex*." *Bustamente v. Stewart*, 56 Cal. 115.

An injunction bond, conditioned as required by statute "to indemnify for all damages that may be sustained by reason of such injunction," does not cover remote, consequential, or speculative damages, but only such as result directly from the injunction, and its immediate consequences. *Sensening v. Parry*, 113 Pa. St. 115; *Wood v. State*, 66 Md. 61; s. c., 13 Oreg. 362; *Foster v. Stafford Nat. Bank*, 58 Vt. 658; *Chicago City R. Co. v. Howison*, 86 Ill. 215; *Hotchkiss v. Platt*, 8 Hun (N. Y.) 46; *Morgan v. Negley*, 53 Pa. St. 153; *Stewart v. State*, 20 Md. 97.

Damages recoverable for injuries, etc., occasioned by an injunction obtained and continued in good faith in the prosecution of an honestly asserted right, are such only as result from

injuries, etc., received while defendant is in the exercise of ordinary care and prudence with respect thereto; and this rule applies to costs as well as to other elements of damage. Thus, under the circumstances of this case, *q. v.*, it was *held* that defendant, who had been enjoined from removing a house, could not recover damages for depreciation in the value of the house to him during the pendency of the injunction, nor for the expense of fitting up another place to live in while building a new house, nor for costs above taxable costs incurred in contesting the suit in which the injunction was issued, in the absence of a finding that they would not have occurred in establishing defendant's right to the house, if no injunction had been issued. *Center v. Hoag*, 52 Vt. 401. See also *Sturgis v. Knapp*, 33 Vt. 486; *Edwards v. Edwards*, 31 Ill. 474; *Mysenburg v. Schlieper*, 48 Mo. 426; *Center v. Hoag*, 52 Vt. 401. *Sartor v. Strassheim*, 8 Colo. 185.

Mental Strain. A defendant is not entitled to recover compensation for the time and service he may have devoted to the case, nor to compensation for the mental strain and anxiety he may have suffered in consequence of the injunction. *Cook v. Chapman*, 41 N. J. Eq. 152.

1. *Brown v. Gorton*, 31 Ill. 416; *Hibbard v. McKindley*, 28 Ill. 240; *Edwards v. Edwards*, 31 Ill. 474.

Where a person is restrained by injunction from making a race to his mills and the conditions of the injunction bond are, that the obligators will pay all moneys and costs due and to become due from the complainants in the bill, and all moneys and costs which shall be decreed against him, and the bill is dismissed at the costs of the complainant, the person so restrained can sustain an action on the bond against the complainant and his sureties to recover the damages sustained by reason of the injunction. *Roberts v. Dust*, 4 Ohio St. 502.

2. *Center v. Hoag*, 52 Vt. 401.

quired bond with no order as to payment of damages, only the penalty of the bond can be recovered,¹ with interest from date of the breach.²

The decree is conclusive of the amount of damages in a subsequent action upon the injunction bond. And the defendant cannot be permitted to show, in defence to such action, that the plaintiff sustained no damages, or less than was awarded to him.³

A motion to assess damages on an injunction bond may be made after the injunction has been dissolved and the bill dismissed, if made before the term has lapsed.⁴

In an action on an injunction bond, the plaintiffs are entitled to recover for the loss of time occasioned by the injunction at the usual rate of wages, provided they use diligence to secure other employment during such period.⁵ The complainant must allege, however, special damages, or they cannot be proved.⁶

Where an injunction is dissolved for want of equity in the bill, in the absence of any evidence that the defendant desired or instigated the institution of the suit, damages are properly assessed in favor of the defendant, though the plaintiff claims

1. *Glover v. McGaffey*, 56 Vt. 294.

2. *Washington's Exr. v. Parks*, 6 Leigh (Va.) 581; *Perry v. Horn*, 22 W. Va. 381; *McAllister v. Clark*, 86 Ill. 236.

In *Baker v. Morris*, 10 Leigh (Va.) 284, the last point of the syllabus is: "It seems that in an action of debt on a bond at law the surplus interest beyond the penalty may be given in the form of damage."

In *Tazewell v. Saunders*, 13 Gratt. (Va.) 354, it was held that courts of equity will decree interest on a bond or judgment, beyond the penalty against the principal debtor. In this case, MONCURE, J., reviews many authorities including a number of English authorities, and comes to the conclusion that the English authorities are against the proposition, that anything can be recovered beyond the penalty in an action upon the bond, but that the rule, at least as to the principal debtor, is different in this country. He says, page 368: "I think therefore the true doctrine with us is, that full interest on a bond, or judgment for a penalty, is generally recoverable at law or in equity, though the principal and interest exceed the penalty. The only difference between the two forms being, that according to the strict rules of law, the penalty must still be regarded in form as the debt, and the excess of interest can only be recovered, indirectly in the shape of damages, while equity takes no notice of the

penalty, but gives a direct decree for the principal and running interest, as in other cases. Full interest should always be given, though there be a penalty, and the principal and interest exceed it, whenever full interest would be given if there were no penalty. In other words the penalty should have no effect on the question of interest, except in regard to the form of recovering the excess in an action at law upon the bond. What I have said upon this subject has reference only to the case of a principal debtor. I express no opinion in regard to the liability of a surety beyond the penalty, it being unnecessary to do so."

3. *Lothrop v. Southworth*, 5 Mich. 436.

On the dissolution of an injunction granted on condition that a bond of a specified amount be filed, and the bond was filed, with no other order, as to payment of damages, which might result from granting the injunction, the defendant can recover no greater amount than the penalty of the bond. If the injunction had issued, conditioned that the orators pay all the damages sustained, the case might merit a different conclusion. *Glover v. McGaffey*, 56 Vt. 294.

4. *Loehner v. Hill*, 19 Mo. App. 141.

5. *Muller v. Fern*, 35 Iowa 420.

6. *Parker v. Bond*, 5 Mont. 1.

A general allegation of damages is sufficient in an action on an injunction bond in the absence of a special de-

that he brought the suit because of statements of the defendant, which misled him.¹

Where a plaintiff, who has obtained a preliminary injunction, after it has been served, enters an order vacating it, and subsequently, without the consent of defendant, obtains an *ex parte* order discontinuing the action, these orders are equivalent to a determination that plaintiff was not entitled to the injunction, and defendant is entitled to an order of reference to ascertain his damages by reason thereof.²

Where one partner has been enjoined from collecting partnership assets wrongfully, he will be entitled to recover on the injunction bond, as damages, his share of the solvent assets at the suing out of the injunction, which became insolvent, or barred by the statutes of limitation, before the dissolution of the injunction.³

If an injunction was properly granted, no damages can be recovered by the party enjoined, although the suit may afterwards be discontinued by the plaintiff, or reversed by the court of appeals.⁴

(i) *Counsel Fees*.—Under an injunction bond, with condition that the complainant shall pay such damages as the defendant shall sustain by reason of the injunction, in case it is finally decided that the complainant was not equitably entitled to the injunction, a defendant is entitled to recover a reasonable amount of counsel fees necessarily expended in getting rid of the injunction.⁵

murrer. *Rosendorf v. Mandel*, 18 Nev. 129.

1. *Schuyler Co. v. Donaldson*, 9 Mo. App. 385.

2. *Pac. Mail Steamship Co. v. Toel*, 85 N. Y. 646; s. c., 9 Daly (N. Y.) 301.

3. *Terrell v. Ingersoll*, 10 Lea (Tenn.) 77.

4. *New York etc. R. Co. v. Omerod*, 29 Hun (N. Y.) 274.

5. *Cummings v. Burleson*, 78 Ill. 281; *Corcoran v. Judson*, 24 N. Y. 106; *Aldrich v. Reynolds*, 1 Barb. (N. Y.) Ch. 613; *Coates v. Coates*, 1 Duer. (N. Y.) 664; *Edwards v. Bodine*, 11 Paige (N. Y.) 224; *Behrens v. McKenzie*, 23 Iowa 333; *Ah Thaie v. Quan Wan*, 3 Cal. 216; *Prader v. Grimm*, 13 Cal. 585; *Garrett v. Logan*, 19 Ala. 344; *Derry Bank v. Heath*, 45 N. H. 524; *Cook v. Chapman*, 41 N. J. Eq. 152; *Ryan v. Anderson*, 25 Ill. 330; *Collins v. Sinclair*, 51 Ill. 328; *McRae v. Brown*, 12 La. An. 181; *Rose v. Post*, 56 N. Y. 603; *Baylis v. Scudder*, 6 Hun (N. Y.) 300; *Bolling v. Tate*, 65 Ala. 417; *Bustamente v. Stewart*, 55 Cal. 115; *Porter v. Hopkins*, 63 Cal. 53; *Swan v.*

Timmons, 81 Ind. 243; *Fountain v. West*, 68 Iowa 380; *Wilson v. Weber*, 3 Ill. App. 125; *Park v. Musgrave*, 6 Hun (N. Y.) 223; *Pareton v. Collar*, 12 Ill. App. 160; *Beeson v. Beeson*, 59 Ind. 97; *Raupman v. Evansville*, 44 Ind. 392; *Joslyn v. Dickenson*, 71 Ill. 25; *Buford v. Keokuk etc. Co.*, 3 Mo. App. 159; *Hannibal etc. R. Co. v. Shepley*, 1 Mo. App. 254; *Bohan v. Casey*, 5 Mo. App. 101; *Carroll Co. v. Iowa etc. Land Co.*, 53 Iowa 685; *Ford v. Loomis*, 62 Iowa 586; *Underhill v. Spencer*, 25 Kan. 71; *Meaux v. Pittman*, 35 La. An. 360; *Valentine v. McGrath*, 52 Miss. 112; *Strong v. Harrison*, 62 Miss. 61; *Miles v. Edwards* (Mont.), 9 West Coast Rep. 648; *Solomon v. Chesley*, 59 N. H. 24; *Lyon v. Hersey*, 32 Hun (N. Y.) 253; *Crounse v. Syracuse etc. R. Co.*, 32 Hun (N. Y.) 497; *Newton v. Russell*, 87 N. Y. 527; *Randall v. Carpenter*, 88 N. Y. 293; *Livingston v. Exum*, 19 S. Car. 223. But see *Oelrichs v. Spain*, 15 Wall. (U. S.) 230, followed in *Browning v. Porter*, 2 McCrary (U. S.) 581; *Oliphant v. Mansfield*, 36 Ark. 191; and see *Little-*

ton v. Frank, 2 Lea (Tenn.) 300; Disbrow v. Garcia, 52 N. Y. 654; Hovey v. Rubber Tip Pencil Co., 57 N. Y. 119; Andrews v. Glenville Woolen Co., 50 N. Y. 282; Sensening v. Parry, 113 Pa. St. 115; Olds v. Cary, 13 Oreg. 362; Wood v. State, 66 Md. 61.

The amount recoverable, on account of attorney's fees, in an action upon an injunction bond, is limited to fees paid counsel for procuring the dissolution of the injunction, and does not extend to fees paid for defending the entire case. *Bustamente v. Stewart*, 55 Cal. 115; *Noble v. Arnold*, 23 Ohio St. 264; *Riddle v. Cheadle*, 25 Ohio St. 278; *Langworthy v. McKelvey*, 25 Iowa 48; *Allport v. Kelley*, 2 Mont. 343; *Disbrow v. Garcia*, 52 N. Y. 654; *Elder v. Sabin*, 66 Ill. 126; *Campbell v. Metcalf*, 1 Mont. 378; *Parker v. Bond*, 5 Mont. 1; *Meaux v. Pittman*, 35 La. An. 360.

In an action on an injunction bond, conditioned as the statute prescribes (Ala. code, sec. 3871), counsel fees are recoverable as a part of the damages, for services rendered in this court on appeal, as well as in the court below; overruling *Ferguson v. Baber*, 24 Ala. 402; and *Bullock v. Ferguson*, 30 Ala. 227. But the recovery is limited to fees for services rendered, in either court, in procuring the dissolution of the injunction, and does not extend to all the services rendered in the suit in which the injunction was sued out. *Bolling v. Tate*, 65 Ala. 417; s. c., 39 Am. Rep. 5; *Jevne v. Osgood*, 57 Ill. 340; *Porter v. Hopkins*, 63 Cal. 53; *Willson v. McEvoy*, 25 Cal. 172; *Prader v. Grimm*, 28 Cal. 11.

In an action upon a bond given upon the procuring of a restraining order, which is subsequently dissolved, the plaintiff is entitled to recover, as an element of his damages, for reasonable attorney's fees paid by him in procuring the dissolution of such order, and in resisting the application for a final injunction, although the services of the attorney were performed subsequent to the date limited by the order for the hearing of the application for the injunction. *Miles v. Edwards*, 6 Mont. 180.

It may be regarded as the settled rule in Iowa that an attorney's fee is allowable to the defendant where an injunction is dissolved upon motion, or where it is dissolved upon the final hearing, when the injunction is the only relief sought; but where a motion is made to dissolve an injunction as a

whole, and not merely for a modification of it, where a modification is all that the defendant is entitled to, and all that he secures, he cannot, in an action on the injunction bond, recover all the fees paid his attorney for services in relation to such motion. Whether a part of such fees could be recovered is a question not arising in this case. *Ford v. Loomis*, 62 Iowa 586.

The dismissal of an action in which an injunction bond was given entitles the defendant to recover his expenses incurred in making the necessary resistance to that action, including reasonable attorney's fees; but, if other relief was sought, the attorney's fees must be restricted to those necessarily incurred in defeating the injunction. *Swan v. Timmons*, 81 Ind. 243.

In an action in a state court upon an injunction bond given in a federal court, attorneys' fees for which the plaintiff has become liable may be recovered as damages, though not so recoverable in the federal courts. *Wash v. Lockland*, 8 Mo. App. 122; *Barnes v. Webster*, 16 Mo. 263; *State v. Beldsmeir*, 56 Mo. 226; *Uhrig v. St. Louis*, 47 Mo. 528; *Hannibal etc. R. Co. v. Shepley*, 1 Mo. App. 254; *Leisse v. Railroad Co.*, 2 Mo. App. 105.

Counsel fees, incurred by defendant for services in an action other than those made necessary by a temporary injunction therein, cannot be assessed as damages upon the undertaking given on granting the injunction. So, fees for services of counsel in unsuccessfully resisting the allowance of the injunction are not allowable as damages by reason of the injunction. *Randall v. Carpenter*, 88 N. Y. 293.

Where a defendant is unsuccessful in opposing a motion by plaintiff to continue a preliminary injunction, or fails to procure its dissolution, on a motion by him to dissolve it, the expense incurred by such defendant for counsel fees on such motion cannot be assessed as damages upon the undertaking, given on the issue of the original *ex parte* injunction. *Allen v. Brown*, 5 Lans. (N. Y.) 511; *Childs v. Lyons*, 3 Robt. (N. Y.) 704; *Troxell v. Haynes*, 16 Abb. (N. Y.) Pr. N. S. 1; *Strong v. Deforest*, 15 Abb. (N. Y.) Pr. 427; *Andrews v. Glenville Woolen Co.*, 50 N. Y. 287. See *Elder v. Sabin*, 66 Ill. 131; *Wilson v. Haecker*, 85 Ill. 349; *Robertson v. Robertson*, 58 Ala. 68; *Bustamente v. Stewart*, 55 Cal. 115. See *Wallace v. York*, 45 Iowa 81.

A reasonable amount of counsel fees, necessarily incurred in procuring the dissolution of an injunction unfairly obtained, may be recovered under a contract of indemnity, but the rule is subject to this limitation: where the injunction is merely auxiliary to the main object sought to be attained by the action, and no effort is made to get rid of the injunction before final hearing, and the injunction is dissolved on final hearing because the complainant fails in his action, no counsel fees whatever are recoverable.¹

It has also been held in New York that even where an unsuccessful motion to dissolve has been made—the court refusing to dissolve because it deems it more advisable to defer enquiry into the merits until the final hearing—that if, on final hearing, it appears the complainant obtained the injunction unfairly, the counsel fees on final hearing, as well as those incurred in making the unsuccessful motion, are recoverable as a part of the damages which the defendant has sustained by reason of the injunction. The counsel fees on the final hearing are allowed in such cases on the ground that the complainant, by resisting the defendant's motion and inducing the court to deny it, has compelled the defendant to incur the expense of trying the case on its merits in order to get rid of the injunction. *Andrews v. Glenville Woolen Co.*, 50 N. Y. 282; *Hovey v. Rubber Tip Pencil Co.*, 50 N. Y. 335. But a later case seems to hold that the counsel fees of the final hearing are not recoverable in such cases, unless the sole or main question to be determined on the final hearing is whether or not the injunction shall be continued. *Disbrow v. Garcia*, 52 N. Y. 654.

Where an injunction has been obtained against a defendant and a trial is necessary, not merely to dispose of the issues raised in the suit, but to get rid of the injunction, the defendant is entitled to his counsel fees, as part of the damages secured by the plaintiff's injunction bond. *Newton v. Russell*, 24 Hun (N. Y.) 40.

An injunction bond conditioned to "abide the decision of the suit and pay all sums of money, damages and costs that shall be adjudged" against the obligors if the injunction shall be dissolved does not cover the amount of a judgment enjoined by the court, nor the costs and attorney's fees therein. *Browning v. Porter*, 2 McCrary (U. S.) 581.

Where an injunction is dissolved be-

cause of the insufficiency of the petition, the expense of procuring affidavits in support of a motion to dissolve is not covered by the bond. *Elwood Mfg. Co. v. Rankin*, 70 Iowa 403. So where plaintiffs sued on an injunction bond for money paid for counsel fees and expenses, and the evidence showed the money had all been paid by one plaintiff, it was held that this individual expenditure was not within the condition of the bond. *Hildrup v. Brentano*, 16 Ill. App. 443.

The plaintiff's complaint alleged a right in him to maintain a boom across the G river and attach it to the defendant's premises, an interference with this right, and asked that such right might be adjudged. A preliminary injunction was asked for, and upon order to show cause granted, restraining defendant from interfering with said boom, and requiring him to show cause, at a time specified, why the injunction should not be continued. At said time an order was made that within ten days after notice plaintiffs give an undertaking in the usual form and thereupon that the injunction be retained until the further order of the court, or a judge thereof; also that defendant might, on notice as prescribed, have a further hearing before another judge, and that thereupon the question of continuing the injunction should be treated as if the order to show cause had been originally returnable before said judge. The required security was given. Upon trial of the action defendant had judgment dismissing the complaint, and restraining plaintiffs from "putting a boom on defendant's land." In proceedings to ascertain the amount of damages claimed by the defendant, by reason of the preliminary injunction, held that the allowance of counsel fees, reasonably incurred by defendant "in the preparation for and trial of the action," was erroneous. *Newton v. Russell*, 87 N. Y. 527.

1. *Noble v. Arnold*, 23 Ohio St. 264;

The defendant in the injunction suit can recover the fees of his attorney for services in obtaining a dissolution of the injunction before he has paid them. The authorities generally agree that if the liability is fixed and absolute, it is enough; payment is not an essential prerequisite.¹

54. Procedure to Obtain an Injunction.—An injunction, which is a harsh remedy, should not be granted until a clear *prima facie* case is made by the bill. The allegations must be direct and positive. A charge that they are true, "on information received from others," is insufficient.²

Riddle v. Chadle, 25 Ohio St. 278; Cook v. Chapman, 41 N. J. Eq. 152.

Bond—Irregular in Form.—An injunction undertaking was conditioned "to pay all costs and damages which may be awarded against them [the plaintiffs] on the final hearing in this cause by the court." *Held*, that the defendant might recover on this undertaking, though irregular in its form, the reasonable fees and charges of his attorney for services in obtaining a dissolution of the injunction. Underhill v. Spencer, 25 Kan. 71.

1. Underhill v. Spencer, 25 Kan. 71; Garrett v. Logan, 19 Ala. 344; Miller v. Garrett, 35 Ala. 96; McRae v. Brown, 12 La. An. 181; Brown v. Jones, 5 Nev. 374; Noble v. Arnold, 23 Ohio St. 264; 2 High on Injunctions, § 1685; Shultz v. Morrison, 3 Metc. (Ky.) 98; Steele v. Thatcher, 56 Ill. 257; Holthaus v. Hart, 9 Mo. App. 1; Leisse v. St. Louis R. Co., 2 Mo. App. 105.

But see *contra*, Willson v. McEvoy, 25 Cal. 169; Prader v. Grimm, 28 Cal. 11.

2. Jones v. Macon etc. R. Co., 39 Ga. 138; Armstrong v. Sanford, 7 Minn. 49; Crocker v. Baker, 3 Abb. (N. Y.) Pr. 182; Campbell v. Morrison, 7 Paige (N. Y.) Ch. 157; Reboul's Heirs v. Behrens, 5 La. 79; Catlett v. McDonald, 13 La. 44; Shouk v. Knight, 12 Va. 667; Gaetener v. Fond du Lac, 34 Wis. 497; Perkins v. Collins, 3 N. J. Eq. (2 Green) 482; Patterson v. Bangs, 9 Paige (N. Y.) Ch. 627; Waddell v. Bruen, 4 Edw. (N. Y.) 671; Blodheim v. Moore, 11 Md. 365; Laurie v. Laurie, 9 Paige (N. Y.) Ch. 234.

An oath to a bill for injunction by a solicitor, "that the facts set forth in the foregoing bill are true to the best of his knowledge, information and belief," is not sufficient to authorize an injunction. It states no facts, nor that affiant has any knowledge, information or belief whatever. Ballard v. Eckman, 20 Fla. 661; Bowes v. Hoeg, 15 Fla. 403; Pid-

geon v. Oatman, 3 Robt. (N. Y.) 706; Hovey v. McCrea, 4 How. (N. Y.) Pr. 31; Townsend v. Tanner, 3 How. (N. Y.) Pr. 384; Smith v. Reno, 6 How. (N. Y.) Pr. 124; Ratoon v. Bernard, 12 How. (N. Y.) Pr. 464; Bank of Orleans v. Skinner, 9 Paige (N. Y.) 305; Campbell v. Morrison, 7 Paige (N. Y.) 157; Youngblood v. Schamp, 2 McCart. (N. J.) 42; Crocker v. Baker, 3 Abb. (N. Y.) Pr. 182; People v. New York, 9 Abb. (N. Y.) Pr. 253; Hecker v. New York, 18 Abb. (N. Y.) 369; s. c., 28 How. (N. Y.) Pr. 211.

An injunction will not ordinarily be granted under a prayer for general relief, but must be expressly prayed. Lefforge v. West, 2 Ind. 514.

To warrant a court of chancery in issuing an injunction, strong *prima facie* evidence of the facts on which the complainant's equity rests must be presented to the court to induce its action. In such a proceeding, the mere oath of the party as to the existence of a debt of which he holds in his possession the written evidence, without producing it, should not be regarded by the chancellor as any proof of such debt; but where the existence of the debt depends on a written instrument of which the complainant is presumed to be in possession, it should be exhibited with the bill, or a satisfactory reason assigned for its nonproduction. Union Bank of Md. v. Poultney, 8 Gill & J. (Md.) 324.

A bill for injunction should clearly and plainly allege the cause of action or defence, and where they fail to do so, the court may, *ex mero motu*, direct them to be reformed. Turner v. Cuthrell, 94 N. Car. 239.

Where a party has recourse to an injunction, he must disclose all the facts of his case or it will be presumed that those not disclosed would make against him if known. Sauvinet v. New Orleans, 1 La. An. 346.

Where the grounds for an injunction rests on proceedings in which are public and private matters of record and the plaintiff was interested, his allegation of a want of knowledge of them will not be heeded. *Megget v. Lynch*, 8 La. An. 6.

When an injunction is granted without the oath of some person to facts, or to reliable information as to the facts stated in the bill, it is a matter of course to dissolve the injunction before answer, and the officer to whom the application for an injunction is made should require to be annexed to the bill the additional affidavit of the person from whom the information is derived, verifying the truth of the information thus given. *Campbell v. Morrison*, 7 Paige (N. Y.) 157; *Bank of Orleans v. Skinner*, 9 Paige (N. Y.) 305; *Hone v. Moody*, 59 Ga. 731.

Youngblood v. Schamp, 2 McCart. (N. J.) 42; *Crocker v. Baker*, 3 Abb. (N. Y.) Pr. 182; *Reboul's Heirs v. Behrens*, 5 La. 79; *Catlett v. McDonald*, 13 La. 44; *Shonk v. Knight*, 12 W. Va. 667; *Gaetener v. Fond du Lac*, 34 Wis. 497; *Perkins v. Collins*, 3 N. J. Eq. (2 Green) 482; *Paterson v. Bangs*, 9 Paige (N. Y.) 627; *Waddell v. Bruen*, 4 Edw. (N. Y.) Ch. 671; *Armstrong v. Sanford*, 7 Minn. 49. See *Capner v. Flemington Mining Co.*, (2 Green) 3 N. J. Eq. 467.

In Indiana, a bill for injunction need not be sworn to. Rev. Stat. 1843, 851, 852, 853; *Laughlin v. Lamasco*, 6 Ind. 223. To the contrary in Iowa. *Stump v. Busick*, 3 Greene (Iowa) 245.

The usage and practice in Maryland do not require other affidavits than that of the complainant to procure an injunction before answer where the facts are *in pais*. *Myers v. Amey*, 21 Md. 302.

An injunction will not be dismissed because the master has omitted to sign the jurat, if the bill has been actually sworn to. *Capner v. Flemington Mining Co.*, (2 Green) 3 N. J. Eq. 467.

In a creditor's bill against the judgment debtor only, it is sufficient to sustain an application for an injunction if the bill is sworn to by the complainant, although he does not swear positively to the recovery of the judgment and the return of the execution unsatisfied, but merely swears to his belief of those facts founded upon the information of his attorney. *Hamersley v. Wyckoff*, 8 Paige (N. Y.) 72; *Sizer v. Miller*, 9 Paige (N. Y.) 605.

In *Jones v. Magill, Bland* (Md.) 177, it was held that "An injunction may be granted upon the bill alone, supported by affidavits before the subpoena has been served in ordinary cases."

Other Illustrations.—On a bill filed to enjoin the closing of an alley by the erection of permanent improvements, the evidence being conflicting as to whether the complainant had a right to the use of such alley, or whether the defendants had the exclusive right to it, this court will not control the discretion of the chancellor in granting an injunction until the final hearing of the case. *Taylor v. Dyches*, 66 Ga. 712.

In a suit to enjoin a city from using a strip of ground as a street, the complaint must not only show that there has been no grant or condemnation of the land for a street, but also that there has been no implied dedication. *Faust v. Huntington*, 91 Ind. 493.

Where the city of St. Louis filed its bill to enjoin the defendant from completing on his premises within the city a work then in the course of construction, whereby the Mississippi River would be divided from its natural course, and a deposit created rendering it impossible for boats and vessels to land at the city's wharf north or south of the premises,—*held*, that it is not necessary that the bill should relate all the minute circumstances which may be proved to establish its general allegations, and that the defendant should be required to answer it. *St. Louis v. Knapp Co.*, 104 U. S. 658.

An application for an injunction was heard upon bill, answer and replication. A material allegation in the bill was denied in the answer in terms clearly and unequivocally responsive to the bill. Other facts were mentioned in support of this denial bordering on the verge of new matter. Certain exhibits relied on in the bill were in the answer admitted to have been executed by the firm of which the respondent was the survivor, but on terms and conditions materially different from those alleged in the bill; and the exhibits themselves did not fully sustain the construction placed upon them in the bill. The allegations of the complainant describing an interview between his attorney and the respondent, and certain verbal promises of the respondent to the attorney, were positively denied. On appeal from an order refusing the injunction, it was held: 1st. That as the answer so far as responsive to the bill was to be

An injunction can only issue on a bill or complaint. And the bill must specifically pray for an injunction.¹ Affidavits without a bill or complaint are not sufficient.² If the affidavit, in corroboration of the bill or complaint, states more than the complaint, it does not lessen the force of the facts stated in the complaint, nor make the affidavit take the place of the complaint.³

(a) *Verification*.—The facts upon which the injunction depends must be verified by positive proof annexed to the bill, or injunction will be dissolved.⁴

taken as true, on the application for the injunction, the replication had no effect and performed no office at that stage of the cause; its real and only effect being to determine the nature and extent of the issue between the parties, and to regulate the *onus* of proof with a view to the final hearing. 2nd. That looking to the bill, and the answer as far as responsive to the bill, the order refusing the injunction was properly passed. *Dougherty v. Piet*, 52 Md. 425.

1. *Lewiston etc. Co. v. Franklin Co.*, 54 Me. 402; *Union Bank v. Kerr*, 2 Md. Ch. 460; *Wood v. Beadell*, 3 Sim. 273; *Willett v. Woodhams*, 1 Bradw. (Ill.) 411; *African M. E. Church v. Conover*, 12 C. E. Green (N. J.) 157.

The injunction, if granted at all, must be granted as prayed. The court cannot grant an injunction in other terms than those contained in the prayer of the bill. 2 High on Inj., 1582. *Burdett v. Hay*, 33 L. J., Ch. 41; *Kelly v. Baltimore*, 53 Md. 134, 144; *Baltimore v. Warren Mfg. Co.*, 59 Md. 102. See also *Savory v. Dyer*, Amb. 20. But see *contra*, *Webb v. Ridgely*, 38 Md. 364.

2. *People v. New York*, 3 Abb. (N. Y.) Pr. 181; *Badger v. Wagstaff*, 11 How. (N. Y.) Pr. 562.

3. *Badger v. Wagstaff*, 11 How. (N. Y.) Pr. 562. This case was decided under the code of New York, but the principle is believed to be general in its application.

4. *Southern Plank Road Co. v. Hixon*, 5 Ind. 165; *Walker v. Deveneaux*, 4 Paige (N. Y.) 229; *Holdrege v. Gwynne*, 3 C. E. Green (N. J.) 27; *Fowler v. Burns*, 7 Bosw. (N. Y.) 637; *Glidden v. Morrell*, 44 Mich. 202; *Gaertner v. Fond du Lac* 34 Wis. 497; *Livingston v. Dick*, 1 La. An. 323; *Klein v. Coon*, 10 La. An. 522; *McRoberts v. Washburne*, 10 Minn. 23; *Youngblood v. Schamp*, 15 N. J. Eq. (2 McCart.) 42; *Crocker v. Baker*, 3 Abb. (N. Y.) Pr. 182; *Reboul's Heirs v. Beh-*

rens, 5 La. 79; *Catlett v. McDonald*, 13 La. 44; *Campbell v. Morrison*, 7 Paige (N. Y.) 157; *Shonk v. Knight*, 12 W. Va. 667.

Where a bill in equity is filed praying for a preliminary injunction, a mere general affidavit to the truth of the facts averred in the bill is insufficient to authorize the issuing of the injunction. *Gilroy's App.*, 100 Pa. St. 5.

Where the only verification of a bill for injunction was an affidavit of one of counsel, to the effect that what he knew of his own knowledge was true, and what he had heard he believed to be true, but it was not stated that he knew any fact of his own knowledge, such verification was not sufficient; and where the answer did not admit or verify the material facts alleged in the bill, and there were no depositions, an injunction was properly refused. *Landes v. Globe Planter Mfg. Co.*, 73 Ga. 176; *Hone v. Moody*, 59 Ga. 731.

An application for an injunction must be made by affidavit; but the applicant may annex his complaint to an affidavit which shall refer thereto and amount to an oath that the allegations are true; and the whole together may answer the double purpose of a verified complaint and of an affidavit. *Fowler v. Burns*, 7 Bosw. (N. Y.) 637.

If a party who prays for an injunction that will affect the rights of persons who have not an opportunity to be heard, has not personal knowledge of the facts set forth in his application, they must be verified by the affidavit of one who has personal knowledge. *Southern Plank Road Co. v. Hixon*, 5 Ind. 165; *Walker v. Deveneaux*, 4 Paige (N. Y.) 229.

An affidavit which recites that "the facts and allegations set forth in the petition for an injunction are true," and that the facts stated to be on his own behalf he believes to be correct, is sufficient. *Livingston v. Dick*, 1 La. An. 323; *Klein v. Coon*, 10 La. An. 522.

It is not necessary that an affidavit for an injunction, made by an agent, should set forth the absence of the principal; it is sufficient to prove on the trial that he was absent when the affidavit was made. *Wilson v. Curtis*, 13 La. An. 601. An injunction may be verified by an agent if he is conversant with the facts. *Brunswick v. Finney*, 54 Ga. 317.

Where the jurat to a petition sets forth that the affiant is the agent of the plaintiff; that the plaintiff is a non-resident of the State; that he (affiant) has heard read the petition, and that the several matters therein stated are true, the petition is admissible as testimony upon the hearing of an application for an order of injunction. *Long v. Kasebeer*, 28 Kan. 226.

At a hearing upon an application for an injunction the defendant offered an affidavit which stated upon his information and belief that the acts complained of were done by him under the authority of a corporation organized under a certain act, etc. *Held*, that the defendant must connect himself with the corporation by more direct averments. *McRoberts v. Washburne*, 10 Minn. 23. See *Bank of Orleans v. Skinner*, 9 Paige (N. Y.) 305.

Where an injunction is applied for there should be a special affidavit of the truth of all the material facts upon which the application is founded. An injunction issued upon the common affidavit in the form ordinarily annexed to an answer will be dissolved very much as a matter of course. *Youngblood v. Schamp*, 15 N. J. Eq. (2 McCart.) 42.

In an application for an injunction, where the facts of the suit occurred at a distance, statements in letters of third persons to one of the parties, though not, strictly speaking, evidence, may be used temporarily to advance the provisional remedy in connection with other testimony. *Merritt v. Thompson*, 3 E. D. Smith (N. Y.) 283. So documentary evidence establishing complainant's equities and his relief will suffice to warrant the court in granting an injunction, and such evidence may be presented by properly verified copies of private instruments or of records, when such is the appropriate mode of proof. *High on Inj.*, § 1572; *Negro Charles v. Sheriff*, 12 Md. 274; *Youngblood v. Schamp*, 2 McCart. (N. J.) 42.

Written instruments upon which re-

lief is prayed should accompany a bill for an injunction and a receiver, or proper excuse be made for their non-production. *Morton v. Grafflin* (Md.), 11 Cent. Rep. 514.

A bill which is sworn to positively seems to possess the characteristics of an affidavit so far that it need not be corroborated by an affidavit. *Morgan v. Quackenbush*, 22 Barb. (N. Y.) 76. The verification should be such that if untrue the party would be liable to the penalties of perjury. *Beboul's Heirs v. Behrens*, 5 La. 79; *Catlett v. McDonald*, 13 La. 46. It is not sufficient to state that the material allegations of the bill are true. *Sauvinet v. Ponpano*, 14 La. 87, nor that the allegations which render an injunction necessary are true. *Albert v. Joly*, 5 La. 50; *Rickard Hins v. Avilart*, 5 La. 244, as in both cases it is uncertain what facts are sworn to.

If the bill is sworn to by the attorney for the plaintiff, he should state the reason why the oath is not made by the plaintiff . . . such as his absence from the county, or that the attorney knows the facts. Where the affidavit fails to show that the attorney knows any of the facts sworn to by him, it will be insufficient. *Hone v. Moody*, 59 Ga. 731. If the attorney has personal knowledge of some of the facts, but not of others, he should designate those known to him, or the affidavit will be insufficient. *Bowes v. Hoeg*, 15 Fla. 403; *Pallen v. Baker*, 41 Tex. 419; *Ches. etc. R. Co. v. Huse*, 5 W. Va. 579, and to that part of the bill verified upon information and belief there should be corroboratory affidavits.

A complainant is not entitled to an injunction *ex parte* on a bill verified by his oath alone, unless the facts are within his own personal knowledge. *Campbell v. Morrison*, 7 Paige (N. Y.) 157; *Bogert v. Haight*, 9 Paige (N. Y.) 297; *Waddell v. Bruen*, 4 Edw. (N. Y.) Ch. 671; *Christie v. Bogardus*, 1 Barb. (N. Y.) Ch. 167; *Williams v. Lockwood*, 1 Clarke (N. Y.) 197.

If the verification is on information or belief, in whole or in part, and notwithstanding the defendant demurs to the bill or otherwise appears generally he will thereby waive defects in the verification. *Gibson v. Gibson*, 46 Wis. 462.

Attorney General.—In some of the States may file a bill under his oath of office without verification, and it is held equivalent to a verification upon

(b) *Answer, Demurrer, etc.*—An injunction granted before the issuing of the summons in the action is premature.¹ Where the bill and notice of intended application for an injunction is filed, the defendant may at once file his answer, and the rules governing the action of the chancellor will be the same as those which prevail upon hearing upon bill and answer.²

Where the equities of a bill have been most fully denied by the answer, an injunction will be refused.³

But where an injunction has been granted upon a bill in equity and in the answer the facts set forth in the bill are admitted, or not denied, or new matter is set up in avoidance, the injunction will be continued.⁴

Where a complaint for injunction in a single paragraph specifies several independent reasons for granting the relief sought, a demurrer may be addressed to any such separate specification.⁵ While, on demurrer, the court will not look beyond the complaint to ascertain *when* the action was commenced, yet, on the motion to grant or dissolve an injunction,

information and belief. It should be corroborated, however, by a positive affidavit. *Atty. Gen. v. R. R. Co.*, 35 Wis. 593. See *Atty. Gen. v. Eau Claire*, 37 Wis. 400.

Where a corporation files a bill it may be verified by an officer knowing the facts, or by an agent or attorney having such knowledge. *Bank of Orleans v. Skinner*, 9 Paige (N. Y.) 305; *Youngblood v. Schamp*, 2 McCart. (N. J.) 42.

Petition in the Same Case.—Where a court of equity possesses jurisdiction over the subject of the action and the person of the defendants, it may enforce obedience to its order or judgment by injunction founded upon a petition merely, although no bill has been filed against such person. The filing of the petition in such case is a substitute for the bill. *Re Hemiup*, 2 Paige (N. Y.) 316. In the matter of *Creigh*, 1 Ball & B. 108.

1. *Grant v. Edwards*, 90 N. Car. 31; *Patrick v. Joyner*, 63 N. Car. 573; *McArthur v. McEachin*, 64 N. Car. 72; *Hirsch v. Whitehead*, 65 N. Car. 516; *Trexler v. Newsom*, 88 N. Car. 13; *Kincaid v. Conly*, Phil. (N. Car.) Eq. 270.

2. *Sullivan v. Moreno*, 19 Fla. 220.

3. *Hall v. McPherson*, 3 Bland (Md.) 529; *Cross v. Payne*, 31 Ga. 342; *Washington v. Emery*, 4 Jones (N. Car.) Eq. 29; *Patterson v. Miller*, 4 Jones (N. Car.) Eq. 451; *Lady Bryan etc. Co. v.*

Lady Bryan Mining Co., 4 Nev. 414; *Van Houten v. First etc. Church*, 17 N. J. Eq. 126.

The denial of the equity of the plaintiff's bill by the defendant's mere affidavit, without answer, is not sufficient to defeat a motion for an injunction, when the allegations of the bill are corroborated by very important facts set up in an additional affidavit and not denied by the defendant. *Walton v. Crowley*, 3 Blatchf. (U. S.) 440.

The denial of the plaintiff's title in an answer does not prevent the court from awarding a special temporary injunction. *Clum v. Brewer*, 2 Curt. (U. S.) 506. See *Poor v. Carleton*, 3 Sumn. (U. S.) 83.

Where a bill asks for an injunction to protect the complainants from apprehended danger, and the answer denies that the apprehensions are well grounded the court will give the defendants the full benefit of their denial, and refuse the injunction unless the complainants make out a very clear case in their bill and affidavits. *Rogers v. Danforth*, 9 N. J. Eq. (1 Stock.) 289.

4. *McNamara v. Irwin*, 2 Dev. & B. (N. Car.) Eq. 13; *Clark v. Martin*, 4 Edw. (N. Y.) 424; *State v. Northern etc. R. Co.*, 18 Md. 193; *Chase v. Manhardt*, 1 Bland (Md.) 333; *Kerns v. Chambers*, 3 Ired. (N. Car.) Eq. 576; *Reynolds v. McKenzie*, Phil. (N. Car.) Eq. 50; *Strong v. Menzies*, 6 Ired. (N. Car.) Eq. 544.

5. *Hilton v. Mason*, 92 Ind. 157.

it will consider the *whole record* for that and all other purposes affecting the equities of the parties.¹

Where a demurrer to a complaint for an injunction, and a motion to dissolve the temporary injunction, are pending at the same time, it is discretionary with the trial court as to which it will first rule upon, and the exercise of this discretion will not be reviewed in the supreme court.²

A court of equity will vacate a forged paper, or direct its surrender for destruction, when the forgery, or fraudulent character of the paper, is established by proof.³

A hearing upon an injunction bill cannot be had after the act has been done, which it is the sole purpose of the bill to restrain; the remedy for any consequent injury is to be had, if at all, at law.⁴

(c) *Venue*.—A bill in equity to enjoin a trespass upon realty by felling timber is not such a suit respecting the title to land as must be brought in the county where the land lies. The proper venue of such a case is the county of the residence of a defendant against whom substantial relief is prayed.⁵

(d) *A restraining order, made in vacation*, to be effective, must be reduced to writing and signed by the judge, and in case of a suit upon the injunction bond for damages, a recovery cannot be had unless this fact is shown.⁶

(e) *Appeal*.—Where a complaint shows no cause of action, the granting of a preliminary injunction is an error of law, which may be reviewed on appeal. The case must be very clear to justify the court in deciding the merits of the controversy on a mere motion; and, where a doubtful question of law arises on the complaint, the decision thereof should be deferred until a hearing of the case upon its merits.⁷

An appeal from the refusal to grant a special or preliminary injunction may be certified by the prothonotary of the supreme court to any district where said court is in session, or will hold its next session, and the appeal may be ordered down for argument, and will be heard when reached in its order.⁸

(f) *Continuance*.—The continuance or dissolution of an injunction, after the coming in of the answer, depends upon the sound discretion of the court according to the nature and circumstances of the case.⁹

1. Dalrymple v. Milwaukee, 53 Wis. 178.

2. Clark v. Shaw, 101 Ind. 563; Grand Rapids etc. R. Co. v. McAnnally, 98 Ind. 412.

3. Dennison v. Yost, 61 Md. 139.

A demurrer which denies the right to an injunction restraining the defendant from selling, assigning or otherwise disposing of a certain single bill, purporting to be the single bill of the com-

plainant, and alleged by him to be a forgery, is too broad and cannot be sustained. Dennison v. Yost, 61 Md. 139.

4. East Saginaw etc. Co. v. Wildman, 58 Mich. 286.

5. Powell v. Cheshire, 70 Ga. 357.

6. Kiser v. Lovett, 106 Ind. 325.

7. Selchow v. Baker, 93 N. Y. 59.

8. Kraft's Appeal, 94 Pa. St. 449.

9. De Godey v. Godey, 39 Cal. 167;

55. Violation—(See CONTEMPT, vol. 3, pp. 777–800).—The violation of an injunction is punishable as for a contempt of court,¹ and a penalty for the disobedience of the writ is accordingly imposed for the benefit of the party injured thereby.²

To authorize the infliction of punishment for a violation of an order of injunction, the order must clearly embrace and prohibit the act complained of, and the act must have been in contravention of the spirit, as well as the letter, of the order.³ And it must clearly appear that the act has been committed, and the infringement continues.⁴ The offence complained of as a violation must also be injurious to the rights of complainant in the action.⁵

McCreery v. Brown, 42 Cal. 457; *Patterson v. Board of Supervisors*, 50 Cal. 345; *Efford v. South Pac. R. Co.*, 52 Cal. 277; *Coolot v. Cent. Pac. R. Co.*, 52 Cal. 65; *Payne v. McKinley*, 54 Cal. 532; *Parrott v. Floyd*, 54 Cal. 534; *Upson County R. Co. v. Sharman*, 37 Ga. 644; *Cornwise v. Bourgum*, 2 Ga. Dec. 15; *Chetwood v. Brittain*, 2 N. J. Eq. (1 Green) 439; *Edwards v. Banks*, 35 Ga. 213; *McKibbin v. Brown*, 14 N. J. Eq. (1 McCart.) 13; *Blossom v. Van Amringe*, Phill. (N. Car.) Eq. 133.

The continuance or dissolution of an injunction to prevent a sale of property, pending an action between the parties to determine the right to the property, is a matter within the sound discretion of the court that issues the injunction, and this court will not interfere with the exercise of that discretion, except in a case of palpable error or abuse of discretion. *White v. Nunan*, 60 Cal. 406. *Wilson v. Mace*, 2 Jones (N. Car.) Eq. 5; *Monroe v. McIntire*, 6 Ired. (N. Car.) Eq. 65; *Yonge v. McCormick*, 6 Fla. 368; *Oro. Fins. etc. Co. v. Cullen*, 1 Idaho 113; *Salmon v. Claggett*, 3 Bland (Md.) 125; *Drury v. Roberts*, 2 Md. Ch. 157; *Ferriday v. Selcer*, 1 Freem. (Miss.) Ch. 258; *Cornelius v. Post*, 9 N. J. Eq. (1 Stock.) 196; *Lyrely v. Wheeler*, 3 Ired. (N. Car.) Eq. 170; *Nelson v. Owen*, 3 Ired. (N. Car.) Eq. 178.

Although it is a general rule, in chancery practice, that on the coming in of the answer plainly and distinctly denying all the facts and circumstances upon which the equity of the bill is based, the court will dissolve an injunction; yet in some particular cases the court will continue the injunction, although the defendant has fully denied

the equity set up. The granting and continuing of the process must always rest in sound discretion to be governed by the nature of the case. *Carter v. Bennett*, 6 Fla. 214; *Linton v. Denham*, 6 Fla. 533; *Dent v. Summerlin*, 12 Ga. 5; *Holt v. Bank of Augusta*, 9 Ga. 552; *Allen v. Hawley*, 6 Fla. 142; *Swift v. Swift*, 13 Ga. 140; *Crutchfield v. Donilly*, 16 Ga. 432; *Cox v. Mayor etc.*, 18 Ga. 728; *Semmes v. Columbia*, 19 Ga. 471; *Fleischman v. Young*, 9 N. J. Eq. (1 Stock.) 620; *Carpenter v. Danforth*, 19 Abb. (N. Y.) Pr. 225; *Irick v. Black*, 17 N. J. Eq. 189.

1. *Forsythe v. Winans*, 44 Ohio St. 277; *Mead v. Norris*, 21 Wis. 310; *Monroe v. Harkness*, 1 Cranch (U. S.) C. C. 157; *Monroe v. Bradley*, 1 Cranch (U. S.) C. C. 158; *Commercial Bank v. Waters*, 18 Miss. 559; *People v. Spalding*, 2 Paige (N. Y.) 326; *Richards v. West*, 2 Green (N. Y.) Ch. 456; *People v. Sturtevant*, 9 N. Y. 263.

Injunctions issued by courts of competent jurisdiction must be fairly and honestly obeyed, and it would be unbefitting the dignity and self-respect of the court to permit them to be evaded by mere subterfuges or tricks. *Wilcox Silver Plate Co. v. Schimmel*, 59 Mich. 524.

2. *Wells v. Oregon etc. R. Co.*, 19 Fed. Rep. 20.

3. *Rapalje Contempts*, § 43; *Atty. Gen. v. Great Northern R. Co.*, 4 De Gex & Sm. 75; *Dawson v. Paver*, 5 Hare 415; *Mowrer v. State*, 107 Ind. 539.

4. *Smith v. Halkyard*, 19 Fed. Rep. 602; *Winslow v. Nayson*, 113 Mass. 411.

5. *Hudson v. Plets*, 11 Paige (N. Y.) 180; and see *Parker v. Wakeman*, 10 Paige (N. Y.) 485.

Illustrations of What Constitute Viola-

A court may, in vindication of its injunctive order, punish a party for a wilful violation thereof, notwithstanding such order ought not to have been granted;¹ but it may not, in such case

tion.—Where an injunction has been granted to stay proceedings in an action of law, the mere delivery of a declaration has been *held* a violation of the writ. *High on Inj.*, § 1434; *Mills v. Coffy*, 1 *Meriv.* 3. And the service of a trial notice in the action enjoined. *Clark v. Wood*, 2 *Halst. (N. J.) Ch.* 458; *Bird v. Branker*, 2 *Sim. & St.* 186. Or obtaining a change of venue. *Pavient v. Bensusan*, 13 *Sim.* 522. *High on Inj.*, § 1434.

The agents of one against whom an injunction is awarded, having knowledge of the order, may be held liable for acts committed in violation of its terms. *Wellesley v. Mornington*, 11 *Beav.* 181. Yet one who was not a party to the proceedings and who has acquired no rights from any of the parties *pendente lite*, is not guilty of a breach of the injunction by exercising a right which belonged to him before the suit. *Bootle v. Stanley*, 2 *Eq. Ca. Ab.* 528.

Where an injunction was granted restraining a party from running a steam boat between two points, the defendant proceeded to carry passengers a portion of the distance, when they were transferred to a boat belonging to another person, in which they completed the passage. He also carried passengers from one terminus of the route to a point out of the direct course, and after a stop of a few minutes proceeded to the end of the route. *Held*, that either course of proceeding was a violation of the injunction. *Ogden v. Gibbons*, 4 *Johns. (N. Y.) Ch.* 174.

A statute of 1876 authorized the appointment of deputy county clerks, but provided that they should receive no salaries from their respective counties. A statute of 1882 directed that in all counties where the county clerks were then paid by annual salary, the deputy clerk should receive an annual salary of \$2,000, payable quarterly. A bill was filed by some tax payers and citizens of Camden county, alleging that the statute of 1882 was unconstitutional, and thereupon an injunction was issued, restraining the county collector from paying, and the defendant from receiving, as deputy county clerk, any salary thereunder. Pending the suit, the board

of freeholders passed a resolution appropriating \$160 per month to the defendant for his services in the county clerk's office from the time the bill was filed and injunction issued. *Held*, that, although the board of freeholders were not parties to this suit, the payment of the money by the county collector, and its reception by the defendant, were palpable violations of the injunction. *Gibbs v. Morgan*, 39 *N. J. Eq.* 79.

Upon a bill filed in the high court of chancery, an injunction was granted restraining the defendant, A, from giving, and the defendants, B and wife, from receiving from said A, a preference over his other creditors. *Held*, that proceedings subsequently instituted by B and wife in the county court as a court of equity, and a decree thereby obtained giving them such preference, were violations of said injunction, and that the former court had a right to prohibit by injunction the execution of such decree and to treat the same, with the proceedings by which it was obtained, as a nullity. *Winn v. Albert*, 2 *Md. Ch.* 42.

1. *Kaehler v. Halpin*, 59 *Wis.* 40; *Rogers Manufacturing Co. v. Rogers*, 38 *Conn.* 121; *People v. Sturtevant*, 9 *N. Y.* 263; *Woodward v. Earl of Lincoln*, 3 *Swans.* 626; *Moat v. Holbein*, 2 *Edw. (N. Y.) Ch.* 188; *Sullivan v. Judah*, 4 *Paige (N. Y.)* 444; *Richards v. West*, 2 *Green (N. J.) Ch.* 456. And see *Blake v. Blake*, 7 *Beav.* 514; *Chuck v. Cremer*, 2 *Ph.* 113; *Fennings v. Humphrey*, 4 *Beav.* 1; *Erie R. Co. v. Ramsey*, 45 *N. Y.* 637; affirming *s. c.*, 3 *Lans. (N. Y.)* 178, *Mayor v. New York & S. I. F. Co.*, 64 *N. Y.* 623.

Where the district court has jurisdiction of the parties and of the subject matter, the fact that an order of injunction has been erroneously granted affords no justification or excuse for its violation before it has been properly dissolved. *Billard v. Erhart*, 35 *Kan.* 616.

The validity of an injunction is not affected by a failure to require an indemnity bond to accompany it; nor is a party for that reason justified in disobeying the mandate, but if aggrieved, his remedy is in a motion to dissolve. *Young v. Rollins*, 90 *N. Car.* 125.

order the party disobeying the same to pay any sum as indemnity to the opposite party.¹

In injunction proceedings, the order of a court having jurisdiction of the subject matter and of the parties, even if erroneous, is not void, and, until reversed, must be obeyed.² And a person in contempt for violating an injunction cannot move to dissolve till he has purged himself of contempt.³ Nor shall an enjoined party, upon a rule for contempt for disobedience of an injunction, justify on the ground that the injunction was not authorized by the allegations of the petition.⁴

(a) *Jurisdiction*.—The power to punish for the violation of an injunction is incident to the power to grant an injunction, and may be exercised by any judge having jurisdiction of the cause in which an injunction was ordered.⁵ A court has no authority to issue an injunction in a case not within its jurisdiction, and it cannot, therefore, punish a disregard of the injunction granted as a contempt.⁶

(b) *Jurisdiction of Special Judge*.—A special judge, appointed to hear and determine a particular case, has jurisdiction to punish a party for a violation of a restraining order previously granted by the regular judge.⁷

(c) *Injunction Granted in Vacation*.—The power of a court, possessing equity jurisdiction, to punish, as a contempt, the violation of an injunction or restraining order, lawfully granted by the court or a judge thereof at chambers or in vacation, is a power which has long been exercised and never seriously questioned.⁸

(d) *Motive*.—The question of the motive or intent with which the writ was disobeyed does not alter or vary the responsibility for the violation. Where the writ has been duly served on defendants, they are liable for its violation in whatever capacity or from whatever motive they may have acted.⁹

1. Kaehler v. Halpin, 59 Wis. 40; Kaehler v. Dobberpuhl, 56 Wis. 497.

2. State v. Baldwin, 57 Iowa 266; People v. Sturtevant, 9 N. Y. 263.

3. Jacoby v. Goetter, 74 Ala. 427.

4. State v. Levy, 36 La. An. 941.

5. Kerr Injunct. 637; Stimpson v. Putnam, 41 Vt. 238.

6. State v. Voorhies, 37 La. An. 605; Darst v. People, 62 Ill. 306; Dickey v. Reed, 78 Ill. 261; Walton v. Develing, 61 Ill. 201; Andrews v. Knox Co., 70 Ill. 65. See *In re Perry*, 30 Wis. 268.

Where the law authorizes an election to be called in a township to determine whether a majority are in favor of subscribing to the stock of a railroad company, and the election is called in pursuance to the requirements of the law, a court of equity has no power to re-

strain the officers from holding, or the people from voting at such election. A writ of injunction issued in such a case is void, and the officers and people are not bound to obey it, as the court has no jurisdiction to issue the writ. *Walton v. Develing*, 61 Ill. 201; *Darst v. People*, 62 Ill. 306.

7. *Mowrer v. State*, 107 Ind. 539.

8. *Rapalje Contempts*, § 20; *Mowrer v. State*, 107 Ind. 539.

9. *Quackenbush v. Vanriper*, 2 Green (N. J.) Ch. 350. See *Sullivan v. Judah*, 4 Paige (N. Y.) 444. On rule for contempt the defendant showed that his violation of an injunction was not intentional, and that he had misconceived his responsibility. *Held*, that the court might properly reserve the matter for future consideration in connection with

(e) *Notice* of the order should be brought to the knowledge of the party enjoined. He need not be served with it. If he has knowledge of it in open court, such notice is amply sufficient to insure his obedience or incur the consequences of disobedience.¹

(f) *Advice of Counsel*.—The fact that the defendants, in violating an injunction, may act under the erroneous advice of counsel, will not protect them from liability for injury sustained by the adverse party, although such advice may protect them from further punishment.²

his subsequent conduct and tax against him the cost of the rule. *Spink v. Francis*, 19 Fed. Rep. 678. See *Watson v. Citizens' Savings Bank*, 5 S. Car. 159.

1. *Milne v. Van Buskirk*, 9 Iowa 558; *Wimpy v. Phinzy*, 68 Ga. 188; *Poertner v. Russel*, 33 Wis. 193; *Howe v. Willard*, 40 Vt. 654; *Hull v. Thomas*, 3 Edw. (N. Y.) Ch. 236; *Fowler v. Farnsworth*, 1 Swan (Tenn.) 1; *Skip v. Harwood*, 3 Atk. 564. See *Powel v. Follet*, Dick. 116; *Hearn v. Tennant*, 14 Ves. 136; *McNeil v. Garratt*, 1 Cr. & Ph. 98. See *Elliott v. Osborne*, 1 Cal. 396; *Haring v. Kauffman*, 13 N. J. Eq. (2 Beas.) 397; *Coddington v. Webb*, 4 Sandf. (N. Y.) 639; *State v. Rush Co.*, 35 Kan. 150.

Where an injunction was granted against a defendant, his servants, agents and employes, restraining them from interfering with the possession, use and enjoyment by complainant of a certain house, an attorney who represented the defendant on the hearing, and who had notice of the injunction, was bound thereby; and he could not, by virtue of subsequent employment by other parties claiming the house, take possession of the same, or put others in it. Having done so, an order requiring him to remove the tenants put in the house by him, and return the same to the complainant or his agents, by a specified time, or in default that he be imprisoned until he should do so, was right. *Wimpy v. Phinzy*, 68 Ga. 188.

Service of a notice of an application for an injunction on a corporation at its office is good service on all the company's directors. *Brown v. Pac. etc. Co.*, 5 Blatchf. (U. S.) 525.

Where injunction issues against the corporation of a city, and is served upon the mayor, it is sufficient service, and binds all the officers of the city and members of the city government, who have knowledge or notice of it. *People v. Sturtevant*, 9 N. Y. (5 Seld.) 263.

A bill of injunction is well served by leaving a copy at the residence of the defendant. *Morris v. Bradford*, 19 Ga. 527.

A notice by telegraph of the granting of an injunction is sufficient to place the party disregarding such notification in contempt, provided such notice proceed from a source entitled to credit, and inform the defendant clearly and plainly from what act he must abstain. *Cape May etc. R. Co. v. Johnson*, 35 N. J. Eq. 422; *In re Bryant*, 4 Ch. D. 98.

If the defendant of an injunction obtains knowledge of its contents and of its having issued, no matter how he gets his information, he is amenable to the law for the violation of its mandate as if the writ had been regularly served upon him by the proper officer of the court. *Fowler v. Farnsworth*, 1 Swan (Tenn.) 1; *Thebaut v. Canova*, 11 Fla. 143; *Cumberland etc. Co. v. Hoffman etc. Co.*, 39 Barb. (N. Y.) 16.

Although a party who has obtained an injunction has so long delayed to have it served as to furnish adequate ground for its dissolution on motion therefor, nevertheless such neglect does not justify the respondent, after the service, and before a dissolution, in violating it. *Howe v. Willard*, 40 Vt. 654.

2. *Cape May etc. R. Co. v. Johnson*, 35 N. J. Eq. 422; *Lansing v. Easton*, 7 Paige Ch. (N. Y.) 363; *Roosevelt v. Edson*, 1 How. (N. Y.) Pr. 250; *People v. Edson*, 19 Jones & S. (N. Y.) 257; *People v. Compton*, 1 Duer (N. Y.) 522; *Smith v. Cook*, 39 Ga. 194; *Mead v. Norris*, 21 Wis. 310; *Hawley v. Bennett*, 4 Paige (N. Y.) 163; *McKillopp v. Taylor*, 10 C. E. Green (N. J.) 139; *Columbia Water Power Co. v. Columbia*, 4 S. Car. 388; *Rogers v. Patterson*, 4 Paige (N. Y.) 450.

In *Erie R. Co. v. Ramsey*, 45 N. Y. 637, FOLGER, J., said: "There was abstract jurisdiction then, in the learned justice who granted the injunction

(g) *The attorneys*, in a cause in which an injunction is granted, are chargeable as for contempt if they co-operate with the parties to violate the injunction and advise its violation.¹

(h) *Interference with Status of Property*.—An order of injunction prohibiting any disturbance of, or interference with, the *status* of property, pending litigation concerning it, does not prevent any party, having an interest in such property, from doing whatever is reasonably necessary for its preservation.² So, when subsequent events have so changed the general or immediate situation of property, for the maintenance of the *status* of which an order of injunction has been granted, as to render a literal compliance with the order impracticable, a reasonable conformity with the spirit of such order is all that can be insisted upon.³

(i) *Receiver of Railroad*.—Where an injunction is granted and served on a railway company, restraining it and its servants from

order, to entertain the question and to decide whether upon the complaint and affidavits in this action an injunction order should be granted or be refused. Having that jurisdiction, that power of decision when the order was granted, it was to be respected as the legitimate and valid order of the court, so long as it was not set aside by the court itself, or upon appeal. The defendant not having obeyed it, but having taken a proceeding in the action, proceedings in which were enjoined, he was in contempt. But it is evident to us that this contempt was not headstrong. He was advised by counsel that the order was void, and might be disregarded. And though the advice of counsel will not excuse a disregard of an order, so far as the rights of a party have not been affected (*Hawley v. Bennett*, 4 Paige (N. Y.) 163), we cannot but perceive that both counsel and client had reason for faith that the advice was sound. It had been declared in an opinion from the general term of the district in which this order of injunction was granted, and in a case in which the plaintiff in this action was a litigant, that an order of injunction made by a judge in an action pending in the supreme court in one district, restraining an action pending in that court in another district, was absolutely void and might be disregarded. *Schell v. Erie R. Co.*, 51 Barb. (N. Y.) 568. As this stood unreversed, counsel and client might easily conceive that they could take it as a guide to their conduct, and though it does not justify, it does palliate. Courts are authorized to take such facts into consideration in de-

termining the extent of punishment which is to be awarded against a defendant for a breach of the injunction order. *Sullivan v. Judah*, 4 Paige (N. Y.) 447. But the least that a court can do in such a case is to require the derelict party to pay his adversary the costs of the proceedings against him for contempt." See also *Columbia Water Power Co. v. Columbia*, 4 S. Car. 388; *Smith v. New York Consolidated Stage Co.*, 18 Abb. Pr. (N. Y.) 429.

1. *Watson v. Citizens' Bank*, 5 S. Car. 159.

Where an attorney has two clients, one of whom is enjoined, and the other, who is in an independent position, having or claiming different rights or interests, is not enjoined, such attorney cannot ordinarily be charged with violation of the injunction in advising or acting professionally for the client not enjoined; his being enjoined as attorney for one client does not limit or restrain his professional action for others. *Salter v. Merritt*, 75 Ill. 268; *People v. Randall*, 73 N. Y. 416.

2. *Behrens v. McKenzie*, 23 Iowa 333.

3. *Robertson v. Bingley*, 1 McCord (S. Car.) Ch. 333.

Where, during the pendency of an action respecting the ownership and custody of a piano, "the defendant and all other persons" are enjoined from removing it from the defendant's house, where it is situate, but the defendant, before the action is determined, and without reporting his intention to the court, rents his house and moves to another State, leaving the piano in the

obstructing a public avenue, in a city, with its trains, it will be binding upon a receiver of the company subsequently appointed, and such receiver, the same as a subsequent purchaser, will be punishable for contempt for disobeying the mandate of the writ.¹

(j) *Acts Enjoined Pending Appeal*.—Where a preliminary injunction is granted, and dismissed on the hearing in the court below, an appeal from that decree does not revive the injunction, and the defendant is not liable for violating it.²

(k) *Punishment for Breach*.—An attachment for contempt is the proper mode of enforcing obedience to a continuing order in the form of an injunction. But the defendant's guilt must be clearly and explicitly established.³

The proper practice to punish for contempt in violating an injunction is by motion to commit, upon proper notice to the parties.⁴

(l) *Laches*.—If an injunction is made broader in its scope than was intended by the order under which it was issued, the defendant should, on being served with it, take immediate measures to set it aside for that reason, and not wait, to raise the objection, until the hearing of a motion for an attachment for violation.⁵

(m) *Proof of Violation*.—The basis of a precept for violating an injunction is an authenticated copy of the injunction, and satisfactory proof that it has been violated, and this fact may be established by affidavits.⁶ The service of the writ of injunction should be shown, since without such service or notice of the injunction there can be no violation, and the attachment pro-

house, but making no arrangement for its storage, the plaintiff may remove the instrument to his own house for safe-keeping without being guilty of contempt. *Mowrer v. State*, 107 Ind. 539.

1. *Safford v. People*, 85 Ill. 558.

2. *Brevoort v. Detroit*, 24 Mich. 322. See *Sixth Avenue R. Co. v. Gilbert Elevated R. Co.*, 71 N. Y. 430.

An appeal from a judgment granting a perpetual injunction does not suspend the injunction during the pendency of the appeal, nor does it deprive the court in which the judgment was rendered of the power to punish a disobedience of the injunction as a contempt. The existence of the power devolves upon the court the duty to entertain a proper application on the subject, and such an application being made to examine the facts, and render a decision thereon. *Heinlen v. Cross*, 63 Cal. 44.

3. *State v. Baldwin*, 57 Iowa 266; *Probasco v. Probasco*, 3 Stew. (N. J.) 61; *Magennis v. Parkhurst*, 3 Green (N. J.) Ch. 433; *Monroe v. Harkness*, 1 Cranch (U. S.) C. C. 157; *Newark Plank Road Co. v. Elmer*, 9 N. J. Eq.

(1 Stock.) 754; *Monroe v. Bradley*, 1 Cranch (U. S.) C. C. 158.

The court may imprison for a contempt in violating an injunction. *Monroe v. Bradley*, 1 Cranch (U. S.) C. C. 158. The remedy by attachment was adopted by the English court of chancery at an early day, for the punishment of violations of injunctions. In addition to fine and imprisonment the penalty may also be enforced by *scire facias* in favor of the petitioner, in cases where an act is prohibited under a penalty to be paid to him. *Rogers Mfg. Co. v. Rogers*, 38 Conn. 121.

4. *United States v. Berry*, 24 Fed. Rep. 780; *Gray v. Chicago etc. R. Co.*, 1 Woolw. (U. S.) 63; *Worcester v. Truman*, 1 McLean (U. S.) 483; *Folger v. Hoagland*, 5 Johns. (N. Y.) 235; *Durant v. Supervisors*, 1 Woolw. (U. S.) 372; *Ex parte Kearney*, 7 Wheat. (U. S.) 38; *Winslow v. Nayson*, 113 Mass. 411; *Edwards v. Dykeman*, 95 Ind. 509; *Deeds v. Deeds*, 1 Greene (Iowa) 395.

5. *Sickels v. Borden*, 4 Blatchf. (U. S.) 14. See *Mills v. Cobby*, 1 Meriv. 3.

6. *State v. Myers*, 44 Iowa 580.

ceedings may be dismissed or an attachment refused for want of such proof.¹

(n) *Extent of Fine Imposed.*—In contempt for violation of an injunction, the amount of fine and duration of imprisonment to be inflicted are within the sole discretion of the court which issued the injunction, and no court of review has any control over the matter.² In case of a violation of a temporary injunction, the fine cannot be divided between the State and the petitioner, but the party in contempt should be discharged without payment to the petitioner of the costs and expenses of the proceedings on the attachment.³

56. Dissolution.—On a complete and full denial of the allegations on which the equity of the bill rests, the injunction should be dissolved.⁴

1. *State v. Gilpin*, 1 Del. Ch. 25; *Whipple v. Hutchinson*, 4 Blatchf. (U. S.) 190.

2. *Rogers Mfg. Co. v. Rogers*, 38 Conn. 121; *Thweatt v. Gammell*, 56 Ga. 98; *Williams v. Lamkins*, 53 Ga. 200.

3. *Rogers Mfg. Co. v. Rogers*, 38 Conn. 121.

4. *Saunders v. Cavett*, 38 Ala. 51; *Miller v. Bates*, 35 Ala. 580; *Brooks v. Diaz*, 35 Ala. 599; *Taylor v. Dickinson*, 15 Iowa 483; *Case v. Green*, 4 Ind. 526; *Burnett v. Whitesides*, 13 Cal. 156; *Moore v. Ferrell*, 1 Ga. 7; *Hemphill v. Ruckersville Bank*, 3 Ga. 435; *Clark v. Clegborn*, 6 Ga. 220; *Jones v. Joyner*, 8 Ga. 562; *West v. Rouse*, 14 Ga. 715; *Edmondson v. Jones*, 19 Ga. 19; *Boring v. Rollins*, 20 Ga. 623; *Miller v. Maddox*, 21 Ga. 327; *Alexander v. Markham*, 25 Ga. 148; *Gravely v. Southerland*, 29 Ga. 335; *Weaver v. Garner*, 28 Ga. 503; *Howard v. Marine Bank*, 30 Ga. 841; *Thrasher v. Partee*, 37 Ga. 392; *Applewhite v. Baldwin*, 30 Ga. 915; *Dorsey v. Hagerstown Bank*, 17 Md. 408; *Hubbard v. Mobray*, 20 Md. 165; *Wooden v. Wooden*, 3 N. J. Eq. (2 Green) 429; *Atty. Gen. v. Oakland Co.*, Walk. (Mich.) 90; *Hatch v. Daniels*, 5 N. J. Eq. (1 Hals.) 14; *Washer v. Brown*, 5 N. J. Eq. (1 Hals.) 81; *Masterton v. Barney*, 11 N. J. Eq. (3 Stock.) 26; *Greenin v. Hoey*, 9 N. J. Eq. (1 Stock.) 137; *Kaighn v. Fuller*, 14 N. J. Eq. (1 McCart.) 419; *Marshman v. Conklin*, 17 N. J. Eq. 282; *Gould v. Jacobsohn*, 18 How. Pr. (N. Y. 158; *Finnegan v. Lee*, 18 How. (N. Y.) Pr. 186; *Lindsey v. Etheridge*, 1 Dev. & B. (N. Car.) Eq. 36; *Manhattan etc. Co. v. Barker*, 36 How. (N. Y.) Pr. 233; *Perkins v. Hollowell*, 5 Ired. (N. Car.) Eq. 24; *Sharpe v. King*, 3 Ired.

(N. Car.) Eq. 402; *Miller v. Washburn*, 3 Ired. (N. Car.) 161; *Smith v. Harkins*, 3 Ired. (N. Car.) 613; *Radcliff v. Alpess*, 3 Ired. (N. Car.) 556; *Wright v. Grist*, 1 Busb. (N. Car.) Eq. 203; *Machette v. Hodges*, 1 Brews. (Pa.) 313; *Dyche v. Patton*, 8 Ired. (N. Car.) Eq. 295; *Hansborough v. Towns*, 1 Tex. 58; *Rosset v. Greer*, 3 W. Va. 1; *Linly v. Bristow*, 12 Tex. 60.

The answer must satisfactorily deny the equity of the bill. *Johnson v. Wide West etc. Co.*, 22 Cal. 479; *Thomas v. Horn*, 24 Ga. 481; *Horn v. Thomas*, 19 Ga. 270; *Callaway v. Jones*, 19 Ga. 277; *Rich v. Thomas*, 4 Jones (N. Car.) Eq. 71; *Bouldin v. Baltimore*, 15 Md. 18.

If the allegations be weakly made in the bill, as upon belief merely, and strongly denied in the answer, the injunction should be dissolved. *Williams v. Garrison*, 29 Ga. 503.

If the answer and the affidavits to support it fully deny the bill, an injunction must be dissolved. *Morris Canal etc. Co. v. Fagan*, 18 N. J. Eq. 215; *Suffern v. Butler*, 18 N. J. Eq. 220.

A mere formal or technical denial of the charges of a bill is not as of course sufficient to dissolve an injunction. *Horner v. Jobs*, 13 N. J. Eq. (2 Beas.) 19; *Brown v. Fuller*, 13 N. J. Eq. 271; *Everly v. Rice*, 4 N. J. Eq. (3 Green) 553.

Where there is equity on the face of the bill, an injunction will not be dissolved on the coming in of the answer, unless there is a positive denial of all the material facts which form that equity based on personal knowledge; denial on information and belief is not sufficient. *Holmes v. George*, 24 Ga.

636; *Coffee v. Newson*, 8 Ga. 444; *Ketchens v. Howard*, 30 Ga. 931; *Doub. v. Barnes*, 1 Md. Ch. 127; *Calhoun v. Cozens*, 3 Ala. 498; *Nelson v. Robinson*, *Hempst.* (U. S.) 464; *Kent v. Richards*, 3 Md. Ch. 392; *Smith v. Appleton*, 19 Wis. 468; *Norton v. Woods*, 5 Paige (N. Y.) 249; *Rodgers v. Rodgers*, 1 Paige (N. Y.) 426; *Hooker v. Austin*, 41 Miss. 717; *Society etc. v. Low*, 17 N. J. Eq. 19; *Higbee v. Camden etc. R. Co.*, 19 N. J. Eq. 276; *Johnson v. Wide West etc. Co.*, 22 Cal. 479; *Horn v. Thomas*, 19 Ga. 270; *Thomas v. Horn*, 24 Ga. 481; *Callaway v. Jones*, 19 Ga. 277; *Bouldin v. Baltimore*, 15 Md. 18; *Rich v. Thomas*, 4 Jones (N. Car.) Eq. 71; *Gelston v. Rullman*, 15 Md. 260; *Pledger v. McCauley*, 25 Ga. 46; *McGinnis v. Inferior Court*, 30 Ga. 47.

Where under Cal. Prac. act, § 254, a preliminary injunction is granted to restrain the defendant from selling the premises in controversy, it will be dissolved upon the filing of an answer setting up paramount title in the defendants. *Curtis v. Sutter*, 15 Cal. 259.

In Maryland, where the material allegations of a bill are denied by the answer, the motion to dissolve an injunction must prevail, unless the bill can be supported by testimony taken under Stat. 1835, ch. 380, § 8, Washington University v. Green, 1 Md. Ch. 97. In North Carolina it must appear that the answer fully meets the plaintiff's equity. *Deaver v. Eller*, 7 Ired. (N. Car.) Eq. 24; *Allen v. Pearce*, 6 Jones (N. Car.) Eq. 309.

An injunction may be dissolved on the coming in of the answer denying the equity of the bill; but the bill should not be dismissed in such case. *Beams v. Denham*, 3 Ill. (2 Scam.) 58; *Bettison v. Jennings*, 8 Ark. 287; see also *Fulgham v. Chevallier*, 10 Tex. 518. It may be partially dissolved in accordance with the case made out by the answer. *Edwards v. Perryman*, 18 Ga. 374; *Martin v. Spier*, 1 Hayw. (N. Car.) 369.

A preliminary injunction granted *ex parte* upon the bill alone should be dissolved upon an answer fully denying the facts upon which the bill raised the plaintiff's equity. *Cowles v. Carter*, 4 Ired. (N. Car.) Eq. 105; *Withers v. Dickey*, 1 Stew. (Ala.) 190.

In the case of a common injunction, where the answer is full and the plaintiff fails to prove his allegations by any admission in the answer, being without

proof his injunction must be dissolved. *Mims v. McLean*, 6 Jones (N. Car.) Eq. 200; *Jones v. McKenzie*, 6 Jones (N. Car.) Eq. 203. If the answer does not confess the equity set up in the bill, and is not evasive but contains a fair response to all the allegations, the injunction will be dissolved as a matter of course. *Green v. Phillips*, 6 Ired. (N. Car.) Eq. 223.

The facts set forth in the complaint asking for an injunctive order, etc., in this case were improbable in themselves and the equities alleged in the complaint having been fully denied by the answer, and the affidavits filed in support of it, and there being no counter affidavits, a motion to dissolve the injunctive order should have been granted. *Schoeffler v. Schwarting*, 17 Wis. 30.

An injunction ought not to be dissolved or a bill dismissed upon an answer which was not made under oath and where evidence of the truth of the facts were not furnished. *Gray v. McCance*, 11 Ill. 325.

It is erroneous to dissolve an injunction for more than the amount claimed in the answer. *Vandyke v. Hardin*, 6 J. J. Marsh. (Ky.) 122.

Where bill sets forth a contract and the plaintiff's construction thereof, and the answer admits the contract and claims under it, but denies the correctness of the plaintiff's construction, this is not such a denial as *per se* entitles the respondent to a dissolution of the pending injunction. *Hughes v. Tinsley*, 80 Va. 259.

Exceptions.—The court, in *Carter v. Bennett*, 6 Fla. 214, 236, remark that it is the general practice that if the answer denies fully all the circumstances upon which the equity is founded, credit is given to the answer and the injunction dissolved; but there are exceptions quite as important as the rule itself. Where parties are charged with fraud, unless the answers are full and satisfactory, the injunction, if right in the first instance, ought to be retained until the hearing. *Hayden v. Thrasher*, 20 Fla. 715; *Roberts v. Anderson*, 2 Johns. Ch. (N. Y.) 204.

Mere denials of fraud, or of fraudulent intent, without a full explanation of the facts disclosed in the bill and in affidavits filed in support of the bill, leave the question of fraud unsettled, and in such case it rests in the discretion of the court to dissolve an interlocutory injunction. *Jenkins v. Wallers*, 80 Va. 668; *Howell v. Whitehall*, 80 Va. 668.

Whenever the allegations of the bill are not sufficient to warrant the interference of the court by injunction, the injunction may properly be dissolved.¹

It rests in the sound discretion of the court to dissolve an injunction upon the coming in of the answer denying the equities of the bill, or to continue it to the final hearing on the merits, if such course shall seem best calculated to subserve the ends of justice, and to protect the rights of all parties in interest.²

"So where the case, as presented by the bill, is one which seems to require investigation, and the effect of dissolving the injunction would be to place the property which is the subject of controversy beyond the control of the court in which the action is pending, and would be equivalent to a complete denial of the relief sought by the bill, the injunction will not be dissolved." High on Inj., § 900. *Nelson v. Armstrong*, 5 Gratt. (Va.) 354; *Beale v. Diggs*, 6 Gratt. (Va.) 582, 591.

Where the circumstances are such as to lead the court to believe it quite probable that, upon a final hearing, the material allegations of the complaint will turn out to be true, it will be an exception to the rule that upon the coming in of an answer denying all the equities of the complaint, a temporary injunction will be dissolved. *Stees v. Kranz*, 32 Minn. 313; *Mulock v. Mulock*, 26 N. J. Eq. 461; *Pineo v. Heffelfinger*, 29 Minn. 183.

An injunction will not be dissolved merely because the complainant, in his bill, has unintentionally misstated some of the facts on which his claim to relief is founded, such misstatements not affecting the merits. *Frone v. Warren Co.*, 33 N. J. Eq. 464.

In the cases of special injunction, if the merits are satisfactorily denied by the answer, the injunction is generally dissolved; but there are exceptions to the rule, chiefly in cases of irreparable mischief. *Purnell v. Daniel*, 8 Ired. (N. Car.) Eq. 9; *Troy v. Norment*, 2 Jones (N. Car.) Eq. 318; *Ryckman v. Coleman*, 21 How. (N. Y.) Pr. 404; *Dubois v. Budlong*, 10 Bosw. (N. Y.) 700; s. c., 15 Abb. (N. Y.) Pr. 445; *Poor v. Carleton*, Sumn. 70; *Linton v. Denham*, 6 Fla. 533; *Scott v. Ames*, 11 N. J. Eq. (3 Stock.) 261.

1. *Henderson v. Marcell*, 1 Kan. 137; *Beard v. Geran*, Hard. (Ky.) 14; *Sutherland v. Lagro etc. Co.*, 19 Ind. 192; *Norris v. Norris*, 27 Ala. 519; *Richardson v. Prevot*, 1 Ill. (Breese) 216; *Harri-*

son v. McCrary, 1 Ala. Sel. Cas. 619; *Chesapeake etc. Co. v. Baltimore etc. R. Co.*, 4 Gill & J. (Md.) 1; *Westcott v. Gifford*, 5 N. J. Eq. (1 Hals.) 24; *Gilbert v. Cooley*, Walk. (Mich.) 494; *Van Horn v. Talmage*, 8 N. J. Eq. (4 Hals.) 108; *Mullen v. Jennings*, 9 N. J. Eq. (1 Stock.) 192.

2. *Jenkins v. Waller*, 80 Va. 668; *Purnell v. Daniel*, 8 Ired. (N. Car.) Eq. 9; *Troy v. Norment*, 2 Jones (N. Car.) Eq. 318; *Poor v. Carleton*, 3 Sumn. (U. S.) 83; *Linton v. Denham*, 6 Fla. 533; *Scott v. Ames*, 11 N. J. Eq. (3 Stock.) 261; *Dubois v. Budlong*, 10 Bosw. (N. Y.) 700; s. c., 15 Abb. Pr. (N. Y.) 445; *Ryckman v. Coleman*, 21 How. (N. Y.) Pr. 404.

An injunction should not be entered without strong reason. *Buchanan v. Ford*, 29 Ga. 490.

Mercantile firms having on hand large stocks of perishable goods, confessed judgments for large sums in favor of certain preferred creditors. Executions were issued and levied, and the goods advertised for sale. Unpreferred creditors bring their bill charging fraud in the confession of said judgments, usury in the debts whereon the judgments were founded, want of jurisdiction in the courts wherein they were confessed, etc., and obtain injunction to sale, and appointment of receiver to take charge of the goods, and sell same publicly or privately, upon giving bond in sufficient penalty. Judgment creditors present their answers to the bill, and move to dissolve injunction in vacation. No depositions had been taken; but affidavits sustain the allegations of the bill, and receiver had executed ample bond and taken possession of the goods. The motion to dissolve was overruled, and the injunction continued to the hearing on the merits, the decision of all questions being reserved until then. *Held*: Such action is sustained by sound judicial discretion under the circumstances, and should be affirmed. *Howell v. Whitehill*, 80 Va.

Although the allegations of an answer should be positive, yet an answer by an executor or administrator to dissolve an injunction, stating facts, "as he is informed and verily believes," is sufficient.¹ As a general rule, however, an injunction will not be dissolved without the answer of all the defendants,² or the defendant on whom the *gravamen* of the bill rests. But if the defendant who answers is liable to lay the facts before the court which show that the complainant has no equity, the injunction may be dissolved without the answer of the other defendant.³

The rule that, where several defendants are implicated in the same transaction, the answers of all must be perfected before either of them can move to dissolve an injunction, will not be enforced unless the plaintiff has taken requisite steps to compel an answer from all.⁴ Where part only of the defendants apply

668; *Jenkins v. Waller*, 80 Va. 668.

The discretion exercised in refusing to dissolve an injunction will not be interfered with merely on the ground that some of the allegations of the complaint are on information and belief, a portion of these allegations not being denied by the answer, and the others supported by affidavits. *Miller v. Collins*, 63 Cal. 235.

The rule that an injunction founded upon the equity alleged in a bill will be dissolved when that equity is fully denied by the answer is not imperative; it is subject to the discretion of the court. *Camden etc. R. Co. v. Stewart*, 18 N. J. Eq. 489; *Firmstone v. DeCamp*, 17 N. J. Eq. 309; *James v. Lemley*, 2 Ired. (N. Car.) Eq. 278.

Although the equity of a bill is not answered, yet if the continuance of the injunction is a material injury to the defendant, and its dissolution is no present injury to the complainant and cannot prejudice his right, the court may in its discretion dissolve it. *Bechtel v. Carslake*, 11 N. J. Eq. (3 Stock.) 244; *Wooding v. Malone*, 30 Ga. 979.

When an injunction is granted or refused upon the facts made by the bill, answer and affidavits, this court will not interfere with the discretion of the court below unless it has been abused. But if there be errors of law committed by the chancellor, the judgment will be reversed, though he may be right on the facts. *Poole v. Sims*, 67 Ga. 36.

1. *Coale v. Chase*, 1 Bland (Md.) 136; *Clayton v. Lyle*, 2 Jones (N. Car.) Eq. 188.

2. *Baltimore etc. R. Co. v. Wheeling*, 13 Gratt. (Va.) 40; *Wisham v. Lippincott*, 9 N. J. Eq. (1 Stock.) 353; *Jones*

v. McGill, 1 Bland (Md.) 177; *Stoutenburg v. Peck*, 4 N. J. Eq. (3 Green) 446; *Cape Sable Co.'s Case*, 3 Bland (Md.) 606; *Reynolds v. Mitchell*, 1 Ill. (Breese) 177; *Price v. Clevenger*, 3 N. J. Eq. (2 Green) 207; *McVickar v. Walcott*, 4 Johns. (N. Y.) 510.

3. *Fowler v. Williams*, 20 Ark. 641; *Long v. Brown*, 4 Ala. 622; *Dunlap v. Clements*, 7 Ala. 539; *Gregory v. Stillwell*, 4 N. J. Eq. (2 Hals.) 51; *Goodwyn v. State Bank*, 4 Dessaus. (S. Car.) 389; *Ashe v. Hale*, 5 Ired. (N. Car.) Eq. 55; *Dennis v. Green*, 8 Ga. 197; *Heck v. Vollmer*, 29 Md. 507; *Vliet v. Lowmason*, 2 N. J. Eq. (1 Green) 404; *Rogers v. Hosack*, 18 Wend. (N. Y.) 319; *Depeyster v. Graves*, 2 Johns. (N. Y.) Ch. 148; *Coleman v. Gage*, 1 Clarke (N. Y.) Ch. 295.

4. *Ward v. Van Bakkelen*, 1 Paige (N. Y.) 100; *Robinson v. Davis*, 11 N. J. Eq. (3 Stock.) 302; *Mallett v. Weybossett Bank*, 1 Barb. (N. Y.) 217; *Ijams v. Ijams*, Phill. (N. Car.) Eq. 39; *Wisham v. Lippincott*, 9 N. J. Eq. (1 Stock.) 353; *Baltimore etc. R. Co. v. Wheeling*, 13 Gratt. (Va.) 40.

"There is no rule of a court of equity which requires, in every case, that before an injunction will be dissolved on motion every defendant must answer the bill. If the defendant who has failed to answer is a formal defendant, or if his answer would be in reference only to uncontroverted facts, the court may order the dissolution of an injunction, though such an answer has not been filed, if the defendants really interested in the subject of controversy have answered and deny on oath every material allegation in the bill, and no proof is offered to sustain the allegations of the bill." *Hayzlett v. Mc-*

to dissolve an injunction, it can be dissolved as to them only.¹ The representatives of a deceased party need not answer where the foundation of the injunction is a fraud charged against the deceased party jointly with other defendants.² If the plaintiff in an injunction case dies, his representatives will be ordered to revive the suit by a certain day, or the injunction will be dissolved.³

The answer must deny explicitly the facts on which the equity of the bill is founded; it is not sufficient that it deny the inference to be drawn from those facts.⁴

(a) *Motion*.—On a motion to dissolve an injunction, everything is to be presumed against a defendant in respect to every matter which he could answer directly, and has not; and where the equity of the bill is not denied but a new equity is introduced to repel or avoid, or where any doubt exists in the mind of the court, the injunction will not be dissolved.⁵

Millan *et al.*, 11 W. Va. 464; Livesay *v.* Feamster, 21 W. Va. 83, 103.

1. Teller *v.* Van Deusen, 3 Paige (N. Y.) 33.

2. Wakeman *v.* Gillespy, 5 Paige (N. Y.) 112.

3. Collier *v.* Bank of Newbern, 1 Dev. & B. (N. Car.) Eq. 328; Carter *v.* Washington, 1 Hen. & M. (Va.) 203; Griffith *v.* Bronaugh, 1 Bland (Md.) 547.

4. Teasey *v.* Baker, 19 N. J. Eq. 61; Carpenter *v.* Devon, 6 Ala. 718; Hunter *v.* Bradford, 3 Fla. 269; Thompson *v.* Adams, 2 Ind. 151; Smith *v.* Loomis, 5 N. J. Eq. (1 Hals.) 60; Skinner *v.* White, 17 Johns. (N. Y.) 357; Scott *v.* Loraine, 6 Munf. (Va.) 117.

5. Drury *v.* Roberts, 2 Md. Ch. 157; Cornelius *v.* Post, 9 N. J. Eq. (1 Stock.) 196; Yonge *v.* McCormick, 6 Fla. 368; Oro Fino etc. Co. *v.* Cullen, 1 Idaho 126; Salmon *v.* Clagett, 3 Bland (Md.) 125; Ferriday *v.* Selcer, 1 Freem. (Miss.) Ch. 258; Cornelius *v.* Post, 9 N. J. Eq. (1 Stock.) 196; Lyrely *v.* Wheeler, 3 Ired. (N. Car.) Eq. 170; Monroe *v.* McIntire, 6 Ired. (N. Car.) Eq. 65; Wilson *v.* Mace, 2 Jones (N. Car.) Eq. 5; Lyrely *v.* Wheeler, 3 Ired. (N. Car.) Eq. 170.

New matter set up in the answer cannot avail the defendants on a motion to dissolve. Morris Canal etc. Co. *v.* Jersey City, 12 N. J. Eq. (1 Beas.) 227; Green *v.* Pallas, 12 N. J. Eq. (1 Beas.) 267; Wooten *v.* Smith, 27 Ga. 216.

On a motion to dissolve an injunction upon the whole case the court is not bound to take the answer as true. When such a motion is made and submitted for judgment, it means a judgment

whether or not the injunction shall be dissolved and no more. Sunrall *v.* Grant, 79 Ky. 435.

A motion to dissolve an injunction for want of equity in the bill cannot perform the office of a demurrer to the bill; but, on the hearing of such motion, all amendable defects should be regarded, *pro hac vice*, as cured by amendment, and the enquiry made whether, if the facts were well pleaded, the case would be of equitable jurisdiction, and an injunction the appropriate remedy. East etc. R. Co. *v.* East Tenn. etc. R. Co., 75 Ala. 275.

Contempt.—When a defendant is in contempt, for the violation of an injunction, he cannot be heard on a motion to dissolve the injunction until he has purged the contempt. Jacoby *v.* Goetter, 74 Ala. 427.

When Not Granted.—Where a preliminary injunction has been granted upon the allegations of the petition, it will not be dissolved upon the filing of an answer which sets up matter in avoidance of the petition, but the cause will be continued to the hearing, to the end that the evidence of both parties may be heard. Huskins *v.* McElroy, 62 Iowa 508.

Only One Motion to Dissolve.—While under Code, § 3402, only one motion to dissolve an injunction may be made in a case, yet where the circuit judge who granted the injunction overruled a motion to dissolve, with leave to renew and present the same to the district court in which the main cause was pending, the renewal of the motion in the district court was not another motion, in contemplation of the statute.

A motion to dissolve an injunction for want of equity on the face of the bill will be heard before answer filed.¹

(*b*) *Laches*.—The want of due diligence on the part of the complainants in prosecuting a suit in equity is always a cause for dissolving an injunction.²

(*c*) *Irregularities*.—It is not proper for equity to absolutely dismiss a bill or dissolve an injunction for a deficient injunction bond, for nonpayment of costs, or for want of notice; it should allow these matters to be amended.³ But if that part which sets forth the facts is not sworn to, the injunction should be dissolved, though the bill should not be dismissed.⁴

If the original bill, on which an injunction was granted, be sworn to, the addition of an unsworn amendment, not needed to

but the same motion, and the district court could properly entertain the same. *Carrothers v. Newton etc. Co.*, 61 Iowa 681.

Affidavits.—Under section 3399 of the Code, where an injunction has been allowed without an opportunity to defendant to show cause against it, defendant may, *upon his answer alone, without affidavits*, move the judge for its vacation; and in such case the plaintiff may support his petition by affidavits. *Palo Alto Banking etc. Co. v. Mahar*, 65 Iowa 74.

1. *Cooper v. Alden*, Harr. (Mich.) 72; *Morris Canal etc. Co. v. Biddle*, 4 N. J. Eq. (3 Green) 222; *Zoll v. Campbell*, 3 W. Va. 226; *White etc. Co. v. Robinson*, 3 W. Va. 542.

2. *Hoagland v. Titus*, 14 N. J. Eq. (1 McCart.) 81; *Scholk v. Schmidt*, 14 N. J. Eq. 268; *Depeyster v. Graves*, 2 Johns. (N. Y.) Ch. 148. See *Duncan v. Finch*, 10 Ill. (5 Gilm.) 296; *Dodd v. Flavell*, 17 N. J. Eq. 225. Where a party had remained for ten years in the undisturbed enjoyment of the property which he purchased, it was *held* to be no ground for an injunction to stay proceedings for the recovery of the purchase money, to say that the original purchase was void by the laws of the State, but that he had neglected to urge that defence at law or to say that he had heard that some persons unknown might possibly, at some future time, assert a title to the property; and such an injunction, if granted, must be dissolved. *Truly v. Wanzer*, 5 How. (U. S.) 141.

So where a plaintiff files a bill praying an injunction to the enforcement of a common law judgment, and asking a new trial on the ground of after-discovered evidence, the injunction is awarded, and the evidence shows that

the defence sought to be introduced, which was a legal defence, was suspected by the plaintiff to exist before the common law judgment was entered, and that he knew of two witnesses by whom it could be proven, if such defence really existed; he not only failed to have these witnesses summoned, but actually compromised the case and permitted a judgment to be entered against him on the plaintiff's agreeing not to issue an execution on the judgment for a year. *Held*, the court on the motion of the defendants in the chancery suit should dissolve this injunction, and the bill should be dismissed at the plaintiff's costs. *Hevener v. McClung*, 22 W. Va. 81.

An injunction will not be dissolved for laches in prosecution when the cause has been set down by the opposite party to be heard next term. *Smith v. Cooper*, 21 Ga. 359.

Neglect to file within the proper time the papers upon which the injunction was issued does not render the injunction a nullity or entitle the defendant to have it set aside. *Leffingwell v. Chave*, 5 Bosw. (N. Y.) 703.

An injunction granted temporarily will be dissolved at the next term, if the case directed by the court to try the validity of the complainant's patent is not brought before that time. *Woodworth v. Edwards*, 3 Woodb. & M. (U. S.) 120.

3. *Collins v. Ripley*, 8 Iowa 129; *Gamble v. Campbell*, 6 Fla. 347; *Dickerson v. McDermott*, 13 Tex. 248; *Pillow v. Thompson*, 20 Tex. 206.

4. *Porter v. Moffett*, 1 Morr. (Iowa) 108.

Where an injunction had issued, though the bill was not sworn to, *held* that the injunction should not be dis-

continue the injunction, is no cause for a dissolution thereof.¹ But when an injunction is granted in vacation on a valid bill, and it is shown to the court at the next term that the injunction had been irregularly granted, the injunction may be dissolved, but the bill should not be dismissed.²

(*d*) *Power to Dissolve in Vacation*.—A circuit judge has power to dissolve in vacation an injunction ordered by himself in vacation, but the defendant can have no damages on the bond.³

solved for that reason, where the effect of the dissolution would be to put the property out of the power of the court. Nor will mere delay in bringing the cause to a hearing be sufficient ground for dissolving the injunction, where it is sworn to have happened through inadvertence and mistake and no evidence of wilful procrastination is shown. *Schermerhorn v. L'Espinasse*, 2 Dall. (U. S.) 360.

1. *Maddox v. Rowe*, 28 Ga. 61.

2. *Gray v. Baldwin*, 8 Blackf. (Ind.) 164.

3. *Sanders v. Plunkett*, 40 Ark. 507. A judge in vacation may dissolve an injunction, though some formal parties defendant have not answered the bill, when an answer has been filed by the substantial defendants in the bill, which denies all the material allegations of the bill, and no proof has been taken to sustain the bill. *Livesay v. Feamster*, 21 W. Va. 83.

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